13

HINDU LAW

Poonam Pradhan Saxena[*]

I INTRODUCTION

IMPORTANT JUDICIAL pronouncements in the area of Hindu law relating to marriage, adoptions, maintenance, custody, guardianship, Hindu joint family and succession reported during the year 2018, have been briefly analyzed here.

II HINDU ADOPTIONS AND MAINTENANCE ACT

Validity of adoption

A valid adoption generates ties equivalent to natural birth. The most important aspect of the complete transportation of the child from the natural/biological to the adoptive family is creation of property rights in favour of the baby. This property angle apparently has twisted and cast a heavy shadow on the entire objective of adoption, *viz.,* parental joy for childless couples and provision of a home to the orphan/ neglected baby. Due to the monetary angle dominating the whole claim of adoption, more often the challenge to the validity of adoption is made much later at a point of time when either the adoptive parents dies intestate and the issue of whether the claimant is an heir or not needs to be adjudicated. Going back in years to bring authentic proof then becomes cumbersome yet imminent and required. In such cases an investigation into the adherence to the legal requirements becomes imperative. The time of adoption as stated by the claimant as against his current age often shows a mismatch and if he is proved to be above the statutory age of 15 years, strict proof is required of its permissibility by demonstrating the existence of a custom to the contrary in the community to which he belonged. A valid adoption can also be inferred from the post adoptive behaviour conduct and pattern of lifestyle of both the adoptive parents as also the adopted child. A change in the residence, surname, substitution / inclusion in important government records/documents, such as school record, *aadhar* card, voter identification, ration card, nominee in insurance policies and bank accounts etc are strong pointers indicating altered relationships. In several cases, the name of the father printed on the wedding invitation cards is also taken into account to establish the change in parentage. In *Dundappa* v. *Sundrawwa*,[1] the fact that in ascertaining the

* Vice Chancellor, National Law University Jodhpur, Rajasthan.

1 AIR 2018 (NOC) 191 (Kar).

validity of an adoption, strong evidence needs to be brought forward if the adoption is in contravention of the provisions of the Act was reasserted. Plaintiff was given in adoption to the family of the deceased adoptive father by his natural father. He was adopted after duly performing rituals and ceremonies prevailing in the community. Though he was overage at the time of adoption, the court held the same as valid, as he was able to lead strong evidence establishing the prevalence of the custom in their community of adoption of a person above the age of 15 years. Again in *Raj Kumar Modi* v. *Bajranglal Modi*,[2] the age of a person claiming to be the adopted child of another was shown as 17 years at the time of the alleged adoption but without submission of either the age certificate, as also any explanation with respect to the variation of the age claimed by them with the one mentioned in the certificate. The adoption was held as invalid.

A mere deed of acknowledgement of adoption is not sufficient to prove the factum of adoption and it is necessary that the fact of giving and taking of adoption must be proved.[3] Similarly, where the deed of acknowledgment is neither signed by both the parents *i.e.*, persons giving and taking child in adoption nor was there any evidence of performance of the giving and taking of the child ceremony, it was held that the mere fact of inclusion of the name of such child in the voter's list would not be sufficient to prove the factum of adoption.[4]

Permission to give the child in adoption

Section 9(2) of the Hindu Adoption and Maintenance Act, 1956, makes giving of the child a mutual and consensual act of the parents. If the father decides to give his child in adoption he cannot do it without the consent of the mother and similarly, if the mother wants to give the child in adoption she can do it only with the consent of the father. No single parent has a unilateral right to give the child without the consent of the other parent. In this connection, it must be noted that the statute is presently gender neutral and the preferential right of father over the mother is abrogated. Both parents can do it but the intention of the legislature is that it must be a consensual decision of both. This permission by the other spouse to give the child in adoption can be dispensed way with only if the other spouse has ceased to be a Hindu by converting to another religion or has been declared to be of unsound mind by a court of competent jurisdiction or has finally or completely renounced the world. The statue specifies only these three conditions. In cases of matrimonial breakup, where the custody of the child is with one parent, the statue still requires the consent from the other parent to permit the custodial parent to give the child in adoption. In this connection a case came up before the High Court of Allahabad this year.[5] Here, post matrimonial breakup the custody of the child was given to the mother who remarried. The natural/biological father of the child had permanently forsaken the child and

2 AIR 2018 (NOC) 501 (Gau).

3 *Srikanta Naik* v. *Kokila Bea,* AIR 2018 (NOC) 461 (Ori).

4 *Grama Devati, Satabhani Thakurani* v. *Ranga Bewa* AIR 2018 (NOC)466 (Ori).

5 *Shweta Gupta* v. *Rahul Keshav Jadhao* AIR 2018 (NOC) 757 (All).

even given up all rights of even visitation. He had also given the complete responsibility of bringing up the child to the mother. In these circumstances the mother wanted the baby to be given in adoption to the second husband that was allowed by the court.

Effects of adoption

The transportation into the new family through a valid adoption is complete and an uprooting from the natural family is a necessary corollary save three statutory exceptions relating to matrimonial prohibition and carrying capacity of the child of property that had vested in him. He is not allowed to sail in two boats and an express prohibition prevents him from claiming any right whatsoever from the biological family unless expressly ordained by the statute. In *Ranchhod* v. *Ramchandra*,[6] a child, A, was given in adoption at the age of 10-11 years, after his father died and mother remarried. His biological family headed by his uncle, continued to maintain and cultivate the joint family land. Upon the death of his uncle the land was mutated in the name of his widow and his children. A claimed that since he was a biological family member and he continued to be a party to the biological family despite the fact that he was given in adoption, therefore his name should also be entered in the official records as the owner and they be accordingly mutated. The court held that once a child is given in adoption he is deemed to be dead for the biological family except that he cannot be divested of any property that had vested in him. A share in the coparcenary property the court held, does not vest in a person till a partition takes place and since no partition had taken place here before the child was given in adoption the property had not vested in him. Once he was given in adoption, no further connection including even a claim over the joint family property can be maintained by him, and therefore his suit was dismissed.

III MAINTENANCE

Proof of marriage

Marriage as a social institution carries certain bondings and extensive judicially enforceable privileges. Economic responsibilities can be enforced in a valid marriage as against the financially active spouse. The term spouse refers and indicates the existence of a valid marriage. One of the most important and legally implementable duties of the husband is to look after his legally wedded wife and provide her maintenance. A denial to maintain the wife attracts both civil and penal consequences. In complete contrast to the extensive economic security legislated in a lawful marriage, a relationship short of marriage provides little or no security to a female partner if she is not economically independent. Little succour is provided by way of protecting women from economic abuse under the, Domestic Violence Act, 2005 (DVA) but to be able to qualify for that a woman must prove that she was living with the man (from whom she claims maintenance) in a relationship 'in the nature of marriage'. The term relationship 'in nature of marriage' has been clarified by the apex court in *D Velusamy* v. *Patchaiammal*.[7] The first qualification or essential ingredient for this

6 AIR 2018 MP 42.

7 (2010) 10 SCC 469.

relationship is that it must be a monogamous union and that the parties must be competent to marry. It clearly indicates that since bigamy is prohibited under Hindu law, they must be parties to a monogamous union. In *Master Dharmesh Nankani* v. *Savitri Devi*,[8] a Hindu woman maintained friendly relations with a married man and later filed a maintenance petition claiming maintenance from him. She did admit that there was no registration of marriage and was also unable to prove or produce witnesses to authenticate the factum of marriage as between the two. On the other hand in an earlier petition filed by her as against him, she had admitted that she had only friendly relations with him. He had died leaving behind his legally wedded widow.

Here two things stood in sharp contrast to the apex court judgement, first that the man with whom she was living was already married and secondly, the woman herself maintained that not only she was not married to him but had only friendly relations . It did not hint at a continuous, monogamous long cohabitation even of a regular nature akin to a relationship in the nature of marriage but revealed a casual physical relationship of a woman with a married man. Earlier in *Indra Sharma* v. *V K V Sarma*,[9] the apex court had negated such a claim of a woman in more or less identical factual situation with a difference that in that case the relationship had spread over a continuous period of 18 years. The apex court had not only dismissed her prayer claiming maintenance from the married man but had actually held her alone responsible for attempting to break his family. They had further said, that for the tort of alienating the man from his legally wedded wife and children, a case can be filed against her by the lawful relations. Thus the wife and children if they so wished could proceed against her to claim compensation or damages. Therefore, instead of granting her a monetary relief, she was burdened with a voluntarily committed tortuous act. In the present case, it was held that she was not entitled to claim maintenance from him under Hindu Adoptions and Maintenance Act, 1956.

Obligation of the father in law holding coparcenary property to maintain the widowed daughter in law

A lawful marriage secures the financial /economic rights of a woman not merely against the husband , but after his death against his property as well. It is irrespective of who ever may be in possession of that property. Where the property left behind by the deceased was in the nature of a share in the coparcenary property , the widow is empowered to enforce her maintenance rights from that. In *Tikaram Baiswade* v. *Sangeeta Baiswade*,[10] the High Court of Chhattisgarh held that a widowed daughter in law is entitled to claim maintenance from the father in law who retains possession of the joint family property in which her deceased husband had a share. If the amount of interim maintenance remains unpaid she can even recover the amount from the property so occupied by her father in law.

An application was filed under section 19 of the Hindu Adoptions and Maintenance Act, 1956, by a Hindu widow, W, as against her father-in-law stating

8 AIR 2018 (NOC) 27 (UTR).

9 2014 (1) RCR (Cri) 179 (SC).

10 AIR 2018 Chh 20.

that her late husband along with his brother and father, jointly owned family property and since the death of her husband, they were under an obligation to maintain her and her two years old daughter. The family court fastened the liability to maintain both of them on the father-in-law as also the brother-in-law who were in joint possession of the coparcenary property and granted her interim maintenance pending the disposal of the main petition for claiming permanent maintenance and distribution of coparcenary property. The brother-in-law made a preliminary objection that the primary responsibility of maintaining the two is on the father-in-law under the Act and not on the brother-in-law. He also pleaded that in cases under section 19, interim maintenance cannot be provided as the property was yet to be divided.

The court held that a widowed daughter in law can claim maintenance from coparcenary property available in the hands of her father-in-law. As the main petition was pending awaiting disposal. It was further held that she was entitled to claim interim maintenance from her father-in-law as against the property that was held by the father-in-law and also her brother-in-law. The court also said that if any amount remains unpaid and falls in arrears, the same shall be charged on the joint family property held by both of them. They also directed the family court to dispose of the main petition claiming maintenance within a period of six months.

IV HINDU MARRIAGE ACT, 1955

Application of the Act to members of scheduled tribes

Religious based personal laws exempt from its application members of scheduled tribe. So the Hindu marriage Act does not apply to the tribes specified in the schedule of the Constitution. This is specifically provided under the Hindu Marriage Act, 1955 section 2. In *Kailash Chand Meena* v. *Gopi Devi Meena*,[11] the issue was with respect to the applicability of the Act to the members of scheduled tribes. The marriage here was solemnized between an eight years old boy and four years old girl by their respective parents in 1983 who came from the Meena tribe in Rajasthan , a tribe listed in the Constitution of India as a scheduled tribe. The husband at the age of 30 years, in 2005 filed a petition in the family court stating the fact of their marriage and also that since, no gauna ever took place, the marriage remained unconsummated. He further pleaded, that in 2004, on the request of the family members of both the parties, a caste Panchayat was convened and since they never lived together with each other, nor wanted to, the marriage was dissolved by the panchayat *via* a mutual agreement on a signed document called the marriage dissolution deed, that was also notarized in October, 2004. The wife on the other hand countered successfully all the claims of the husband. *Firstly*, that she had stayed in her matrimonial home after marriage for around eight to nine years up to 2006, and her name was also depicted in their ration card. (Her name was deleted from the ration card in 2007). Thus his claim that since they never stayed together and the marriage remained unconsummated was proved false. *Secondly*, she said that the resolution of the caste panchayat was forged and not genuine. Interestingly, on all documents she had put her signatures and not thumb

11 AIR 2018 Raj 81.

impression, and the marriage dissolution deed put forward by her husband had her thumb impression that was later proved as per forensic evidence to be forged resulting in a criminal investigation of the same. Further, the chairperson of the panchayat was not examined as witness and this she claimed was due to the fact that he was scared and could not prove something that did not happen at all. The trial court held as against the husband on both the counts and refused a declaration of dissolution of marriage in his favor. The husband filed an appeal as against this verdict in the High Court of Rajasthan.

The court held as against the husband, refused to give him the desired declaration and on the issue of whether the marriage was valid as it was solemnized when the children were of tender ages, the court held that since the parties were members of the scheduled tribe, their marriage could not be tested in light of section 5 of the Hindu Marriage Act, 1955. As the Act is not applicable to them, its application becomes totally irrelevant.

Non availability of the Act to Muslims

Family laws in India are not uniform and therefore multiplicity of family laws exist and their applicability depends primarily on the religion of the parties. Though there are further criterion that need to be kept in mind, but the rule is that Hindu Marriage Act, 1955 is applicable and available only to Hindus and non-Hindus cannot avail any of its provisions. In an interesting case,[12] coming from Madhya Pradesh, the matrimonial discord between a Muslim couple led them to maintain separate habitation and the husband filed a case in the trial court praying for a decree of restitution of conjugal rights as against his wife. The wife contested the case, and filed as a counter an application praying for interim maintenance but under section 24 of the Hindu Marriage Act, 1955, that was granted in her favour by the court despite the objections by the husband that the Act cannot be applied to him as he was a Muslim. The trial court accepted the maintenance application by granting her maintenance by directing the husband to pay to her Rs 2,500 per month. The matter was taken in appeal to the high court which reversed the order passed by the lower court and held that since the parties professed Muslim faith, Hindu law cannot be applied to them. They also observed that the trial court had exceeded its jurisdiction in granting maintenance to the wife under Hindu law in the proceedings initiated by the husband under Muslim law.

Validity of marriage

Extensive parental control over the lives of their children specifically matrimonial matters is a norm in the Indian scenario. Girls in the prime of their youth despite attainment of the statutory age of marriage are hounded by them when they take vital decisions like choosing their partners with whom to share their entire life with, independently. Additional trouble that is nothing short of a perceived catastrophe that befalls on the parents and the entire family is, if the chosen partner is either from a different/lower caste or from a different religion. Desperation is evident as charges of kidnapping, rape and illegal confinement are leveled against the son-in-law following

12 *Mohd Hasan* v. *Kaneez Fatima* AIR 2018 MP 262.

a voluntary elopement. This is despite the fact that the girl who happens to be major testifies before the court that her marriage was a result of a well thought out conscious decision. Unfortunately, many a times even the courts label her as innocent, young, gullible love struck person, who can be easily lured away by an unscrupulous man coming from a different caste/religion with nefarious and fraudulent motives out only to exploit her. In *Nandakumar* v. *State of Kerala*,[13] the case commenced with the filing of a habeas corpus petition by a man A, claiming that his daughter was missing from his home since 2017 and that despite filing of an FIR, the police was not investigating the case. His 19 years old daughter, the facts revealed had married a 20 years old boy, on her own without or rather against the wishes of her parents. The High Court of Kerala found that since the boy was still not of marriageable age, was almost one year short of 21 years, the marriage was not valid and consequently she was not his legally wedded wife. The court also noted that apart from the photographs of marriage there was no other document produced that could authenticate solemnization of marriage or any evidence to show that a valid marriage had taken place. In addition there was no certificate issued from the local authorities under the Kerala Registration of Marriages (Common) Rules, 2008 to confirm the solemnization of marriage. On the basis of these facts the high court allowed the writ petition and entrusted the custody of the girl to her father. It held, "we accordingly dispose of the writ petition by entrusting custody of Ms Thushara, the daughter of the petitioner with the petitioner. The sub-inspector of Police ... shall to ensure their safety accompany them to their residence at Thiruvananthapuram".

The parties filed an appeal in the apex court. The main contention was that as the girl was major, of more than 18 years on the date of her marriage the high court had erred in deciding against its validity. She contended that since she was major, she had a right to live wherever she wanted and with whomsoever she wanted to live. Secondly, since she was no longer a minor, her custody cannot be handed over to anyone let alone to her father against her wishes. As far as the age of the boy is concerned, merely because he was underage, the marriage performed does not become void, under the HMA, and under section 12 of the PCMA at the most it would be a voidable one. The apex court held:[14]

> For our purposes it is sufficient to note that both the parties are major. Even if they were not competent to enter into wedlock (which position itself is disputed) they have a right to live together even outside wedlock. It would not be out of place to mention that live in relationship is now recognized by the legislature itself which has found its place under the provisions of the Protection of Women From Domestic Violence Act, 2005.

Explaining that the very purpose of the writ of habeas corpus was different than the present one, as the daughter was not in illegal confinement, the apex curt observed that the high court in the present case has been erroneously guided by some kind of social phenomenon that was frescoed before it. The high court had taken an

13 AIR 2018 SC 2254.

14 *Id*., para 10.

unwarranted exception to the same forgetting that parental love or concern cannot be allowed to fluster the right of choice of an adult in choosing a man to whom she gets married. They after an inter action as regards her choice directed that she was free to go where she wished to. The court quoted two of its earlier pronouncements with approval. In the first case, [15] a Hindu girl after conversion to Muslim faith had married a Muslim boy. She had initially refused to go with her father and expressed her desire to stay with her husband before the high court. The present court observed that in that case the adamant attitude of the father, possibly impelled by obsessive parental love, compelled him to knock the doors of the high court. The court held that as a major she had every right to enter into wedlock with anyone.

The second judicial pronouncement,[16] that the apex court took note of, involved a major daughter who had expressed a desire to reside in Kuwait with her father against the wishes of her mother, for pursuing her education. The court ruled in her favour, and held that as a major, she is entitled to exercise her choice and freedom and the court cannot get into whatever were the reasons for her, or that the father had indeed influenced her. These, the court said were irrelevant considerations.

Reverting to the present case the court upheld and highlighted the importance of her freedom and observed that non acceptance of her choice would simply mean creating discomfort to the constitutional right by a constitutional court which is meant to be a protector of fundamental rights, a situation cannot even be remotely conceived. Though the relationship continues, law perceives them to be independent and competent to take their own decision. The decision of the high court in sending a major daughter to the custody of her father flouting all legal norms surpasses all principles. The duty of the court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. The court said without any reservations that there is no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She /he is entitled its make his/her choice. The courts cannot, as long as the choice remains assume the role of *parens patriae*. The daughter is entitled to enjoy her freedom as the law permits and the court should not assume the role of a super guardian being moved by any king of sentiment of the mother or the egotism of the father. As the girl had expressed the desire its be with the husband, the court allowed the appeal, set aside the high court judgment making it clear that she would be free and entitled to live with whom she wants.

The tussle between the over possessive parents and independent children is age old. The present judicial pronouncement by the highest court of India makes it clear that the statutory protection awarded to a minor can no longer be used by the parents as a shield to decide the matter of hearts of their legally major children.

Bigamy

Proper solemnization is important for terming a relationship a legal marriage and in case of bigamy a man can be punished only where both of his alleged marriages

15 *Shafin Jahan* v. *Asokan K M,* AIR 2018 SC 1933, para 27, 28; 2018 SCC Online SC 343; that came to be popularly known as the *Hadiya* case.

16 *Soni Gerry* v.*Gerry Douglas,* AIR 2018 SC 346.

pass the solemnization validity tests. As a necessary corollary, the relationship proved to be short of marriage , carries no rights and obligations. In *Urmila Devi* v. *Pradeep Kumar*,[17] the second marriage was proved to have been validly solemnized but in the first marriage there was no proof that saptapadi was performed. Hence the court concluded that the second marriage was valid. Even though the first marriage was registered it was held that mere registration was not sufficient and it would not cure the defect of an otherwise invalid marriage. Registration of marriage, the court said is a mere corroborative evidence and the marriage is not complete by registration and it has to be proved by proving performance of saptapadi. The second marriage was proved and as the husband had put the wife in a miserable condition for over 15-16 years by making false statement and bringing a false case for nullity of marriage, he was held to be liable to pay a cost of Rs 5000 to the wife.

Despite abolition of bigamy, multiple relationships continue at the behest of men who first violate the monogamy mandate and then attempt to wriggle out of the mess created by themselves. Evasion of their economic responsibilities forces either of the two women to approach the court enforcing their rights of maintenance. In such a scenario, the man tries to challenge the very validity of marriage and denies existence of legal relationship with the woman with whom he had maintained a prolonged spousal cohabitation. If the first marriage is not proved to be validly solemnized, the partner of a void marriage would not be entitled to claim maintenance as she cannot be termed a wife. However, if the first wife is neglected and forced to approach the court for her sustenance her vulnerability becomes apparent as the validity of her marriage. The registration of the first marriage notwithstanding, here, the second wife successfully proved that the requisite ceremonies in the first marriage were not performed so her own marriage got the legitimate stamp. The court absolved the husband of the charges of bigamy, stripped the first wife the tag of a lawfully wedded wife and declared the second marriage valid. The court in the present case also ignored several earlier cases where under it was pronounced that observance of saptapadi may not be mandatory for a valid solemnization of a marriage. Even section 7 mandates that marriage can be performed in accordance with the customary rites and ceremonies of the bride or the bridegroom's community and it may or may not include saptapadi. It is only where the marriage rituals include saptapadi, that it is essential to be observed and the marriage would be final and binding on the completion of it. Here if saptapadi was not performed, it created a havoc for a woman who perceived herself to be the legally wedded wife with all attended rights/responsibilities/duties associated with matrimony. Where a woman lives with a man and looks after his household under a bonafide belief of being married to him, the situation is very different from voluntary cohabitation in a live in relationship, where the parties do understand the implications of no rights and no responsibilities relationship. To create a balance between the competing interests of two women, both of whom claim the status of legally married wife, this appears to be a classic case of how the husband with considerable ease was

17 AIR 2018 (NOC) 337 (HP).

able to evade bigamy charges, by escaping the first marriage, taking shelter behind the technicality and non- performance of saptapadi.

This hyper technicality on the other hand gave way to practicality in *D Sivadasan* v. *Santha*,[18] wherein it was held that the presumption as to solemnization of a valid marriage must be established in case of disputes related to marriage. If the marriage is proved to have taken place, mere small omissions would not make it invalid and solemnization has to be proved by adducing evidence or by conduct of the parties. In such situations, long cohabitation of man and a woman, who are accepted by the society as husband and wife raises presumption of a valid marriage as per the customs. Presumption as to solemnization cannot be rebutted by minor omissions alone. Here, pursuant to solemnization of a customary marriage, the parties started living together as husband and wife and cohabited with intention to procreate children. Their relationship was in cognizance of and accepted by the families of both the parties. The husband had also executed a marriage agreement to strengthen the customary marriage, though the solemnization of marriage was not sought to be proved through this marriage agreement alone. In an earlier petition presented by the wife, the husband had admitted marriage between them and had been paying maintenance to her as well. However after 17 years of passing the maintenance order, he filed a suit in a court of law seeking a declaration that his marriage was not a valid one. The court held that the suit for this declaration, filed after such a long time was barred by the law of limitation as he sought it under the common law. Since the presumption as to the solemnization of marriage was not rebutted, he cannot be allowed to resile from his earlier admissions and challenge validity of marriage as the customary marriage between the two was established.

The court observed that if it is proved that the marriage ceremony has taken place than a minute inspection of the completeness and appropriateness of all requisite ceremonies and a proof beyond doubt of their solemnization need not be emphasized. Marriage therefore can be presumed /assumed by long cohabitation, their conduct as that of spouses and an acceptance of their relationship by the society would be enough indicators of their spousal relationship. As denial of legal relationship adversely affects the wife more than the husband, courts have to proceed very cautiously in declaring a relationship short of marriage

Registration of marriage

Registration of marriage though perceived as highly desirable still remains optional under the Hindu Marriage Act. Several states however have enacted rules for the same. An interesting issue arose in *Pranav A M* v. *Secretary, Engandiyur Grama Panchayath*,[19] with respect to the extent of the powers and role of the Registrar in registering such marriages. Does the registrar have to satisfy himself and ensure the valid solemnization and legality of marriage. If he feels that the marriage is not valid, can he refuse to register it then? In the present case, a man who was a Hindu and an Indian citizen, married a Filipina woman. Before marriage the woman converted to

18 AIR 2018 (NOC) 20 (Ker).

19 AIR 2018 Ker 156.

Hindu faith after undergoing sacred ceremonies and rites held at *Vallivattam Sree Ayyappa Temple, Thrissur* District who issued a certificate of conversion. Thereupon their marriage was solemnized in accordance with the customs and ceremonies applicable amongst the Hindu community, *i.e.,* the community of her husband. After the solemnization of marriage they applied for its registration under the Kerala Registration of Marriages (Common) Rules. The registrar refused to register the marriage as he entertained a doubt regarding the validity of the marriage according to the Hindu Marriage Act, 1955, *i.e.,* whether they belonged to the Hindu community or not was not ascertained or accepted by him. The parties filed an appeal to the High Court of Kerala. The issue before the court was whether the registrar under the Rules of the relevant Act, is bound to register any marriage upon a declaration made by the parties without entering into the satisfaction as to the legality of such marriage? The court noted that a marriage under the Hindu Marriage Act can take place between two individuals who are Hindus. If one of the parties is not a Hindu then even adherence to proper rites and ceremonies cannot validate such marriage . The registrar was not examining the validity of such marriage but merely examining whether he is competent or bound to register such marriage or not. The court held that the legality of the marriage between a foreign individual and Indian citizen would depend upon law applicable in India. When a person declares his/her conversion to Hindu faith, that would be sufficient for public authorities to act. There is no formal ceremony of expiation necessary to effectuate conversion to Hinduism. In absence of any particular mode prescribed for conversion as a Hindu, without there being any malafides that can be pointed out , public authority cannot refuse to act upon such request. The court further said that the government or any other public offices cannot insist that they can only act upon such declaration based on certificate issued by any authority appointed by the government in this regard, and that he is only duty bound to conduct summary enquiry as to legality of marriage. Registrar is not competent authority to decide on competency to marry or validity of such marriage . He needs to have *prima facie* view that marriage has taken place in accordance with personal law applicable to parties . Once such satisfaction is entered by the registrar, he need not conduct further enquiry to find whether conversion to Hinduism or other religion is valid or not. Accordingly, he was directed to register this marriage.

Nullity of marriage taking consent to marriage by force/fraud

Free and voluntary consent to the marriage is an essential criteria for ensuring its validity and therefore the cheated party has the option to declare it null and void through the instrumentality of the court. The court in these circumstances takes cognizance of the matter to ascertain the veracity of the claim and fulfillment of the mandatory conditions to which the remedy of a decree of nullity is subject to. In *Sanjiv Kumar Mahato* v. *Rekha Mahato*,[20] the parties married in 2012 at West Bengal as per the rites and ceremonies prevailing in the Hindu community and the same was registered though under the Special Marriage Act, 1954, in 2013. The husband later filed a petition praying for a decree of nullity on two grounds; first that the wife was

20 AIR 2018 Jhar 87.

a distant relative and within prohibited degrees of relationship to him and second that his consent to the marriage was procured by force/ pressure or coercion and the marriage was therefore voidable, and the same be dissolved under section 12(1) (c) of Hindu Marriage Act, 1955 /section 25 (iii) of the Special Marriage Act, 1954. The court noted that with respect to the first allegation, the husband was not able to prove that the wife stood in degrees of prohibited relationship and additionally had never filed a petition for the marriage to be declared void on this ground under section 5 (iv). All that he said was that she was a distant relative. On the second ground of his consent being procured by force, the facts revealed that both the parties before marriage were involved in an intimate physical relationship as they had an affair and the girl had agreed to have physical relations with him on his promise to marry her. His refusal to do so, led the girl to file a criminal complaint of rape case against him, following which a charge sheet was filed in the criminal trial. Probably to escape the severe penal consequences, he on a sworn affidavit stated before the court that he would marry her and that they would both lead a happy life. The marriage was solemnized thereafter and registered as well. In light of these facts, the court held that since he had on his own agreed to marry her there was no force and a decree of nullity was refused to him.

In yet another case,[21] the consent to the marriage of a young girl aged 23 years was taken by extreme fraud by a man who had posed as a god man and was believed by her family to have divine healing powers of all maladies. The man having an eye on the girl, but when she told him of her friendship with a boy, he tried to poison her against him and cooked up a lie that the boy had made some videos of her in an objectionable state and that he would attempt to blackmail her as he had done with other girls as well. Terrified at such propositions, she sought his help and directions so that she and her family should not be humiliated or embarrassed publicly. The alleged Godman then offered to marry her as a solution to her problems and warned her not to reveal the fact of their marriage to any of her family members. He took her to Mansa Devi temple and married her in accordance with rites and ceremonies. She was then taken to an advocate's office and was made to sign some papers. The substantive content of the paper later revealed that it contained her fear of honour killing from her parents and a demand for police protection. Soon thereafter an order of police protection was granted by the high court but impleading only his family members while keeping the family members of the girls family in dark about the whole issue. After obtaining orders from the high court, the girl was left by him at her parent's place with a promise that he would return soon; would take her with him but she should keep silent about the whole incident. The girl agreed and he kept on coming to her house but would take money from her. The realization that he was merely blackmailing her traumatized her to such an extent that she decided to commit suicide by hanging from the ceiling fan. Timely intervention of her brother saved her and the truth dawned on her entire family. She realized that she had been cheated into marriage so that he could extract money from her and that he had entered into a conspiracy to further blackmail the entire family of hers by forcing her to commit suicide and then

21 *Satpal* v. *Mamta* AIR 2018 P&H 94.

blame the family for honour killing and violating the order of the high court. She filed a nullity petition in the court that her consent to this marriage was taken by fraud and cheating, but he claimed that they had married on their own free will and had lived together at his parental place like husband and wife and had even sought judicial protection as her parents were against their marriage. He further claimed that he was an ordinary person and had never claimed the status of a god man. The court held that the man was guilty of deception and undue influence; had played havoc with the mental state of a vulnerable 23 years old girl and to satisfy his lust had meticulously planned a conspiracy, and pressurized her to marry her. The marriage was accordingly annulled.

The role of the Godman was deplorable, in luring a 23 years old girl without the family members getting a hint of it. Playing on the common man's psychology, blinding them with hypnotic sermons and larger than life "divine power vested" image, the real life crooks thrive on their devotion, sexually exploiting their young daughters while fleecing them monetarily. The feeble protests of young girls are ignored by their own parents who even in the wake of existence of ample and visible evidence choose to ignore it and on the other hand feel blessed that the deity has bestowed them with a huge favor by the self styled god man by eyeing their child. The ability to befool the family elders to exploit their own daughter emboldens them with a confidence that they can carry their nefarious activities and get away with it.

The judicial stand is in the right direction and an effective check on the ugly design that these unholy men have on young and innocent girls.

Charge of infidelity and request to lead proof through DNA test

Mutual trust and faithfulness are the expected essentials of a marriage. Infidelity and even its suspicions strike at the root of the matrimony eventually leading to its breakup. In *Renu Singh* v. *Pramod Kumar Singh*,[22] the husband filed a petition praying for a decree of divorce and alleged infidelity as against the wife. He stated that a child was born after seven months of the marriage of whom he denied paternity. To substantiate his denial of paternity, he sought a DNA test to be performed on the baby. The court held that as the parties were yet to lead evidence, the stage for ordering/ conducting DNA test had not reached and therefore an order for the DNA test on the baby would be improper considering the welfare of the child.

An infidelity charge is a very serious charge. It shatters the very foundation of marital life and renders amicable and amiable cohabitation an impossibility. If it is limited to the conduct of spouses, separation, condemnation or even condonation may be possible options, but where it results in the birth of a child, it not only destroys the faith, loyalty and honesty of spousal relationship but it is very harsh on an innocent child. Suspicion must always be laid at rest through an authentic and scientific mechanism like DNA tests. Usage of modern technologies by the judiciary for according justice is the order of the day. Examination of witnesses through video conferencing, admissibility of audio/video evidences, tracing locations electronically have been used very effectively. Therefore the hesitation to use DNA technologies for

22 AIR 2018 (NOC) 48 (All).

ascertaining the truth appears perplexing. The conservative and patriarchal judicial attitude of an apprehension of labeling the child as a bastard is less severe and traumatic for a child than the deprivation of the love and affection of a suspicious father. Revelation of truth can protect both the marriage as also the childhood of the baby. A child with the judicial protectionist label of legitimacy would suffer more at the hands of a father who believes otherwise than a child who is proven to be of his father's blood through a DNA test. If the tests show otherwise, it would be perfect and just way of ending the relationship of the both the wife and that of the child with the man whose suspicions are confirmed as no person should be saddled with the responsibilities of looking after, maintain or give his name to the child who is not his. In such situations, despite the protection of surname , judiciary can never ensure that the child would be the recipient of the love and care of the man whom the child thinks and looks up as his father but without any reciprocal love.

Thus in an attempt to protect and promote the welfare judiciary would end up doing irreparable harm to the boy in denying to the father the permission for a DNA test.

Cruelty

Bulk of the matrimonial litigation this year rested on cruelty as a ground for divorce, with the courts granting relief in some and denying in others. In absence of any concrete definition of cruelty , the focal point remained as to whether the alleged conduct of a spouse would amount to cruelty or not would depend upon the facts and circumstances of each case. In *Muneshwar Pal* v. *Rajkumari Pal*,[23] a man approached the court praying for a decree of divorce on grounds of his wife's cruelty. The parties were married for a period of 18 years, with five children as between them. The allegations of the husband included, *firstly* her extremely quarrelsome nature and not taking care of the children, *secondly*, leaving him seven years back; lodging a report and moving a maintenance application even though he was ready to keep her in his house. The allegations aptly countered by his wife with the help of documentary evidence revealed that the husband had illicit relations with his maternal aunt who lived in the same house, had a daughter from this union and had described his aunt as his wife in official records, the voter's list, in his service records, and in the school records of the daughter, in the name of mother and father the names of his aunt and him were written. Yet he contended that as his wife had refused to live with him, she was guilty of cruelty and he was eligible to get a divorce from her.

The court held that the withdrawal of the wife from the company of the husband in this situation was with a reasonable excuse since a man cannot compel his wife to live with him in the matrimonial home where he lives with another woman in an illicit relationship and describes her in all records as his wife. They observed, [24]

> once the husband starts residing and having relations with another lady, he cannot expect from his legally married wife that she should reside with him under the same roof where another lady is also living in the company of her husband.

23 AIR 2018 Chh 1.

24 *Id*., para 8.

Rejecting the allegations of cruelty as against his wife the court dismissed his prayer seeking divorce and observed,[25] that mere difference in temperament or in the behavior of the husband and wife does not amount to cruelty and law needs some grave form of dispute or such conduct of the spouse which makes the life miserable or unbearable for the other spouse to be called commission of cruelty.

A typical case of calling the pot calling the kettle black, here was the saga of a desperation of an unfaithful husband having an affair out of wedlock, to be free of his wife who bore him five children and brought them up. He had the audacity of labeling the wife 's conduct as cruel. It was interesting that the wife had fought back, contested his claim and accusations, proved them false with convincing evidence of his having an affair with his maternal aunt. Documentary proof revealed that he had in fact included the name of his aunt as his wife in the office records and had even fathered a daughter from her. The court had rightly rejected his prayer for divorce from his wife.

In *Som Kumar Bahidar* v. *Jyoti Som Kumar Bahidar*,[26] the court held that an examination into the overall conduct of the parties was important to ascertain the claim of cruelty. Here, the husband alleged that right on the wedding night the marriage could not be consummated as his wife told him that her marriage to him was fixed without her consent and that he was not a man of her dreams. She later went back to her parents place, was brought back and then again left and refused to come back. Her claim that she had gone to her parents place in accordance with the custom or for giving an examination, were unsubstantiated and she was silent on her refusal to come back despite efforts made by her husband and his friends. On the other hand she had made unsubstantiated allegations that she was made to do the complete household work at the matrimonial home. A surprising fact that was revealed in evidence was that in her service book/records, she had shown herself as unmarried/not married. In addition she admitted in her cross examination that she neither made any attempts to return to the marital home nor requested the husband to take her back, as against the husband several attempt to bring her back. Holding her guilty of cruelty with intent of permanent abandonment, the court granted divorce to the husband.

In *Ravi Bhushan Seth* v. *Meena Seth*,[27] the marriage was solemnized, when the wife was 18 years old. A son was born to them soon thereafter. Two years later the wife started pursuing her education at Patna while the husband was posted at Ranchi. She completed her graduation and BEd degree, and took up an employment at the girls school at Patna itself in 1990. She was maintaining her son from her salary. Three years later, but apparently without her knowledge, the husband instituted a matrimonial suit against her in 1993 for divorce, that was decreed ex-parte in his favor and thereupon he remarried. She rushed to her husband's home when she came to know it but was denied entry by him she then filed an FIR and got the *ex-parte* divorce decree set aside. The husband unsuccessfully challenged it till the level of the Supreme Court. By this time, two daughters were born of the second marriage and the

25 *Id.*,para 10.

26 AIR 2018 CHH 14.

27 AIR 2018 Jhar 106.

whole family of these four were living together. The criminal prosecution filed by the wife against the husband for committing bigamy and cruelty under section 498A failed, as he had married after getting the divorce degree. The court held that since the man had remarried, the parties were living away from each other for a period of more than 35 years, the marriage was dissolved with the direction to the husband to pay Rs 20 lakhs to the wife as maintenance.

In *Prabir Kumar Das v Papiya Das*,[28] the husband presented a petition praying for a decree of divorce on grounds of wife's cruelty. The evidence on the record indicated that the wife was unwilling to reside with him and her mother in law. The mother in law had lost her husband long ago and was residing alone with her son. The wife suggested that the aged mother should either be sent to an old age home or parties may reside separately without obtaining divorce. She also appeared indifferent and casual towards matrimonial obligations. The court granted divorce to the husband and held that insisting upon the husband to live separately from his single mother aged 68 years, suffering from cardiac problems by itself amounts to cruelty. The judgment re-enforces the duty on a son to look after and take care of his parents even if it comes in conflict with his matrimonial duties towards his wife.

Desertion

Gainful employment of wives often comes in conflict with her matrimonial duties as a job may force a woman to live away from the matrimonial home. Customary expectations from her to leave her job is so deeply entrenched in Indian society that a working woman is still viewed as unserious towards her marriage if she insists upon pursing her career at a place away from the matrimonial residence. In *Madan Mohan Sharma* v. *Manju Madan Sharma*,[29] the parties were blessed with two girls. While the husband was only 12th pass, the wife prior to her marriage was posted in village Naipur as a para teacher and after marriage in 2007, was made a permanent government teacher with her place of posting at Raipur. Along with both the children she left for Raipur and started staying there. The husband alleged that since she joined her service she never returned to the matrimonial home. There was no communication post 2007 between them even though the husband made unsubstantiated claim that he called her several times over telephone but not only she did not agree to return she did not permit him to speak to his daughters. He also alleged that even prior to 2007, she never behaved as a wife, was cruel to his mother and exhibited rude behaviour. As he was less educated than her, she looked down upon him and refused to live with him. The wife on the other hand contended that the husband never took care of her and her two daughters, was displeased with her as she did not bear a male child. The most notable aspect of the case is that not only the family court but also the high court refused to give relief to the husband on these grounds. The court very explicitly said that her staying away from the husband was due to her job and she needed to be at her place of posting . Not only the court respected a married woman's right to hold on to her job without the consent of the husband but also at a place different from the place

28 AIR 2018 (NOC) 762 (Chh).

29 AIR 2018 Raj 49.

of the location of matrimonial home. Secondly they also dismissed the allegations/ instances of cruelty as general or vague and rejected the submission of the counsel of the husband that she did not behave like a wife. There was an admittance by the husband in the cross examination that since the wife was much qualified than him, he did suffer from inferiority complex . The court held that all allegations of cruelty levelled against the wife were stale and general in nature and would not form the substance for granting a decree of divorce. Similarly, for her staying away from the matrimonial home, they did acknowledge that she did it because of her job and thus was not in desertion. Even with respect to breakdown of marriage irretrievably, the court did not accept the contention of the husband and said that since it is not a ground for divorce, the same cannot be granted in his favour and resultantly, the petition of the husband was dismissed. A similar line approach was taken by the Chhattisgarh High court in *Ashok Kumar Sambhaker* v. *Sheeta Singh*, [30] where the separate habitation of the wife was again due to reasons of her employment. The insistence of the husband that she must resign from her job and give him conjugal company at the matrimonial home was termed by the court as unreasonable. The court said that merely because the wife was serving at a place different from the place of residence of the husband due to reason of her employment does not mean that she had an intention of bringing cohabitation permanently to an end. Moreover it was established by the wife that she was neither guilty of desertion nor of cruelty. The petition of the husband seeking divorce was dismissed.

Judiciary has come a long way from the dictum of *Kailashwati* v. *Ayodhya Prasad*,[31] wherein the court had held that it is always the prerogative of the husband to decide the location of matrimonial home, and withdrawal of the wife due to her employment at a place away from the place of residence of the husband would not constitute a reasonable excuse. Much water has flown down the river since then and presently the judiciary has started recognising the compulsions of a woman to carry on employment be it away from the matrimonial home. Merely because her employment necessitates her living away from the husband, it would not by itself amount to cruelty leading to a breakup of her marriage. The days of 'choose the job or matrimony' seem to be considerably diluted. The notion that the job of a man is for a family and that of a woman is at the cost of the family is now being re-examined and the present judgement is therefore a step in the right direction.

Divorce by mutual consent pursuant to an agreement

Divorce by mutual consent remains by far the most appropriate way of putting an end to an unhappy marriage. It avoids the bitterness of a contentious litigation if implemented in its true spirit. However, in many cases despite initial agreement, one of the parties later retracts the consent, making it difficult for the party desirous of freedom to proceed . In many cases the courts have come to their rescue after analyzing the facts and circumstances of the case and granted them relief. In *A V G V Ramu* v. *A*

30 AIR 2018 (NOC) 928 (Chh).

31 AIR 1977 P&H.

S R Bharathi,[32] the parties were married for about four years when it ran into difficult waters. With a view to end all their disputes, after a year of their marriage, the parties entered into an agreement/MOU for dissolution of their marriage with consent and agreed to make a joint prayer under section 13-1B. They then filed an application to this effect in the Family Court at Hyderabad but the wife did not appear, as a result of which the petition was dismissed. The husband filed an appeal in the high court and then the apex court. Despite several notices that were issued to the wife, no one appeared on her behalf in the court. The apex court exercised their powers under article142, and held that since the parties were living away from each other for a period of more than four years, the marriage between them has broken irretrievably and both the parties had consented to the agreement/MOU for the dissolution of marriage, the marriage would accordingly be dissolved .Similarly, in *Sneha Parikh v Manit Kumar*,[33] pursuant to marital discord, the husband filed a petition in the family court praying for divorce. An FIR and a number of criminal petitions were filed by the wife as against the husband. The parties were living separately from each other for a period of more than two years without any hope for a reunion. Both of them arrived at an amicable mutual settlement for dissolution of marriage by mutual consent and quashing of the FIRs against the husband . Owing to this settlement reached between the two an application was filed for quashing the FIR against the husband and grant of divorce by mutual consent. In exercise of its inherent powers, the proceedings against the husband were quashed and divorce was granted.

Waiver of cooling off time period of six months

Pooja Sumer Purohit v. *Sumer Madanlal Purohit*,[34] is an illustration of judicial distortion of a clear provision creating unwarranted ambiguities. Married in February 2017, the spouses lived together for 2 to 3 days and separated. Exactly a year later both the parties presented a joint petition praying for a decree of divorce through mutual consent. The next day of hearing was given by the court for mediation and counseling after one and a half month. The efforts of mediation and counseling failed and so the next date of hearing was given in August, *i.e.,* six months after the filing of the joint petition. Meanwhile the parties filed a joint application to reduce/relax the cooling off period of six months. In April itself. The application was dismissed by the Family court but the parties filed an appeal in the high court of Chhattisgarh. The present court allowed the appeal and waived of the cooling period on the reasoning that since the parties lived together only for a period of three days and the efforts of conciliation failed and as such marriage between the parties has been broken down irretrievably. They said that as the parties had also settled the financial aspect like stirdhan *etc*, the parties were well educated and were not able to live with each and desired to remarry as well, the insistence on the waiting period would only prolong their agony.

32 AIR 2018 SC 202.
33 AIR 2018 SC 575.
34 AIR 2018 Chh119.

Remarriage of divorced couple

Law does not stipulate any minimum or maximum period before the divorced couple can remarry each other or to some other person. The mandatory requirement is that the time for filing an appeal should be over. In violation of such a condition, the second marriage, according to s. 15, would be void. In *Reena Devi* v. *Pramod Kumar*,[35] pursuant to a matrimonial discord the wife left for her parental place, six months later despite the fact that she had initially secured at the behest of the matrimonial family a transfer of her school placement at the place of the residence of the husband. Despite several attempts the parties were not able to patch up the differences. The husband filed a petition praying for a decree of divorce on grounds of her cruelty and desertion. The wife contested and refuted all the allegations making counter allegations of ill-treatment and neglect. She maintained that the husband had made her life miserable so it was not possible for her to live with him in dignity. The trial court granted divorce to the husband accepting his aversions to be true and the wife went in appeal to the high court. However, before the time for filing an appeal was over, the husband remarried. The court looked down upon the behaviour of the husband but did not pronounce the second marriage as void. It took help from an earlier decision of the apex court that on parallel line and facts had refrained from pronouncing on the status of the marriage but had awarded the compensation to the wife to the tune of Rs five lakhs to be paid to her by the husband. Here the amount of compensation to be paid to the wife was held as Rs one lakh.

V HINDU MINORITY AND GUARDIANSHIP ACT, 1956

Distinguishing between a guardian and next friend

A minor needs special protection to secure his rights. Since by reasons of his minority he is incompetent to file a suit in a court of law to protect his property, the same can be filed through a next friend. An interesting issue arose in *Nagaiah* v. *Chowdamma*,[36] as to whether an elder brother can act as the next friend of the minor brother, as against the legal guardian of the child, *i.e.,* the father. These two concepts, *guardian ad litem* and the next friend are same or different was clarified by the apex court. The suit here commenced on behest of two brothers for a declaration that the property held by their father was the joint family property and that its alienation by him was not binding on them as they had 2/3rd interest in the property. They therefore sought a relief of permanent injunction against the father restraining him from selling the ancestral property that included their share. Out of the two brothers, one was major and he on his behalf as also acting as the next friend of his younger brother had filed the suit. The property was sold to one X against whom the case was filed for a declaration that the sale to the extent of 2/3rd share is not binding on the brothers. The trial court dismissed the case on merits, but the first appellate court decreed it in favour of brothers, and X went in appeal to the High Court of Karnataka. The high court allowed the appeal on the ground that the elder brother could not act as the

35 AIR 2018 HP 27.

36 AIR 2018 SC 459.

guardian of the minor brother during the life time of their father who alone is the legal guardian of the minor son and since the elder brother was not appointed by the court as his guardian, he could not act as one. The matter was then taken to apex court who explained the difference between the expressions 'guardian' and 'next friend' and also *'guardian ad litem'* and held in favour of the elder brother acting as the next friend of the younger brother to protect his interests as against the action of the legal guardian to his detriment. The court said that the term 'Guardian' as defined under the 1956 Hindu Minority and Guardianship Act, is a different concept from the concept of a next friend of minor plaintiff or by *'guardian ad litem"*. Representation by next friend of minor plaintiff or by guardian ad litem of minor defendant is purely temporary, that too for the purposes of that particular law suit. Instituting suit on behalf of the minor by next friend or to represent minor defendant in suit by guardian ad litem is a time tested procedure which is in place to protect interests of minor in civil litigation . 'Next friend' and *'guardian ad litem'* possess similar powers and responsibilities. Both are subject to control by court and may be removed by court if best interests of the minor so require. Only practical difference between 'next friend' and 'guardian ad litem' is that the next friend is a person who represents the minor who commences law suit and 'guardian ad litem' is a person appointed by the court to represent the minor who has been a defendant in that suit. Before a minor commences a suit, a conscious decision is made concerning deserving adult (next friend) through whom suit will be instituted. *'Guardian ad litem'* is appointed by court whereas next friend is not.

Legal guardian for issuance of passport to destitute minor

The issue of who is the competent authority in case of orphan/abandoned children who are looked after by the state registered shelter homes arose this year in case of *Master Arpan Chhetri* v. *Sujata Sen*.[37] The case involved a trust duly registered with the authorities, that runs shelter homes at different part of Kolkata for destitute minors under the name of 'Future hope'. A licence was issued to them under the West Bengal Women's and Children's institutions (licensing) Rules, 1958. The organisation/trust was taking care of such children with engagement in several social services activities including exchange programs with different countries for the betterment of the children providing them with opportunities for development and growth. The trust received an invitation from Tanglin Rugby Club for RUGBY tournament to be held in Singapore and they wanted one of the child to participate in the event. The CEO of the trust thereupon made an application on behalf of the child named *Arpan Chhetri*, who had been brought up at Future hope, as his parents were untraceable, that she be appointed a guardian of person and property of the child. They further made an application for issuance of VISA, for the child's participation in the Singapore tournament and ensuring its return to India. The court held,[38] that the duty of a court exercising in parens patriae jurisdiction as in cases involving custody of a minor child is all the more onerous. As the welfare of the minor in such cases is of paramount consideration,

37 AIR 2018 Cal 59.

38 *Id*., para 3.

before any order could be passed, the court needs to be satisfied that the interests of the minor would be best protected by the guardian so appointed. Though the father being a natural guardian of a child has a preferential right to claim custody of the son, but the paramount consideration is the welfare of the minor and not the legal right of a particular party. Referring to the instant case the court further said that since the parents of the minor are untraceable and on the basis of material on record, it was apparent that the welfare of the child has been duly taken care of by the applicant, so in the event she is not permitted to sign the required documents, the minor might lose the opportunity to travel abroad and participate in the tournament. Thus, on consideration of the welfare of the child, the court held that the applicant shall be treated as a legal guardian of the minor by the passport authorities in terms of the passport rules and the applicant shall be permitted to sign swear and make other declarations before the passport authorities as may be required for issuance of the passport in favour of the minor. The court also directed the trust CEO to attempt to try and ascertain the whereabouts of the parents of the minor and serve a copy of the application along with the order upon them and also posting a copy of the order to some conspicuous place such as court house or the residence of the minor if could be ascertained , and publish it in the local newspaper and the telegraph, the English daily. Option was given if the situation so arose for the parents of the minor to pray for modification of the guardianship order.

Custody of minor child

The worst sufferers of a matrimonial breakup are the children. In many cases, the custody battles force them to do the court rounds at an age where their innocence should best avoid the court melodrama. In order to get even with each other , parents do not even hesitate to threaten their own children or attempt to ruin their future prospects. In three cases under survey this year, fathers lost the custodial battles and even had their visitation rights substantially modified owing to their behaviour that could cause patent harm to their own children. In *Sanjay Kumar* v. *Poonam Priya*,[39] amongst the strained relations between the parties, the tug of war became a minor daughter. The father was denied the custody but was granted visitation rights for one hour at the residence of the estranged wife, that was later shifted to the office of the mediation centre. Observing that the minor daughter was very resistant rather unwilling to meet the father, the court decided to interact with her. It was revealed by the minor that the father was actually threatening her and was talking only about the case to her. He even went to the extent of trying to destroy her birth certificate as to cause an irreparable harm to her education. The father himself admitted that he had written to the office about cancelling her birth certificate. Looking into all these facts the court denied him the custody and modified the visitation rights to that he was permitted to only see the daughter from some distance for half an hour on a specified day. He was directed not to interact with her unless the child herself with passage of time out of natural love for the father remaining if any, ventures to interact with him. Similarly, in

39 AIR 2018 Jhar 3.

Gopal Prasad v. *Shyamdeo Sao*,[40] it was held that the father despite the fact that he is the natural guardian of his children does not have an implicit or superior right over everybody else in light of the facts and circumstances of the case. Here the father was accused of causing the death of his wife and the maternal grandfather had claimed the custody of the minor child. Since the father was convicted in connection with the death of his wife the court held that the custody of person of the child cannot be given to the accused. There would be a strong possibility of adverse psychological effect on child if he was compelled to live in the family of his father. The court held the appointment of the maternal grandfather as his guardian instead of the natural father. In *Bharat Kripa Ram Sahu* v. *Chitralekha Bharat Sahu*,[41] the husband was tried and later convicted for an offence of murder during the pregnancy of the wife. He preferred an appeal against the decision of the conviction that was pending in the court and was released on bail . Upon his release, he pressed for the custody of the boy. For sometime before that he used to regularly visit his son once a week at her residence. He made unsubstantiated allegation that the wife wanted to remarry and consequently, was not looking after the boy properly and was neglecting him. The court observed that due to strained matrimonial relations it was not possible for the parents in the present case to live together but observed that it is not the right of any parent but the consideration of the welfare of the minor that should be taken into mind. The wife was highly educated having studied up to MSc Microbiology, PGDCA, BEd ; was in a position to look after the child and had despite the false allegations levelled against her by the husband maintained that she had no plans to marry nor was she in love with anyone else. Her place of work was near to her residence. The child was well taken care of by her. On the other hand the father was a murder convict sentenced for life but out on bail presently awaiting decision on his appeal with an uncertain future. The court directed that the custody be continued with the mother.

Father's prayer for grant of custody was granted in two cases, in the first the girl had already attained majority. In *Soni Gerry* v. *Gerry Douglas*,[42] the writ for *habeas corpus* was filed by the mother of the children alleging that the father who was residing in Kuwait had illegally detained them with him and he be asked to produce them in court of law. The daughter attained majority and expressed her desire to be with the father. She was pursuing her bachelor's degree in Kuwait and wanted better future career prospects and therefore did not want to relocate to India and reside with her mother. The court held that the daughter being a major was entitled to exercise her choice and freedom and the court cannot assume the role of parens patriae. During the pendency she also filed contempt proceedings as an earlier order dated 2011 provided that both the children then in Kuwait were to be sent to India to spend the entire vacations with the mother. The court refused to issue the writ in light of the content of the emails that the daughter had sent two years earlier to the mother expressing that she did not want to visit or relocate to India. The parties had two

40 AIR 2018 (NOC) 195 (Jhar).

41 AIR 2018 Chh 69.

42 AIR 2018 SC 346.

children 7 years apart one studying in 2nd and the elder in 9th class, when the earlier order was passed . During the pendency of the custody battle the daughter attained majority while the son was still a minor. The father was directed to send him to India for the vacation period. Again in *Kamla Bai Dansena* v. *Subran Dansena*,[43] the claim to the custody of the children, two sons aged seven and six years respectively, who were living with the mother, was made by the father during the pendency of the divorce proceedings for his children. The father had sound earning, he had a grocery shop whereas the mother was dependant on her parents and was incapable of looking after her children and herself as well. She had no means to look after their education or upbringing. The court held that motherly love and affection should not be blindly accepted to ruin minor's future and therefore the custody was granted to the father with the mother having visitation rights.

Custody of the child who is a foreign national

Matrimonial discords between Indian couples settled abroad raise additional complications if one of the spouse comes back to India taking the baby with him/her, who because of its birth abroad happens to be a foreign national. Invariably in such cases, the parent remaining abroad, gets a favourable order passed from the local (foreign) court and if such court also orders repatriation of the child, important issues relating to conflict of law and jurisdiction arise. In *Chandan Mishra* v. *Union of India*,[44] on account of marital discord the mother of the boy, who was born in a foreign land came to India. Meanwhile the father of the child secured a favourable custody order from the foreign court who also ordered its repatriation. The mother filed a writ petition in the Delhi court. She stated that she alone was looking after the child for the past six years without any financial support from the father and the child also had developed roots in India. The father had not demonstrated any affection towards the child by either enquiring about him or providing monetary support or even trying to interact with him. The court held that in these circumstances repatriation cannot be ordered as it could not be in the interests or welfare of the child.

With respect to the doctrine of most intimate contact and of closest concern the court held that these doctrines are components of modern theory of conflict of laws, in as much as, a court which has most closest concern and most intimate contact with issue of custody of child arising in case, may fruitfully exercise its jurisdiction in case. The other court, which is far distant from the issue, may not take upon itself onerous task of ascertaining welfare of the child. This self restraint by court, less connected with issues, would be in the best interests of the minor himself. With respect to the adherence and importance of the foreign court order the court held that interim court order of foreign court in favour of the father is not to be blindly adhered to by the domestic court. The closest concern doctrine , principles of comity of courts, first strike principle along with the welfare of the child are to be considered while adjudicating upon the issue.

43 AIR 2018 Chh 49.

44 AIR 2018 (NOC) 296 (Del).

VI HINDU LAW

Character of property: separate versus coparcenary

A Hindu can own at the same time two kinds of properties, his separate property and also a share in ancestral or coparcenary property. The character of both these kinds of properties is different with differential consequences of the ownership as well. The separate property confers exclusive ownership, and consequently an exclusive right of alienation and possession as well. In contrast, till a partition takes place, a share in coparcenary property is jointly possessed by other coparceners who are also the owners of their respective shares. Till a partition takes place, all the coparceners have a collective title to the property, and consequently the right of alienation cannot be exercised by any one of them with the exception of Karta, that too in certain specific limited situations. The right to possess and enjoy the property is joint with other joint family members and no excusive possession rights can be enforced by any coparcener despite him having the title to a portion of it. In the coparcenary property, the son of a coparcener has an interest equal to the interest of the father and can ascertain its demarcation at any point of time by simply asking for its partition. Thus the separate character of the property benefits the owner while the joint family character benefits the entire family. In *Ratti Bai* v. *Dharam Singh*,[45] some of the property was inherited by a Hindu man from his ancestors and some other property was purchased by him through his self acquired property and the same was mixed in such a manner that it was not possible to segregate them. The court held that the entire property would take the character of separate property and not joint family property. The primary reason for them to come to this conclusion was that since the claimant failed to prove the existence of any joint family property nucleus from which the property could have been purchased, the property would be termed as the separate property. The court further held that since the character of the property was separate, the owner was empowered to also execute a will of the whole of the property. Again in *Dayanand Rajan* v. *Ramlal Khattar*,[46] a family comprised of a Hindu man, A, his wife, W and his three sons. A died in 1970. At the time of his death, his eldest son B, was running a shop. From the income of this shop he purchased a land and using his own funds constructed a house. Later his younger brother sought partition of this house by claiming possession of two rooms in it and also other properties and contended, that firstly, the house was an Hindu Undivided Family (HUF) property, that was headed and represented by B as its Karta, and therefore he as a joint family member had a share in it and secondly, he had contributed monetarily when the property was constructed. The court on the basis of evidence concluded that on the day the property was purchased there was no HUF existing and secondly the claimant also failed to prove why his own property did not form part of such alleged HUF. The court held that the suit property was purchased out of B's own funds. He then constructed a shop and a house, gave it on rent and was appropriating the rent himself. Even if for argument

45 AIR 2018 P&H 153.

46 AIR 2018 Del 104.

sake it was established that the claimant had contributed towards construction, it could not establish a title, and dismissed his suit.

In *Shyam Narayan Prasad* v. *Krishna Prasad*,[47] it was held that property that a Hindu receives at the time of partition happens to be his separate property qua his all other relatives except his own descendants. Since they constitute a coparcenary, the moment a child is born to the sole surviving coparcener who receives his share from the HUF at the time of partition, the said child acquires a right by birth in it with the quantum equalling the share of the father. Here a Hindu man, A, received his share from the joint family property. His son and grandson wanted to have partition of this property that was allowed by the Supreme Court, which observed:[48]

> it is settled that the property inherited by a male Hindu from his father, father's father or father's father is ancestral property. The essential feature of ancestral property according to Mitakshara Law is that sons, grandsons and great grandsons of the person who inherits it , acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship

They further said,[49] that the property acquired by A in the partition, although is separate property *qua* other relations but it would be coparcenary property in so far as his sons and grandsons are concerned. In the instant case there was a clear finding by the trial court that the properties were ancestral properties which were divided as per the deed of partition. The property which had fallen to the share of A, therefore retained the character of a coparcenary property and thus his sons and the grandson had a right in the said property.

Karta's power of alienation

Since coparcenary property is owned by multiple persons and needs to be managed, law confers the power on Karta to manage it for the benefit of the family. An inherent power of management of the joint family property also includes its alienation if required. Law also confers the power on Karta to assess the whole situation and go ahead for its alienation even without the consent of the other coparceners, or in presence of the minor coparceners, if in the interests of the family or its members, the joint family property needs to be sold. However, the powers of the karta are not unlimited and are constrained by three specific situations, *viz,* legal necessity, benefit of estate and for performance of certain indispensable religious duties or charitable purposes. An unauthorised alienation can be challenged by the coparceners, including minor coparceners, and the court may pronounce the sale as invalid. In such a situation the same would not bind the coparceners and, Karta alone would be liable for the

47 AIR 2018 SC 3152.

48 *Id*.,para 12.

49 *Id.,* para 16.

sale. In *Kehar Singh v Nachittar Kaur*,[50] the Karta of a Hindu joint family sold the suit land belonging to the family to discharge the debt liability and spend some money to make improvement in agriculture land for the maintenance of his family. The evidence revealed that the family owned two debts and also needed money to make improvements in agricultural land belonging to family. After the alienation was effected, the other coparceners approached the court and challenged the validity of the sale . They contended that the sale would not bind their share as the Karta had exceeded his powers, and there was no justification for him to sell the family property without seeking their prior consent. The court held that repayment of debt amounted to legal necessity and improvement of the agricultural land would be covered under "benefit of estate" and therefore the karta was entitled to effect the sale. The sale of the joint family land was held as valid.

Succession rights of children born of void marriages and claim over ancestral property

Legitimacy of children is closely linked with their succession rights. A valid marriage therefore is a pre-requisite for conferring full succession rights in favour of the children. Illegitimate children under Hindu law ordinarily inherit only from their mother and not from their biological father. Special exception is created in favour of children born of void or annulled voidable marriages under section 16 of the Hindu Marriage Act, 1955, which however is limited to succession from the separate property of both the parents of the child. Since they are not deemed to be related to the other relations of their parents , they cannot succeed to the property of the other relations as also be sharers in the coparcenary property of their respective parent. In *Balakrishnan* v. *Selvi*,[51] a Hindu man, F was married to W, and had three sons and two daughters from her. During the life time of W, he married W1 , and had two sons and four daughters from the second union. Since the second marriage was solemnised on June 17, 1956, *i.e.,* after the coming into operation of the Hindu Marriage Act, 1955, the same was void and the children begotten from this marriage were illegitimate. One of the daughters from the second marriage, D filed a claim of partition as against her father seeking partition of the properties that were in his hands claiming that since it were ancestral properties, and by virtue of the Tamil Nadu (Hindu Succession Amendment) Act, 1989, unmarried daughters had become coparceners, she was a coparcener in the Hindu joint family headed by her father and thus entitled to her legal share. The father resisted her claim and admitted that he was holding both his separate property as also ancestral property. He contended that with respect to his separate property, he was the exclusive owner of it and during his life time, no one can claim any right over this property. It is only post his death that succession rights in their favour of his heirs can be determined. With respect to the claim from the ancestral property, he pleaded that since an illegitimate child is not and cannot be a member of the coparcenary of the father, the daughter notwithstanding the Tamil Nadu Act, is not a member of the father's coparcenary and therefore not entitled to claim any partition from it. Accepting both his contentions, the court held that in the

50 AIR 2018 SC 3907.

separate property, the child does not have a right during the life time of the owner and it is only upon his death that the right of the children would arise in such properties. Further, as far as the ancestral property is concerned , law clearly mentions that children of void and voidable marriages are entitled only to inherit the property of their father upon his demise but they cannot inherit the property of any other relative of their parents . Since coparcenary property is not inherited at the time of the death of the father , such a child cannot inherit the same. The court held that the right of the illegitimate daughter extends only to the separate property of her father but on his demise and not while he was living, but she cannot seek any right over the coparcenary property as a coparcener. Thus no cause of action arose in favour of his illegitimate daughter over property of her father during his life time, as also from the coparcenary property even by virtue of section 29A of the Amendment Act.

VII HINDU SUCCESSION ACT, 1956

Application of the Act to Pondicherry

After the merger of Pondicherry, (the then French settlement), with Indian union, several laws prevailing in Indian Union were extended to merged Territory of Pondicherry to have both administrative and legal control. One such enactment that was extended to Pondicherry is the Hindu Succession Act, 1956, with effect from October, 1963.[52] Even at that time, those who had already opted for French nationality and application of French Civil Code, 1804, over them even in personal matters were termed renocants and at the time of annexation of Pondicherry to Indian soil, legislators in their wisdom thought it fit to protect their rights. The exemption given to renocants made it clear that except renocants , other Hindus who were natives of Pondicherry would be governed by the Act of 1956 in entirety. This Act brought about fundamental and radical changes in law of succession and result was that immediately on coming into operation of this Act, (Hindu Succession Act, 1955) 'any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before commencement of this Act ceased to have effect with respect to any matters expressly dealt with by this Act'. From overriding effect of the Act it could be easily understood that any custom or usage as part of law which was governing Hindus in Pondicherry except renocants immediately before commencement of this Act ceased to have effect and such practice in vogue was literally overridden by section 4 of the Act. An issue arose in *Gowri* v. *Subbu Mudaliar*,[53] whether after the promulgation of the Hindu Succession Act in Pondicherry, a Hindu can bequeath the totality of the joint family property through a Will. The court replied in the negative and said that any Will executed with respect to the totality of the entire joint family property by a Hindu in not valid in law.

Devolution of interest in coparcenary property: share of the daughter

Even though Hindu daughters became coparceners with effect from 2005, an ambiguity still remains as to whether they can claim the benefit of this removal of

51 AIR 2018 Mad 103.

52 By s. 2 (2A) of Regulation 7 of 1963.

53 AIR 2018 (NOC) 301 (Mad).

inequality if the case claiming their share was presented either by them or by their brothers before 2005, but the Act was amended during the pendency of litigation? Whether in such situations she would be entitled to claim an enhanced share or her share would be deemed to be fixed on the day the petition was filed in the court, came for adjudication before the supreme court this year as well. In *Danamma @Suman Surpur* v. *Amar*,[54] a suit for partition was filed in the court of law in the year 2002 by the son of a Hindu deceased. Though the preliminary decree was passed in 2007, during the pendency of the suit the amendment of 2005 was passed. Making the daughters coparceners in the same manner as a son. The issue was whether the daughters in this case would be benefited by the Amendment of 2005. The apex court held that the daughters would get the benefit of the amendment and their rights would crystallize in 2005. Thus two sons, two daughters and widow of the deceased would all be entitled to 1/5th share in the property. The court observed that the law relating to joint Hindu family governed by Mitakshara Law has undergone unprecedented changes that have been brought forward to address growing need to merit equal treatment to nearest female relation namely daughters of coparceners. Section 6 stipulates hat daughter would be a coparcener from her birth and would have the same rights and liabilities as that of the son. Daughters would hold property to which she is entitled as coparcenary property, which would be construed as property being capable of being disposed of by her either by Will or any other testamentary disposition. These changes, the court said have been sought to be made on touchstone of equality, thus seeking to remove perceived disability and prejudice to which daughter was subjected. Amended section 6 stipulates that on and from commencement of the Act of 2005, a daughter of a coparcener by birth becomes a coparcener in her own right in the same manner as son. It is apparent that the status conferred upon sons under old Hindu law as also the old section 6 was to treat them as coparceners since birth. Amended provision now statutorily recognises the rights of coparceners of daughters as well since birth. The section uses the word" in the same manner as a son". It should therefore be apparent that both sons and daughters of coparcener have been conferred right of becoming coparceners by birth. It is the very factum of birth in coparcenary that creates coparcenary, therefore sons and daughters of coparceners become coparceners by virtue of birth. Devolution of coparcenary property is later stage of and consequences of death of coparcener. First stage of coparcenary is obviously its creation and as is well recognised. One of the incidents of coparcenary is right of coparceners to seek severance of status. Hence rights of coparceners emanate and flow from birth now including daughters. The court finally held that irrespective of the passing of the preliminary decree, the daughters would be entitled to a share in the coparcenary property as a coparcener.

Intestate succession

The Hindu Succession Act, 1956, did not abolish the concept of Mitakshara coparcenary but introduced far reaching consequences in the devolution of the share, where a man died as an undivided coparcener in Mitakshara coparcenary. The general

54 AIR 2018 SC 721.

rule of the undivided share going through survivorship continued but was severely modified in case the deceased died as an undivided member of Mitakshara coparcenary but left behind surviving him either a class-I female heir or a male heir claiming through a female. In such cases the concept of notional partition was sought to be applied. 'Notional Partition' is a term that did not find its place in the legislation but was judicially coined. It would be presumed in such cases that immediately before his death the deceased had asked for partition, and that it was effected as well, irrespective of whether he was entitled to demand it or not due to minority. His share would be calculated and the same would go as per the intestate succession in which his daughters as class-I heirs would also have a share. This was done to give a better deal to the female members of the joint family of the deceased. In *Dundappa*,[55] a Hindu man died leaving behind his two daughters born prior to 1956 and an adopted son. Since the death occurred after 1956, the court held that the Hindu Succession Act, 1956, would apply and a notional partition would be effected to the property due to the presence of class-I female heirs , *i.e.*, daughters. In this notional partition between the father and the son, each would be assigned a half share. Out of the share of the deceased father, the widow, both the daughters and the adopted son would inherit equally, *i.e.,* one eight each. thereafter upon the death of the widow, her share would be equally divided amongst the three children. Son would get 4/6th and each daughter would get 1/6th.

Succession to the property of a female Hindu

The Act provides two entirely different schemes of succession depending on the sex of the intestate. While the rules in case of both eventualities are expressly provided in the Act, succession from a female has involved provisions with rudimentary mindset creating unwarranted ambiguities. In *Anima Das* v. *Samaresh Majumdar*,[56] is again a classic case of unjust provisions applied with full force actually resulting in serious miscarriage of injustice. Here, post marriage the husband did not look after his wife at all and owing to his neglect the wife came back to her parents place where her mother gave her shelter. She was employed in the telecom sector BSNL, and died a premature death. The husband who had never bothered to check on her now as her legal heir applied for succession certificates claiming valuable securities and immovable property as against the claim of the mother who also applied for the same. The High Court of Gauhati relied on an earlier apex court decision and held that desertion notwithstanding the husband is the rightful heir of the self acquired property of his wife and hence issuance of succession certificates in his favour was proper. The counsel for the mother had argued,[57] that the mother was a widow and did not have any independent income of her own and therefore the respondent/husband who did not discharge his duties and responsibilities towards his deceased wife if allowed to appropriate the entire amount then the same would not only cause injury to the

55 *Supra* note 1..

56 AIR 2018 Gau 114.

57 *Id.,* para 5.

rights and interests of the mother but the same would also lead to serious miscarriage of justice. Dismissing the argument, the court noted: [58]

> It is not in dispute that the daughter of the appellant (deceased intestate) who was an employee under the BSNL, did not live with her husband after marriage , nor did the husband look after her and that the daughter of the appellant was living with her widow mother till the time of her death. It is also not in dispute that late Gouri Das had joined service and had brought the Postal Endowment Assurance Policy before her marriage from her personal income. The daughter had nominated her mother in all of her death cum retirement benefits and also in respect of the Postal Endowment Assurance policy.

The court said that the position would be governed by the provisions of the Hindu Succession Act, 1956, which clearly preferred the husband over the mother of the deceased come what may be the hardships and the other circumstances as it was the self acquired property of the deceased Hindu female.

Not merely law provides separate schemes of succession depending upon whether the deceased was a male or a female Hindu, there is further divergence in case of a female intestate depending upon the source of acquisition of her property. In case she had inherited the property from her deceased husband or her father in law in absence of her children or grandchildren, it reverts back to the heirs of her husband and where she had inherited the property from her parents, the same would revert to heirs of her father even in presence of her husband. The only condition is that she must have died issueless. In two cases under survey, the husbands of the deceased tried unsuccessfully to get hold of such of her property but lost in favour of her father's heirs. In *Harsh Chetan Thandani* v. *Chetan Bulchand Thandani*,[59] A Hindu female died leaving behind her husband and a daughter and property that she had inherited from her parents. She had executed a will of part of her property in favour of her husband. Since the deceased had inherited the property from her parents , in this case her father, the court held that the husband of the deceased would not be entitled to inherit the property but it is only her daughter who would succeed to it. The court said:[60]

> plain reading of s. 15 makes it explicitly clear that , only in absence of son or daughter or children of predeceased son or daughter property inherited by a female Hindu from her parental side will devolve, as per s. 15 (1) of the Hindu Succession Act. In all other cases, it will devolve only on her children or children of her predeceased son or daughter . Hence , for husband to inherit her property under s. 15(1) of the Succession Act, it is essential that she must have died issueless, then only property will devolve on him, in order laid down in s. 15 (1) of the succession Act. Otherwise it will devolve as per order laid down in s. 15 (2) (a) of the Act. Wording of s. 15 (2) (a) of the Act is very clear to that effect. As husband stands in class of heirs laid down in s. 15 (1)

58 *Id.,* para 7.

59 AIR 2018 Bom 70.

60 *Id.,* para 18.

> (a) he can succeed to the property only when she died in absence of her children or children of pre deceased children.

However, since the will was executed in favour of the husband he was allowed to be made a party and obtain the letters of administration. Again in *Tarabhai Dagdu Nitanware* v. *Narayan Keru Nitanware*,[61] an issueless Hindu female died intestate leaving behind property that she had inherited during her lifetime from her father. Heirs of her father as also her husband applied for succession certificates, that were given in favour of the former. Nevertheless, her husband claimed the partition of the property. In addition, he pleaded that the heirs of her father be restrained from creating rights in favour of the third party. His claim was turned down by the court which held that since she had in the first place inherited the property from her father and as per the law, for an issue- less female, it is the heirs of her father who are eligible to get the property, the husband had no right over it. Again in *Sukhwinder Kaur* v. *Rajwant Kaur*,[62] on the death of an issueless Hindu female, her step sisters were held entitled to her property under the category of 'heirs of her father' as the property available for succession was inherited by the deceased from her late father.

Succession rights of a convert

The general rule applicable under Hindu law is that the intestate and the heir must be from the same religion. There appears to be however an exception in favour of convert. In *Balchnad Jairamdas Lalwant* v. *Nazneen Khalid Qureshi*,[63] the issue was whether an heir who converts to Muslim faith can still inherit the property of the Hindu intestate. Here, a Hindu girl converted to Islam and married a Muslim boy. Her father owned a shop and a flat in Mumbai. Her brothers after the demise of the father, post her marriage disposed of this shop and were trying to sell the flat as well. The girl filed a suit claiming her share in it and also claiming an injunction, that no third party rights be created till her share is demarcated. The brothers contested her claim and stated that since she converted to Muslim faith, she had forfeited her rights in the property of her Hindu father. Their main contention was that the Hindu Succession Act, 1956, applied only to Hindus and can be availed of by Hindus in light of section 2(1) (c), and the same cannot be ignored. Because she was not a Hindu on the day inheritance opened, she is disqualified from claiming inheritance of her putative father. The daughter on the other hand claimed that this disqualification does not extend to converts themselves as they enjoy the protection of the caste disabilities Act, 1850. In light of section 26, the court said that it is only the converts descendants born after the conversion who are disqualified from inheriting the property of their Hindu intestates provided that they are not Hindus on that day. The court held,[64]

> Personal law is applicable to person who is converted into Islam, Christian or any other religion for the purpose of marriage, guardianship etc., however, while deciding inheritance , fact of religion of person at

61 AIR 2018 (NOC) 708 (Bom).

62 AIR 2018 P&H199.

63 AIR 2018 Bom 103.

64 *Id.*, para 14.

> the time of birth has to be taken into account to eliminate legal anomaly. Therefore under section 26, children of converts are not Hindu by birth due to conversion of their parents and so they are not covered under the Hindu Succession Act, 1956.

Right to inheritance, the court said is not a choice but it is by birth and in some case by marriage, it is acquired. Therefore renouncing particular religion and to get converted is matter of choice and cannot cease the relationships which are established and exist by birth. Therefore, Hindu convert is entitled to his/her father's property if the father dies intestate.

While stating that people have a right to convert to any religion, they may do so for a variety of reason and the law recognises this, they said,[65]

> Therefore the constitution of India has guaranteed right to religion as fundamental right and in our secular country, any person is free to embrace and follow any religion as his or her conscious choice. Hence Hindu converted into other religion is not disqualified to claim the property under s. 26 of the Act.

The court held in her favour and granted her share to her.

The final conclusion is correct but the reasoning for the judgement unfortunately does not appear to be appropriate. The right of inheritance is not to be extended in favour of a convert through only the reasoning but has to be established through law. The court unfortunately and surprisingly failed to take note of the basic fundamentals of the law of succession prevailing amongst the two religious based inheritance laws in the country, *viz.,* Hindu and Muslim law of succession, the former codified and the later uncodified but endorsing this fundamental principle. The sameness of religion was and to some extent continues to be the firm rule under both these personal laws, till it was modified by another legislation, the Caste Disabilities Removal Act, 1850. The rule of from a Hindu only a Hindu can inherit and from a Muslim only a Muslim can inherit, had no exceptions even amongst very near relations such as father and son if one of them converted, but it was legislatively modified through this enactment that created and protected the inheritance rights of a convert and the one who might have been ex communicated from the society. The Act read as under:

> Whereas it is enacted by section 9, Regulation VII, 1832, of the Bengal Code, that "whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled; and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the government of the East India Company. It is enacted as follows:

65 *Id*.,para 16.

> So much of any law or usage now in force within the territories subject to the government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.

The Act was repealed on January 8, 2018 through the Repealing and Amending (second) Act, 2017, but actually the substantive content of it was already incorporated in section 26 itself. This is the reason why a convert is not specified as a disqualified heir.

VIII CONCLUSION

The year 2018 saw some important deliberations in the area of Hindu law. The court permitted a divorced woman to give her child in adoption to her second husband in wake of complete renunciation of rights and responsibilities by the biological father in respect of the baby. While negating the claim of maintenance put forward by the female partner in a live in relationship the court granted economic security to a widowed daughter-in-law making liable for her maintenance both her father-in-law as also the coparcenary property in his possession. The court also re-iterated, non application of the Hindu Marriage Act, 1955, to members of scheduled tribes despite professing Hindu faith and also stressed upon its unavailability to parties professing Muslim religion. The right of parties to marry on their own and against the wishes of the parents was upheld admonishing the later from interfering in the lives of their adult children. Contradictory judicial stand was evident as in one case of a man marrying multiple times, the court rendered his first marriage void for non performance of saptapadi, saving him from the charges of bigamy but apparently liberal attitude saved another marriage from a minute inspection. An unsuspecting innocent young girl was saved from a fraudulent marriage to a self styled godman and the duty of a married son to look after his old ailing mother led matrimonial breakup of his marriage due to his refusal to give into the insistence of his wife to maintain a separate habitation. The courts adopted a liberal approach and upheld the right of a married women to pursue gainful employment with dignity and the same was held as not amounting to either cruelty or desertion. The court also explained the difference between a guardian, a next friend and a *guardian ad litum,* permitting the elder brother to file a case on behalf of the minor brother as against his own father to protect his rights. Deliberations and clarity was ushered on the succession rights of children born of void and voidable marriages and their claim over the coparcenary property held by their father and settlement of succession rights continued in case of female intestates leading to inequities due to archaic and rudimentary laws and finally, the court upheld the succession rights of a convert to inherit the property of her Hindu father.