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HINDU LAW

*Poonam Pradhan Saxena**

I INTRODUCTION

IMPORTANT JUDICIAL pronouncements in the area of Hindu law relating to marriage, adoptions, maintenance, custody, guardianship, Hindu joint family and succession reported during the year 2019, have been briefly analyzed here.

II THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

Validity of adoption

The laudable objectives of permissibility of adoption are increasingly and heavily shadowed by spurious claims with an eye to make quick monetary gains. The Act provides a simple mechanism for adoption; a cut off age with accommodation of contrary customs, including the optional facility of registration. Adoption of a baby is also such a unique phenomenon that the overjoyed intending parents themselves do their utmost to formalise the legal requirements to ensure that the child should not face any legal impediment later on, or suffer from any of the procedural technicalities that they were unable to fulfil. It is a time to rejoice; both for the new parents and for the one getting a loving and caring home and the probability of futuristic bickering between them involving the material assets is unconceivable. The practical harsh reality on the other hand shows an unfortunate trend. Bogus claims are filed to grab the property of known childless couples in advance ages feigning adoption claims that they deny. The fact of refuting a cleverly propelled assertion is often difficult as also traumatic for people in their advanced ages for whom avoidance of entanglement in legal battles is very crucial. But it encourages unscrupulous persons to put forward such spurious claims with a hope of a feeble opposition. In *Bharatlal* v. *Chherkinbai*,[1] A , a Hindu man claimed partition of the property of B from him, on the ground that he was adopted by him and as the adopted son, has a right of ownership in the property held by the adopted father. The alleged adoptive father refuted all his claims as baseless and imaginative and contested the case actively. Before the court, when called upon to prove the basic requirements of adoption, the claimant failed miserably on all counts. According to his own admission, he was adopted 10 years prior to his filing this suit claiming partition, that made him more than 15 years at the time of adoption, a violation

* Vice Chancellor, National Law University, Jodhpur, Rajasthan

1 AIR 2019 (NOC) 678 (Chh).

of mandatory statutory requirement under section 10 (iv) of the Act. Secondly, he could not adduce any evidence of the fact of physical act of giving and taking of adoption. The court dismissed his claim of partition as adoption was not proved. In addition he also failed to prove that the community to which he belonged permitted adoptions of children even after the attainment of the age of 15 years. The court held as against the claim of adoption and dismissed his prayer for the relief of partition of the property held by B.

Effect of adoption

One of the primary legal effect of a valid adoption is that the adopted baby is deemed to be dead for the biological family and is deemed to be born in the adoptive family with effect from the date of adoption. All rights including inheritance rights in the natural family cease to exist and are acquired naturally in the adoptive family.[2] At the same time if the child was vested with the property prior to his adoption, law protects such ownership and provides that even post adoption, such adopted child cannot be divested of such property. It means that his transportation to the new family would be with the property that has already vested in him. The legal fiction ensures that an adopted child cannot have any heirs to his property in the natural family, despite his presumptive death. Two important cases, one involving the attempts by the biological family to divest the adopted child of his property after he was given in adoption and the other in which the adopted child despite adoption tried to lay his hands on the biological father's property were adjudicated this year by the High Court's of Gauhati and Karnataka respectively.

In *Bansidhar Modi* v. *Premsuk*,[3] A, a Hindu man died leaving behind his widow W and a son S. His property was inherited by both of them in equal shares. Two years after his death, his son S was given in adoption to B by W, after completing all the requisite formalities. The biological family sought to divest the child of the property that he had inherited from his father before his adoption. This attempt was based allegedly on an agreement that provided the possession of his share would remain with his natural mother, with a rider that she would relinquish it, in case the adoption becomes invalid during her life time. The claimant to the property however, failed to prove the execution of this tripartite agreement of which both mother and son were parties. The issue before the court therefore was whether the child after adoption would be divested of the share/property that he had inherited before his adoption was completed. The court held that there is no provision in the Hindu Adoptions and Maintenance Act, 1956 (HAMA), that bars the right of inheritance of a person from his natural born family before adoption. The allegation /fact that after his adoption he had renounced his entire relationship with his family of birth and his property rights, is a consequence of a valid adoption. It was held that the adopted child having inherited the property before the adoption would not be divested of the right to retain the property, and any kind of agreement made on his behalf, the court held, would not result in divesting him of the property that had already vested in him. In *M Krishna* v. *M*

2 See s. 12 the Hindu Adoptions and Maintenance Act, 1956.

3 AIR 2019 Gau 137: AIR Online 2019 Gau. 294.

Ramachandra,[4] a Hindu man A gave his son S in adoption to B. Around 19 years later S, in a litigation with a view to establish his legitimate right to the property in the adoptive family through a sworn affidavit, affirmed the fact of his adopted status. However, around 40 years post his adoption, he filed a suit against his biological father and natural brother claiming 1/3rd share in the ancestral property as a coparcener. The trial court decreed his suit and the father went in appeal to the High Court of Karnataka . During the pendency of litigation, the father died. The court dismissed the suit of the son and held that he was not entitled to the property. Three things went against him, one that pursuant to his adoption, his right to claim the property of his natural relatives were statutorily extinguished. Two, that the property was his father's self acquired property and in that no one, including a son, can exercise any right of partition. Third, that when the father died in 2010, his separate property would be inherited by his son and since the adopted son is deemed to be dead for the natural family from the date of adoption into the new family, he would not have any inheritance rights. A child once given in adoption, therefore loses all rights in the property of his biological father and gains rights in the adoptive family.

III THE HINDU MARRIAGE ACT, 1955

Right to marry and an appeal for protection by underage parties

All Indians have a right to marry, subject to the fulfilment of certain fundamental requirements laid down in the law under which the marriage is sought to be solemnised. Since marriage involves performance of marital obligations with responsibility necessitating physical and mental maturity, a specific minimum age for the spouses with varied consequences in event of its violation is stipulated under all matrimonial laws. Nevertheless, a harsh reality of India remains that matrimonial matters starting from, choosing the life partner, to negotiations and solemnisation, a pivotal role is played by the parents instead of the parties who are to spend their lives together. Thus, the decision, as to with whom the offspring is going to tie the knot is to a large extent, within the exclusive domain of the elders and parents. Considerations of family, religion, caste, sub caste, social and financial status, personality and salary of the boy and the looks of the girl, all must be to the satisfaction of the parents and family members and sometimes, those who are to marry actually get to even see each other in the last, only when every other aspect of marriage negotiations are fulfilled/satisfied. Love marriages or marriages without consent or information to the parents are severely frowned upon and young lovers who till the time they decided to elope were the beloved children of their parents now become their prey. With complete social approval, in fact with their co-operation and connivance, the young couple is hunted down and often murdered to avenge the pseudo honour (or the lack of it), of the family. It is as if a catastrophe falls on the family of the parents, if the girl chooses a boy from a different caste or religion or a lower financial and social status. If the parties are legally competent to marry, they desperately seek police protection and invariably get it as well, but live a life of perpetual fear. Alarming are those cases where both the parties or one of them happens to be an adolescent and therefore underage for the

4 AIR 2019 Karn 188; AIR OnLine 2019 Kar 856.

purposes of marriage. In such situations, an issue arises, can police protection be available to such children, who were not legally empowered to marry? Would a self created circumstance of voluntary violation of a legal provision still entitle them to look up to the legal machinery to protect their lives? In *Kawaljeet Kaur* v. *State of Punjab*,[5] a girl aged 18 years and six months and a boy aged 19 years and three months, though a major, but a child under the Hindu Marriage Act, 1955(HMA) for the purposes of marriage eloped, and got married, without informing their parents. Coming from different castes, in wake of vehement opposition of the girl's parents to this alliance, they were lived in constant fear, changing their habitation frequently, with grave and real danger to their lives. Finally, with no other option left, they filed a writ seeking protection and for enforcement of their fundamental right to life and liberty in the court. It was pleaded before the court that the marriage was voidable under the Prohibition of Child Marriage Act, 2006 (PCMA) and they having violated the law themselves, cannot seek legal protection for having done something that was illegal in the first place. The court ignored the issue of the validity of the marriage and said that regardless of the validity, invalidity or that it is void, the issue is not about a marriage, but the deprivation of their fundamental right of life and liberty.[6] The life of the parties must be protected regardless of their age, solemnisation and nature of marriage or even absence of any marriage between the parties, as per the constitutional obligations, it is the burden duty of the state to protect the life and liberty of every citizen. As right to human life is to be treated on much higher pedestal, regardless of a citizen being minor or major and the mere fact that the boy here was not of marriageable age would not deprive him of his fundamental right as envisaged in Constitution of India, because constitutional fundamental right under article 21 of the Constitution of India stands on a much higher pedestal, being sacrosanct under the constitutional scheme.[7]

The court directed the senior superintendent of police, Amritsar to verify the threat perception and provide necessary protection to bride and groom qua their life and liberty, if required in the given set of circumstances.

Validity of marriage

Marriage between a Hindu and a non Hindu

Religious based personal laws postulate specific and stringent requirements for validity of a marriage. Under Hindu law, a marriage may be solemnised between two Hindus only. Difference of religion makes the parties ineligible to marry under the Hindu Marriage Act, and in such cases they should ideally proceed under the Special Marriage Act, 1954. A marriage against the dictate of sameness of religion would be no marriage in eyes of law. What is very important is the fact that the validity of such marriages on account of confusion about sameness /difference of religion can be questioned even after the death of the one of the parties to the marriage. The reason being that a valid marriage confers rights and obligations on not only the parties to

5 AIR 2019 Pand H 148; AIR OnLine 2019 P and H 614.

6 *Id*., para 18.

7 *Id*., para 19.

the marriage but bestows legitimacy on the children granting in their favour inheritance rights from the property of both their parents. In case the verdict is against the validity of marriage, both the wife and children would become incompetent to inherit the property of the deceased man and his property would go to his other relatives. In *Madhu Chaudhry* v. *Rajinder Kumar*,[8] a marriage was solemnised between a Hindu man and a woman, who was by birth a Roman Catholic Christian. She converted to Hindu faith prior to her marriage, and the priest who performed the marriage had also performed all the rites and ceremonies necessary for conversion from Christianity to Hinduism. A son was born to this couple. The husband who had joined his service as a bachelor, after the birth of the son changed his nomination and made a specific application that the entire retiral benefits were to go to his son. The wife owing to marital discord filed a petition praying for a decree of divorce under section 13 of the HMA praying for a decree of divorce, that was also decreed in her favour. The issue of whether the son was a legitimate child and her marriage a valid one was raised after the death of the husband in connection with the inheritance to his property and possession of the retiral benefits. Aspersions of legitimacy with respect to the son, were caused by the claimants to the property on the ground that since she was a Christian by birth, her marriage to a Hindu man under Hindu law was no marriage in eyes of law and the son begotten was illegitimate. The court held that where a person converts to Hindu faith, the validity of conversion is determined not merely by mere conversion but also by the facts as to whether the person had adopted Hindu way of life after conversion. Her post marriage conduct showed that she embraced Hinduism and followed Hindu religion as a way of life, that included regular visits to temples, including the visit to the holy shrine of Vaishno Devi. She even got a temple constructed. Regular visits to temple, including construction of temple showed that she had adopted the Hindu way of life. In addition her petition under section 13 was accepted by the court when upon her prayer, divorce was granted to her, which meant that the matrimonial courts had also treated her marriage as valid which would have been possible only when her religion at the time of marriage was treated as Hindu. In these circumstances, the court held that the marriage was valid and as a legitimate child, the son was entitled to his father's retirement benefits and his property.

The term 'bride' includes a 'transgender'

The debate on whether the HMA permits only a heterosexual union or includes a marriage between a man and a transgender is a continuing one. Analogous to it is an examination into the purpose of a marriage under Hindu law. Interestingly, this year the High Court of Madras explored the issue of marriage from a humane angle and upheld the right of a transgender to marry in light of the judicial precedents and the constitutional mandate of a right to lead a life of dignity. Here,[9] a marriage was duly solemnised between two Hindus, H and W at *Arulmighu Sankara Rameswara Temple, Tuticorin*, as per Hindu rites and customs. An application for registration of this marriage was submitted to the concerned authorities under the Tamil Nadu Registration

8 AIR 2019 P and H 82.

9 *Arun Kumar* v. *Inspector General of Registration , Chennai* , AIR 2019 Mad 265.

of Marriage Rules but it was refused, on the ground that there was no marriage in the eyes of law. Since only a valid marriage can be registered by the authorities, and because W here was a transgender and not a woman and the term 'bride' specified in section 5 can only refer to a Woman, the same cannot be registered. The parties filed a writ in the high court, and the counsel on behalf of the registration authority, re-iterated his argument that it is only a heterosexual union between a biological male and a biological female that is permitted under the Act. The situation being different here, their refusal to register the marriage was justified. The issue before the court was, since the Act uses the term bride and bridegroom under section 5, whether the term 'bride' would include a person who is a 'transgender' and can her marriage be registered under the HMA, as a valid marriage?

W was an intersex female at the time of birth but was described as a male in the school certificate and as a T, transgender in the Aadhar card. She had chosen to express her gender identify as that of a woman, and claimed that it fell within the domain of her personal autonomy and involved her right of privacy and dignity. The High Court of Madras held the marriage as valid and issued directions for registration of the same, while making the following observations:[10]

> A marriage solemnised between a male and a trans-woman, both professing Hindu religion , is a valid marriage in terms of section 5 of the Hindu Marriage Act, and the Registrar is bound to register the same. By holding this, the court is not breaking any new ground. it is merely stating the obvious. Sometimes to see the obvious, one needs not only physical vision in the eye but also love in the heart..... We therefore hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of transgender community under Article 19 (1)(a) and the state is bound to protect and recognise those rights.

The court decision stemmed primarily from three arguments. One, citations from the Hindu scriptures, second from an earlier apex court pronouncement and third from the constitutional and human rights perspective. The court noted that the existence of the third category outside the male-female binary has always been recognised in the indigenous citations of Hindu tradition revolved around the epic of *Mahabharata*, with references to Krishna transforming himself into *Mohini* and *Shikhandi*, as men who transformed into women and *vice versa*. The court further said that sex and gender are not the same one is determined biologically at birth and the other does not. The earlier apex court pronouncement in *NALSA* v. *Union of India*,[11] wherein the court had upheld the right of the transgender to decide their self identified gender and directed the central and the state governments to grant legal recognition of their gender identity such as male, female or the third gender was also relied on presently. The court had opined that discrimination on grounds of gender and identity or of sexual orientation impairs equality before law and equal protection of laws violating both

10 *Id.,* para 1.

11 AIR 2014 SC 1863.

article 14 and 21, of the Constitution as they encompass one's gender identity also. Since gender identify lies at the core of one's personal identity, gender expression and presentation, therefore it needed to be protected under article 19 (1)(a), of the Constitution of India. A transgender 's personality could be expressed by the transgender behaviour and presentation and State cannot prohibit , restrict or interfere with a trans-gender's expression of such personality. Often the state and its authorities either due to ignorance or otherwise fail to digest the innate characters and identity of such persons. They further observed that recognition of one's gender identity lies at the heart of the fundamental right to dignity as gender constitutes the core of one's sense of being as well as an integral part of one's identity. Self determination of gender is an integral part of personal autonomy and self expression and falls within the realm of personal liberty under article 21.[12] As far as section 5 of HMA is concerned, the court said that it is free to apply the current meaning of a statute to present day conditions. As the right of transgender persons to marry have been upheld by the Supreme Court, thus they cannot be kept outside the preview of the HMA. Thus the term bride includes not only a woman but also a transgender, it is only a question of how one perceives oneself. It is entirely up to that person to choose the gender, and they are free to have a sacramental or even a civil marriage.

The pronouncement would have a far reaching impact on the general social perception towards transgender members, who are an integral part of any social system. Unfairly treated by the biological male and female members, denied of respect, obligatory exclusion from mainstream employment and a forced avocation imposed on them would hopefully be a thing of past. With the judicial recognition of their constitutional right to live a dignified life that includes, ability to pursue education, enter any avocation and matrimony if they so desired, to raise a family and children.

Nullity of marriage: bigamy

The provisions of the HMA, mandate compulsory monogamy with both civil and penal consequences in case of its violation. A second marriage performed while the first is subsisting would be void and the guilty party would be penalised under section 494 of the Indian Penal Code, 1860. Yet even after nearly 65 years of existence, it has failed to act as a deterrent for people, who marry suppressing their already married status, yet take shelter behind their own wrongdoings when the occasion befits such a stand. In *Balbir Singh* v. *Baljinder Kaur*,[13] the issue involved the concealing of the fact of an existing marriage by a man who remarried. Here, before marriage, a man told the intending wife that he was a divorcee, but never showed her any papers. Upon marriage due to strained relations, she filed a petition under section 13 praying for a decree for divorce. The husband countered her, and contended that the petition for divorce is not maintainable as, at the time of his marriage with her, he already had a subsisting marriage. Consequently, his marriage with her was a void marriage due to its contravention with section 5 (i) and a petition for decree of divorce cannot lie. The wife withdrew this petition and filed afresh a petition under section 11

12 *Id.,* para 72-75.

13 AIR 2019 P and H 125.

read with section 5 (i) praying for a decree of nullity. Now the husband contended that his previous marriage was dissolved by Panchayat under the customary divorce, and therefore, the marriage solemnised with the present wife was not void. The court disbelieved the plea of customary divorce and held that since the husband had a subsisting marriage when he got married a second time, the marriage was a null and void and granted a decree of nullity.

Restitution of conjugal rights

Existence of a valid marriage essential

A valid marriage confers judicially enforceable rights and obligations on both the parties, that are to a large extent not available in an intimate relationship short of marriage. Thus before approaching the court praying for a matrimonial relief, the existence of a valid marriage between the petitioner and the defendant must be demonstrated. If one of the party files a petition praying for a matrimonial relief, but the other denies being married to him/her, the court cannot proceed with the case until the factum of marriage is established. Admittance of marriage or its denial must be substantiated with adequate proof sustainable in the court. At the same time a mere denial of the marital relationship by the defendant cannot lead to the dismissal of the petition praying for a matrimonial relief, and in such cases, the first issue to be examined would be whether a valid marital relationship exists between the two or not? If yes the court would proceed with the litigation and if not it would result in the dismissal of the petition itself. As aforesaid, a petition of restitution of conjugal rights (RCR) can be filed for resumption of cohabitation as between the spouses only and not amongst intimate partners in a live in relationship. This year the issue of existence of a valid marriage between the parties arose in several cases, with one asserting it and other denying the same. In *Reena Tuli* v. *Naveen Tuli*,[14] the wife presented a petition for RCR as against her husband but he denied being married to her. The family court, without going into the issue of existence/or not of the marriage, dismissed the petition for RCR filed by the wife on the ground that the husband's refusal is sufficient to indicate absence of a legal relationship between the two. The wife preferred an appeal to the High Court of Madhya Pradesh. The court overruled the lower court judgment and held that a mere denial of the relationship in itself should not result in the dismissal of the petition and the court must go into the issue. Whether the marriage exists or not should be the first question that must be decided by the family court before taking a call on the merits of the case. The court referred the matter back to the family court to decide the issue afresh. Similarly, in *S Meenakshi* v. *S Gopinath*,[15] the petition praying for a decree of restitution of conjugal rights was presented by the husband and the wife claimed that they were never married. The husband testified that they had a love marriage that was solemnised at a temple, and the ceremonies were duly photographed. He produced photographs of the marriages that showed its solemnization and brought in the photographer who had taken pictures of the marriage as a witness. The

14 AIR 2019 MP 169.

15 AIR 2019 (NOC) 205 (Mad).

photographer testified the same and the husband proved post marriage cohabitation. The wife after an initial denial, neither countered the documented evidence nor obtained any expert advice to questioned the genuineness of the photographs. The court held that since the solemnisation of the marriage was established by the photographs and the deposition of the photographer, the husband was entitled to a decree of restitution of conjugal rights. In *Swatantra Arora* v. *Rajendra Kumar Bali*,[16] the husband filed a petition praying for a decree of restitution of conjugal rights against his wife. She appeared, but claimed that no marriage existed between the two as the husband had already divorced her. Therefore, he is not entitled to any relief as the marriage between them is over. The wife defended her stand by producing a photocopy of a divorce decree procured by the husband from a court in United States, and pleaded that after securing a divorce decree, he remains incompetent to pray for restitution of conjugal rights. Since no marriage was subsisting between the two, the same having being dissolved by a foreign court, his petition should be dismissed. Her contentions were ignored and the court held, that the document produced by her was inadmissible in evidence. It is only the production of a certified copy of the judgement, duly certified by an Indian diplomatic agent that would be admissible in evidence and would be necessary to prove the judicial pronouncement. Her plea of invoking estoppel as against the husband leading to summary dismissal of his petition was also rejected by both the lower as well as High Court of Delhi.

Withdrawal must be without a reasonable excuse

The prerequisite for succeeding in restoring martial rights and getting back the company of the estranged spouse, is that the spouse who withdraws from the society of the other must have done so without a reasonable excuse. If the withdrawal was for a reasonable excuse, because of the conduct of the petitioner, and the respondent was forced to withdraw having no other option, the prayer of RCR would not be accepted by the court. On the other hand the person who because of his/her misconduct was instrumental in forcing the other to leave would himself/herself be guilty of constructive withdrawal. In *Navajit Patowary* v. *Karabi Thakuria Patowary*,[17] married in 1983, the parties had a male child born to them in 1984. As the wife went back to her parents place the husband approached the court praying for a decree of restitution of conjugal rights. He specifically pleaded that the wife had left his company without any reasonable excuse. However, the wife was able to prove that the husband failed to discharge his matrimonial obligations and to maintain her and the child, and even disputed the paternity of the younger child. She was tortured by him and his four sisters and to save herself from the arrogant and cruel behaviours, she was forced to flee from the matrimonial home. The wife had to lodge a complaint with the police about his behaviour in order to save herself from his atrocities. It was held that her withdrawal was with a reasonable excuse and the husband is not entitled to the decree of restitution of conjugal rights.

16 AIR 2019 (NOC) 261 (Del).

17 AIR 2019 Gau 104.

Consent to the marriage obtained by force

Free and voluntary consent is mandatory for solemnisation and validity of any marriage and a forced entry into it provides judicial getaway to the aggrieved party. A marriage can be declared a nullity if the consent of the petitioner was obtained by force, but availing the remedy requires fulfilment of conditions precedent under section 12 of the Act. The petition praying for a decree of nullity must be presented within one year of the force ceasing to operate and the parties should not have lived together voluntarily after it as husband and wife. Delay in the presentation of the petition or voluntary cohabitation after the force is removed would result in forfeiture of this right. If the force continues for a long time, and there is confusion about whether it has actually ceased to operate or not, and owing to it, one of the parties in the marriage feels aggrieved, they can attempt to have a dissolution on grounds of cruelty. It is not necessary that the conduct of only the spouse is material. If there is a duty on the spouse to act and he/she does not, resulting in mental trauma to the spouse, then despite keeping a frame of inaction, the spouse may still be guilty of cruelty. However, if the facts did happen a long time ago, an unreasonable delay or other relevant factors may result in negation of a remedy to a spouse who might be aggrieved to begin with becomes a guilty party later by his misconduct. In *Birendra Rajbongshi* v. *Parul Rajbongshi*,[18] the husband filed a petition praying for dissolution of marriage solemnised in the year 2015, contending that his marriage was solemnised by some local people against his will at gun point. He contended that the marriage was not consummated and therefore the birth of the son in the marriage was alleged as owing to the wife's adultery in additions to allegations of cruelty. On examination of the facts, it was revealed that the marriage was solemnised in 1983 and the parties lived with each other for around less than two years. A son was born of this union. In 1985, the husband remarried another woman. Around 30 years after his first marriage was solemnised he approached the court with the story of solemnisation of marriage at gunpoint. The court dismissed his petition, and held that since the birth of the son, the allegations of the forced marriage loses its relevance.

Adultery as a ground for divorce

One of the primary requirements for the smooth marital life besides mutual love and respect, is faithfulness towards each other. Fidelity is an important and indispensable part of a intimate relationship that the marriage represents. In a marriage there is a space for only spouses and entry of a third person makes it a little crowded. Voluntary sexual intercourse with a person other than spouse is considered an instance of grave matrimonial misconduct giving rise to a cause of action in favour of the innocent /aggrieved party. It is not living in adultery but even a single act of sexual intercourse with a third person which is sufficient to terminate the marriage. In *Maya Devi* v. *Pargat Singh*,[19] the parties post marriage lived together and were blessed with three children. The husband was a labourer and worked in Dubai on a labourer VISA.

18 AIR 2019 Gau 102.

19 AIR 2019 P and H 132.

During his absence his cousin chanced upon an incident in which he saw the wife and a co-villager in a compromising position and informed the husband about it. The wife denied all the allegations completely when confronted by him and threatened to implicate him in false dowry cases. However, harbouring genuine doubts and determined to know the truth, the husband secretly, installed a closed circuit CCTV camera in the bedroom. In three clippings, he saw his wife and the co- villager in illicit compromising positions. With the help of the clippings of the video, that were duly proved in the court, both the trial court and the high court held that adultery committed by the wife was established and he was granted divorce. Her contention that after 15 years of marriage the husband had connived with the co-villager to get rid of her was dismissed by the court in light of the documentary evidence.

In another case,[20] involving the adulterous behaviour of the wife, the husband presented a petition praying for divorce not on grounds of her adultery but cruelty. He claimed that the wife had refused to have marital intercourse with him and as a result the marriage remained consummated. However she gave birth to a child. The husband went in for a DNA test of the baby and it was revealed that he had not fathered the child. In addition the separation of the parties had extended for a period of over 14 years. The marriage was dissolved by a decree of divorce at the instance of the husband.

In the past, bringing in a positive proof of commission of the act of sexual indiscretion was extremely difficult, as it would usually be committed at the time when the parties would be alone and most probably within the four walls of the home. The extreme private nature of the act was problematic for those who had a suspicion that the spouse was infidel but were at a loss to bring in the evidence that could be admissible in court. With the advance in science and technology, easy availability of sophisticated and affordable electronic gadgets, and the authentic DNA tests revealing the paternity of the child, it has been made possible to document unacceptable behaviour of the unfaithful spouse, to get the desired relief.

Cruelty and desertion

Cruelty remains one of the matrimonial misconduct which is though not defined in the Act, is still made the basis of a number of matrimonial petitions seeking divorce. As it is difficult to give an exhaustive enumeration of what would constitute cruelty, multiple factors have to be taken into account while assessing the complained of conduct of one of the spouse. The primary principle is to see the conduct and its impact on the other party. If it is such that a reasonable person is not expected to live with the other, cruelty would be established. In addition, the social, financial status of the parties, their education *etc*., are all important factors to be kept in mind while deciding the petition. Cruelty can be both physical or mental. In *Abhilash Kumar Gupta* v. *Shweta Baldev Gupta*,[21] the husband filed a petition praying for a decree of divorce on grounds of wife's cruelty and desertion the marriage of the parties was solemnised in 2012. The husband contended that the wife was subjecting him and his

20 *K S Lakshmikantharaju* v. *Sowbhagyan,* AIR 2019 Kar 99.

21 AIR 2019 Chh 154.

family members to extreme torture and cruelty. She taunted the husband by calling him a rustic beggar and impotent, never took any interest in any of the household stuff, physically assaulted and threw chilly powder in the eyes of her mother in law, lodged false cases of dowry harassment and matrimonial cruelty against the in-laws under section 498A. She herself was proved to be a lady of easy virtue and had deserted the husband. The family court, granted the husband a decree of judicial separation instead of divorce as was prayed by him in exercise of the discretion exercised by them calling them small and trivial disputes. His contention that she had deserted the husband was not accepted by the court as they noted that though the wife was residing separately from the husband he on his own had not made any serious attempts to bring her back and therefore it cannot be a complete case of desertion. The husband field an appeal to the High Court at Chhattisgarh. The court accepted all the averments made by him as against the wife as proved and granted him divorce. Calling names including taunting him as impotent and lodging of false criminal cases against the husband and his family members the court said amounted to cruelty.

Presentation of mutual consent petition within one year of marriage

The Act stipulates a minimum time period of one year within which the parties to the marriage cannot approach the courts praying for dissolution of their marriage. The aim is to prevent hasty separations with the possibility of them regretting it later. In *Arpit Garg* v. *Ayushi Jaiswal*,[22] the parties married in July 2018, and lived together for a period of only three months. In December, 2018 *i.e.,* five months after the solemnisation of their marriage, they filed a petition claiming divorce by mutual consent under section 13 B that requires a mandatory one year separation as a pre-requisite for presenting a joint mutual consent based petition. In addition, section 14 specifically prevents the court to entertain any petition for dissolution of marriage by a decree of divorce within one year of marriage unless the case is of exceptional hardship to the petitioner or exceptional depravity to the respondent. It further cautions that if any party obtains s divorce decree within one year of marriage claiming exceptional hardship or depravity by misrepresentation or concealment of facts, the court may even order that the decree would be effective after the expiry of one year. The parties invoked both section 13-B and section 14. They maintained that their case was one of extreme hardship and thus would be covered under section 14 of the Act. For this purpose, they filed an additional application under section 14, for obtaining a waiver under its proviso, as the petition was presented within one year of solemnisation of the marriage. Even though section 13B does not accommodate any hardship based time relaxation, they contended that both section 13-B and section 14 should be read together, their petition be admitted and divorce be granted. The main argument of the parties was that the period of one year since the date of separation of the parties to the marriage, mandated under section 13 B, can be waived off by the court under the proviso to section 14 of the Act for the purposes of filing a petition under section 13 -B. The circumstances under which they can be waived according to them were, when it appears that there are no chances of living together of husband and wife because

22 2019 (136) ALR 524: 2019(5)ADJ431 (decided on May 6, 2019, High Court of Allahabad).

their differences cannot be resolved. They insisted that in their case there were no chances of reconciliation and if the prayer was rejected the parties would suffer mental trauma and agony. The family court dismissed their petition in January 2019, on the ground that since neither one year mandatory separation was evidenced as per the requirement of section 13-B, nor minimum one year requirement was fulfilled since the solemnisation of the marriage, the desired remedy could not be granted. The matter went in appeal to the High Court of Allahabad. The court upheld the decision of the family court and held that since the petition for divorce was filed by the parties within less than a year of separation of parties to the marriage, this petition for divorce by mutual consent was not maintainable. The application filed under section 14 also was returned to the petitioners for filing it after the expiry of one year of separation of the parties to the marriage.

It must be remembered that institution of marriage is fundamental to the society and serves the purpose of providing stability, respect, socially and otherwise and security to a lot of persons associated with the spouses. It is very discerning to see young people who appeared to be in a hurry to get marriage and seem equally in a hurry to get out of it. Initial coupling requires if not a lot of but considerable patience and time to understand each other and the ideal person that the courting couple see in each other is simply the best behaviour put forward by each of them. With marriage usually, the time for pretensions is over, and the reality dawns on them. Once tied to each other, many a times their fairy tale assumptions of what marriage stands for is shattered, and without realising that every person has a good side as well, the disillusionment settles in, often with a feeling of entrapment. The urgency, and haste sees them grappling with immediate parting solutions, and rather than using the time for cooling of temperaments, they yearn for a final and legal separation. Back with their respective families sometimes is more harmful as the self appointed advisors, and even close family members, indulge in more of fault finding with the spouse of their child rather than introspection and of a possible patch up. Futility of Mediation and conciliation in matrimonial discords is evident as with a predetermined mind, the parties hardly take these exercises seriously. Despite the fact that the stipulation of one year time is not long, it seems to the warring parties, akin to eternity and pulling all resources, they rush to the court, pleading arguing, cajoling and presenting a very pathetic picture of their grievances, hoping fervently for the court to break the rules for them treating it to be a case of exceptional hardship. The most popular argument calling for waiver is that the parties are educated, mature, and have a taken a decision that they do not want to be each other and a wait of one long year will adversely affect their future course of action.

Irretrievable breakdown of marriage

Undoubtedly, it is the obligation of all concerned that the marriage status should as far as possible, as long as possible and whenever possible, be maintained, but the general judicial appraisal also indicates that forcing the parties to be in a dead marriage is an exercise in futility. At least in six cases marriages were terminated, this year on grounds of irretrievable breakdown of marriage, three by the exercise of apex court's powers under article 142 of the Constitution of India, and three by the different high

courts. One party tried desperately to get out of it while the other adopted a policy of "would neither live nor leave" contending even at the level of the highest court that if no matrimonial misconduct can be established , marriage should not be dissolved unilaterally at the instance of one if the other was unwilling to do so. It is strange that in all cases the parties were married for around 20 years or more with a long separate habitation record. The petition for divorce stemmed from the husbands, with their wives defending the same vehemently claiming that no divorce should be granted as they wanted the marriage to go on, and at the same time expressing unwillingness to live together. In *Praveen Singh Ramakant Bhadauriya* v. *Neelam Praveen Singh Bhadauriya*,[23] married in 1998, the couple had a daughter and separated soon thereafter due to matrimonial discord. The husband filed a petition praying for a decree of divorce as against the wife that was dismissed consecutively by the three courts; *viz*, by the trial court in 2009, by district court in 2012 and thereafter by the high court. The matter then came up before the apex court and at last, the parties amicably reached a financial settlement. The husband was required to pay Rs 10 lakhs to the wife as full and final alimony and maintenance and three lakhs to the daughter who had by now attained the age of 18 years and contribute one lakh towards expenses of her marriage. The court held that since the parties had amicably settled their matter the court exercising their powers under article 142 of the constitution dissolved the marriage as it was irretrievably broken down.

In *Munish Kakkar* v. *Nidhi Kakkar*,[24] the marriage was solemnized at Jullundur in 2000, at the place of residence of the husband's family. The parents of the wife lived in Canada. The parties cohabited for only two and a half months and thereupon, the wife went to Canada. She obtained Canadian citizenship in 2002 and then returned to India to be with the husband. Marital differences soon emerged, and pursuant to a compromise before the *Panchayat*, they were advised to live away from the joint family in a rented separate habitation, but the efforts failed and she left again for Canada.

The husband contended that she was not interested in living in India, and pressurized him to migrate to Canada despite the fact that he did not want to do so and had a stable job in India. He signed the papers only to save his marriage. On the petition filed by the husband the trial court granted him divorce on grounds of wife's unsubstantiated continuous character assassination of him. The high court concluded that there were no grounds that could be made out and it was in fact a case of adjustment issue. Both the parties had made allegations of extra marital affairs as against each other but the same were not grave enough to dissolve the marriage as they were made in 'inflamed passion'. Since the ground of irretrievable breakdown of marriage was not present in the statue book the same, according to the high court could not be made the basis of the dissolution of their marriage, and therefore the prayer for divorce was dismissed. On appeal, the bench of JJ, Sanjay Kishen Kaul and K M Joseph, noted

23 AIR 2019 SC 4783.

24 AIR 2020 SC 111; AIR OnLine 2019 SC 1756.

that the parties were living away from each other for over 16 years and had no history of pleasant cohabitation, were not inclined to be with each other at all, had also filed a number of cases against each other; the marriage between them was long over and it would be prolonging their misery to continue being tied to one other.

The apex court observed that though the parties did not see any good in each other yet the wife submitted that she was interested in living with him and this the court observed was may be due to the reason that she did not want a divorce decree to be passed in his favor. They said that they were convinced that the marriage was dead and it was a fit case for dissolution of marriage on the grounds of its irretrievable breakdown. Though there was no consent of the wife for the divorce, but in real terms there was no willingness on her part to live with him as well. There were only bitter memories and angst against each other and has got extended in the case of wife to such an extent to somehow not permit the husband to get a decree of divorce and live his life forgetting that both the parties would be able to live their lives in a better manner, separately, as both parties suffered from an obsession with legal proceedings.

The court also observed that only they had the power under article 142 to put an end to the marriage and that they believe that not only the continuity of the marriage was fruitless but was in fact causing further emotional trauma and disturbance to both the parties and it was better to put an end to it as soon as possible. With respect to article 142, the court observed:[25]

> the provisions of Article 142 of the Constitution provide a unique power to the Supreme court to do complete justice between the parties, i.e., where at times law or statute may not provide a remedy, the court can extend itself to put a quietus to a dispute in a manner which would befit the facts of the case. It is with this objective that we find it appropriate to take recourse to this provision in the present case.

They granted a decree of divorce and dissolved the marriage after the parties had spend nearly two decades battling each other.

In *R. Srinivas Kumar* v. *R. Shametha*,[26] married in 1993, the couple had a son in 1995 but due to strained relations the wife mostly lived at her parental place and the husband filed a petition for divorce in 1999. The Family Court at Hyderabad dismissed the plea both on grounds of cruelty as he failed to establish the same to the satisfaction of the court and also on the ground of irretrievable breakdown of marriage as it did not exist on statute books. An appeal to the high court on grounds of irretrievable breakdown of marriage was again dismissed and he approached the apex court. He cited several cases in support of his contention,[27] that both the parties were living away from each other for a period of 22 years, there was no life left in this marriage and in order to render justice to the parties, the Supreme Court, should exercise its powers under article 142 of the Constitution to put an end to their marriage as the marriage has broken down irretrievably.

25 *Id*., para 21.

26 (2019) 9 SCC 409; AIR 2019 SC 4914: AIR OnLine 2019 SC 1178.

The wife argued that it is only when both the parties agree that the marriage can be dissolved and if one is not willing it should not be terminated even on the ground that it has broken down irretrievably. She also listed few of the earlier decisions in her support.[28] This contention of the wife was dismissed by the court stating that if both the parties desire to bring an end to the marriage they can always do so under divorce by mutual consent. Further, that it was not in the interest of the parties as also the society to preserve or protect a marriage that is living only in name but for all practical purposes is dead It would add to the misery of both, to keep it alive or insist on its protection. In order to protect the financial interests of the wife, the court directed the husband to pay a sum of Rs 20 lakhs and granted divorce to him.

The court observed that the powers, under article 142 are not exercised as a routine but in rare cases where the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably in view of the absence of legislation in this behalf. Here the parties were living away from each other for a period of 22 years and there was no hope for a reunion, and despite giving chances again and again they did not file for mutual consent based divorce. The three judge bench held that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of the fact, that it would be harmful to the society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. Again in *Koracham Kandiyil Shoba* v. *Puthiyottu Thayakunniyil Pavithran*,[29] the husband filed for divorce on the ground that the wife behaved in improper manner with husband , child and his parents and left matrimonial home without his consent. The wife on the other hand alleged that she suffered harassment after giving birth to a retarted child. The High Court of Kerala observed that the marriage had no life left and granted divorce on ground of irretrievable breakdown of marriage.

In *Disha Kushwaha* v. *Rituraj Singh*,[30] married in 1999, the parties had three children, twin daughters and a son. They Lived together for 14 years, and then separated. The wife filed a petition praying for restitution of conjugal rights and the husband prayed for divorce on grounds of her cruelty. The trial court dismissed wife's prayer but held that since the marriage has broken down irretrievably, without any hope for any reunion, dissolved the marriage. It also granted Rs 40,000 to the wife as interim

27 *Durga Prasad Tripathy* v. *Arundathi Tripathy* (2005) 7 SCC 353; *Naveen Kohli* v. *Neelu Kohli* (2006) 4 SCC 558; *Sanghamitra Ghosh* v. *Kajal Kumar Ghosh* (2007) 2 SCC 220; *Samar Ghosh* v. *Jaya* (2007) 4 SCC 511; *K Srinivas Rao* v. *D A Deepa* (2013) 5 SCC 226; *Sukhendu Das* v. *Rita Mukherjee* (2017) 9SCC 632.

28 *Chetna Dass* v. *Kamla Devi* (2001 4 SCC 250; *Vishnu Dutt Sharma* v. *Manju Sharma* (2009) 6 SCC 379; *Hitesh Bhatnagar* v. *Deepa Bhatnagar* (2011) 5 SCC 234; *Darshan Gupta* v. *Radhika Gupta* (2013) 9 SCC 1; *Manish Goel* v. *Rohini Goel* (2010) 4 SCC 393.

29 AIR 2019 (NOC) 327 (Ker).

30 AIR 2019 MP 217.

maintenance. The husband was a forest service officer, while the wife was a home maker. The High Court Madhya Pradesh, upheld the trial court's verdict and in a detailed judgment explaining the concept of a Hindu marriage and under what circumstances a marriage would be deemed to be broken down irretrievably , brought the marriage to an end and observed that since marriage is recognised by Vedas to maintain Dharma, Artha, Kama and Moksha, if any limb is missing by an act, conduct, understanding losing faith, trust in between husband and wife, it would be called as irretrievable breakdown of marriage. The court illustrated the circumstances of irretrievable breakdown of marriage as

i) from the conduct of the parties looking to the facts and evidence brought in the court, if parties are living separately since last more than five years and not ready to live together losing possibility of their reunion despite mediation and conciliation, the case may fall within the purview of irretrievable breakdown of marriage;

ii) in case the parties are not accepting their faults yet under the situation marriage cannot workout, marriage has to be struck down because it is irretrievably broken down;

iii) if there is no substance in the marital life and the marriage is a mere shell, out of which the substance is gone, then divorce should be seen as a solution and an escape route out of a difficult situation and it would come within the purview of irretrievable breakdown of marriage;

iv) if divorce is unconcerned with the wrongs of the past , but is concerned with bringing the parties and the children as a hope of a new situation by working out the most satisfactory basis upon which they may not be in a position to regulate their relationship even in the changed circumstances, it would come within the purview of irretrievable breakdown of marriage;

v) if the parties have consumed most of their lives in litigation and their reunion is impossible and they are living separately for quite number of years by separation and litigation due to which the dislike for each other boils hotter and when the parties have crossed point of no return that can be termed as irretrievable breakdown of marriage;

vi) in cases where one of the spouse decide not to resolve the dispute and live in agony only to make life miserable hell for both husband and wife , this type of adamant and callous attitude and continuation or preservation of such marriage would encourage continuous bickering , perpetual bitterness and may lead to immorality. Thus for this human problem, human approach is warranted by declaring it as irretrievable breakdown of marriage.

vii) Once the marriage has broken down beyond repair and it has become unrealistic for the law not to take notice of that fact, it would be harmful to society and injurious to the interests of the parties because it would show scant regard for the feelings and emotions of the parties. In such circumstances marriage may be declared as irretrievably broken-down.

The litigation involves three issues, of restitution of conjugal rights filed by the wife, of divorce filed by the husband on grounds of her cruelty, of maintenance *pendente lite* filed by wife, grant of permanent alimony and maintenance by the wife for herself and her child.

In *Babul Chandra Majumdar* v. *Ratna Majumdar*,[31] the marriage was solemnized in 1995. The wife was the daughter of an IAS officer while the husband was a diploma passed engineer. The parents of the wife proposed the son in law to live with them as *ghar jamai*. The wife made unsubstantiated allegations that she was tortured at her matrimonial home. On the other hand the husband proved that he had arranged for a rented accommodation and had to be separated from his parents to provide comforts to his wife. The court concluded that the wife was guilty of cruelty and the parties were living away from each other since 2012. Hence marriage was dissolved as it had irretrievably broken down.

Customary divorce

Post 1955, a marriage can be terminated primarily through a court's decree, but at the same time the statute under section 29, retained the provisions of customary divorce. Nevertheless, strict proof of permissibility and adherence to the proper procedure of the customary divorce is essential to recognise the single status of the parties that makes them eligible for remarriage or else a remarriage would be void and the party to a non recognised customary divorce , would be held guilty of commission of the act of bigamy. In *Priya Dayaldas Jethani* v. *Hitesh Ghanshyamdas*,[32] a marriage was solemnised in 2013 at Nagpur in accordance with the rites and ceremonies of the Sindhi community. Around two years later pursuant to marital discord the husband filed a petition praying for a decree of nullity on the ground that post marriage, he learned that the wife was already married to another man, H1; had cohabited with him, had conceived and had a premature abortion as well. Since without putting an end to this marriage legally, she remarried him, this second marriage with him was null and void. The wife countered his allegations and first denied having married before. She later changed her stand and deposed that although she had married H1, but her marriage was dissolved validly, following customs prevailing in their community. She pleaded that as per the customs prevalent in the Sindhi community where she came from, a marriage can be dissolved by a mutual consent divorce deed signed by both the parties and witnessed by the respectable panchas from Sindhi community before a notary public. Her marriage, she said was dissolved in accordance with the customs of the Sindhi community. The court however, held as against it and said that if there is pleading that first marriage was dissolved by following custom or usage applicable to or prevailing in community, such pleading , custom or usage must be proved to have acquired force of law by its consistent following by members of community in general since time immemorial or at least for reasonably long time period showing its wide spread acceptance by members of that community and that it is not unreasonable or against public policy. Here the wife failed to prove the existence

31 AIR 2019 Tri 54.

32 AIR 2019 Bom 108.

of a continuous following of this practice in their community therefore the first marriage was not dissolved and consequently the second marriage was void being in conflict with the provisions of the HMA. Law requires that a marriage once solemnised can be brought to an end only through a decree obtained from a civil court in accordance with the provisions of the HMA. Prior to enactment of the HMA, a Hindu marriage was considered a sacrament with no provision for separation during the lifetime of the spouse. They were viewed as inseparable and the marriage an in-dissoluble and a holy bond. At the same time divorce was permitted, though rarely under some communities as per their customs. The Hindu law as it stood at that time gave no recognition to the practice of obtaining divorce by parties to the marriage unless there was a custom prevailing in the community to which parties to the marriage belong permitting such severance. The court followed an earlier apex court observations, [33] that as per the Hindu law administered by courts in India divorce was not recognised as a means to put an end to the marriage which was always considered to be a sacrament, with only exception where it is recognised by custom. Public policy, good morals and the interests of society were considered to require and ensure that if at all , severance should be allowed only in the manner and for reason or a use specified in law. Thus such a custom being an exception to the general law of divorce ought to have been specifically pleaded and established by the party propounding such custom since the said custom of divorce is contrary to the law of the land and which if not proved will be a practice opposed to public policy. The second marriage was held as void as the court held that the first marriage was still subsisting . The plea of customary divorce was not accepted by them.

IV MAINTENANCE

Non-payment of interim maintenance: defense to be struck down

The whole purpose of making a provision for interim maintenance is to ensure that a spouse in indigent circumstances does not suffer from inadequate representation at the trial level as also has enough to at least feed himself/ herself appropriately. These orders needs to be complied with immediate effect. The application praying for interim maintenance is always taken on a priority basis and decided before taking up the main matrimonial petition. The safeguard for compliance with the order is that where the court directs the financially sound party to pay interim maintenance to the other in dire circumstance, and he abides by it, only then the court would proceed with the main matrimonial petition. However, if the order for maintenance is disobeyed, the guilty party, if happens to be the petitioner, would see his/her case dismissed and if respondent, the defense would be struck down. In *Sonia* v. *Deepak Kumar*,[34] the husband had filed a petition praying for a decree of nullity on the ground that the wife had a subsisting marriage at the time of her marriage with him, hence, the second marriage was void. The lower court granted a decree of nullity in his favour, and the wife presented an appeal against the order. The wife then filed an application under section 24 for grant of interim maintenance and litigation expenses, and the court

33 *Yamanaji H Jadhav* v. *Nirmala* AIR 2002 SC 971; (2002) 2 SCC 637.

34 AIR 2019 P and H 76.

directed the husband to pay Rs 5000, per month and Rs 25,000 as the litigation expenses to her. The husband in partial compliance of the order by the court paid Rs 20,000 and failed to pay the rest. Since the husband failed to comply with the order of the court with the defence that he is unable to do it as he does not have a single penny, the court gave him another chance to comply with the order of the court, but he again defaulted. As a result, the court set aside the nullity decree granted in his favour and the defence put forward by him was struck off.

Permanent alimony and maintenance: **wife guilty of adultery**

The conduct of the parties is not relevant, while considering a grant of interim maintenance as the guilt is yet to be judicially established and the purpose is to accord relief to the indigent spouse so as to prevent starvation. But in contrast, in an application, praying for permanent alimony and maintenance, conduct of the party seeking such an order is relevant. In *Jyoti Rekha Bora Mahanta* v. *Haren Mahanta*,[35] the parties had two daughters from the marriage. Thereafter, the wife secured an appointment as a teacher and it was from than onwards, that the parties started having matrimonial problems. She left the matrimonial home and went back to her parents place. The husband filed a petition praying for a decree of divorce on the ground that she had an illicit affair, and even named the paramour as X. He testified that when confronted by him she confessed that she loved X, wanted to marry him and under no circumstances would leave her paramour. Even though, he tried to make her understand that she was no longer a small child but a mother of two daughters, she paid no heed. Her own father deposed against her, and stated that he was under severe trauma by his daughter's behavior and wanted to put some sense in her to protect her family and marriage but to no avail as she was determined to marry X, once she was free.

The wife countered the husband's pleadings by alleging that had demanded a dowry of Rs 10 lakhs and had tortured her on her failure to meet the same. These allegations of dowry demand and the resulting torture, were countered by her own father and elder daughter studying in class-X. They denied these allegations and categorically testified them as totally false and fully concocted. The trial court granted him divorce and with respect to her maintenance application, it held that since the wife was employed, had herself maintained illicit relations with X, accordingly in the facts and circumstance of the case she would not be entitled to any permanent alimony. The wife preferred an appeal and contended that she had decided to divorce her husband, provided he paid her as permanent alimony, and maintenance a sum of Rs 10 lakhs. In fact she wanted to use this amount as the seed money to start her new life with the man she wanted to marry. She further said that since the prayer of divorce emanated from the husband, he is under an obligation to pay her permanent alimony and maintenance. The high court took note of the entire evidence put forward by the husband, the allegations and admission of love affair by the wife and its authentication by her father and daughters besides the husband and her adamant behavior of leaving her family to join her lover. The evidence included a photograph of her with X. The husband established that when he confronted her, in front of the daughters the wife

35 AIR 2019 Gau 142.

identified him as X and went to further say that she loved him, could not live without him and planned to marry him. In these circumstances the court held that she was not entitled to claim any permanent alimony or maintenance from the husband.

It is well established rule that a blanket denial of maintenance is not desirable if it is proved that the spouse though guilty is without any means to support himself/ herself, yet the courts as courts of equity, justice and good conscience, cannot shut their eyes to not only the blatant misconduct of the spouse but her attempts to use the beneficial provisions to arm-twist the husband to extract money from him so that she can start her life afresh with her paramour. The seed money to start a new life with another man cannot be extorted from the husband in the grab of permanent alimony or maintenance.

Able bodied man and woman: standards to apply

Matrimonial life even presently is to a large extent guided by the socially created stereotyping of roles, that makes it incumbent on the husband to be the chief breadwinner and the wife assuming the domestic responsibilities. The unremunerative nature of house work confers a dependant status on her, and it is never considered unusual when a highly educated, gainfully employed woman is forced to or even voluntarily resigns from her job to look after the children, or other family members of the husband. These factors are so deeply entrenched in the minds of everyone that even the judiciary takes cognizance of it. A role reversal is strictly frowned upon. Thus voluntary incapacitation of a woman is perceived as normal, yet by a man is unusual and highly undesirable. A man sitting at home is called by uncomplimentary names, and a man trying to live off the income of a gainfully employed wife is considered disrespectful. At the same time it is noticeable that a number of woman seeking and taking employment is on the rise, and instances of a wife being parallel in earning the quantum of salary to the husband may not be ruled out. The rigidity of role division is such that even in these cases, it remains the duty of the husband to provide for all the family members including her. Thus in several cases, gainfully employed wives do file maintenance application despite having enough money of their own. Two cases with situational differences came under survey this year, the first involving a highly qualified wife claiming maintenance from the husband and the second an economically active husband resigning from the job to evade payment of maintenance. In *Athira Upendran Nair* v. *Jayakrishnan Krishnan Nair*,[36] soon after marriage, due to matrimonial discord, the wife prayed for a decree of divorce on grounds of cruelty by the husband that was allowed by the family court. She claimed that the husband who was working as a software engineer in United States was having a very good income and was bound to give her a permanent alimony of Rs 50 lakhs. At the time of her marriage she was doing a course in MBBS, after which she went to United States with her husband. She came back to continue her studies, lived with her husband often and on, but complained of torture at his hands. At the relevant time the wife was in United States to complete her internship, and the maintenance was allowed to her till its completion. The husband contended that the wife was the owner of

36 AIR 2019 Ker 176.

considerable property, had a green card and was earning a considerable sum to the tune of around 90 lakhs a year. Since she is not in need of maintenance the same cannot be allowed to her. He had already spend a huge amount of money for procuring green card for the wife and her father. The court dismissed her prayer for claiming travel expenses and permanent alimony and maintenance as she was held capable to maintain herself. The husband was directed to pay her Rs 15,000 per month till the completion of internship. In *Gamara Madhuben Revabai* v. *Gamara Revabhai Nagjibhai*,[37] the husband was the founder of the school, holding the post of its chairman and managing direction. His income approximated to Rs 25 to 30 lakhs per annum Matrimonial discord, saw his wife filing a claim of maintenance against him in the court, and in order to evade any financial liability towards her, he resigned from the school board. However, the court while holding that voluntary incapacitation would not help him in this way observed that as an able bodied man he cannot simply resign from the job so that he does not have to pay maintenance. The court enhanced the quantum of maintenance from Rs 6000 to 15,000 per month to the wife.

V CUSTODY AND GUARDIANSHIP

Custody of minor child

The impact of matrimonial discords is extremely traumatic on the tender children whose upbringing requires, a stable home with love and affection of both the parents. Their separation does have an adverse affect on their growth and development. A remarriage of one or both parents is further distressing, for the child as he is to share the attention of the parent with his/her new spouse. Desolation becomes inevitable, in majority of cases, and it is totally up to the parents to ensure that the child does not feel neglected and lonely despite entering of a new spouse in their lives. Perception of society also reveals differential criterion in case of remarriage of parties with kids. For a man, it is considered normal and in some cases even recommended, but for a woman, it is still strictly frowned upon. The fact of attempting to come out of an isolated existence, to enjoy matrimony a second time, is rare, while attending solely to the well being of her child in isolation is a norm. The exposure of her sexuality, legally to more than one man even though in matrimony in itself is considered negatively. Therefore, her remarriage is often seen as a disqualification to continue to be a fit parent. Even otherwise, a woman with children from her first marriage finds extremely limited or hardly any option of remarriage as while a bride may be accepted but not with children who are alien to the new family. It is hearting to note that these stereotyping is also undergoing change, and hopefully one bad experience would not lead to the doors of remarriage permanently closed on her. Even though an added discouragement comes from the custody oriented interpretations. Perception of a divorcee remarrying is viewed as against the interests of the child. In *Sangeeta* v. *Parveen Kumar*,[38] where both the parents of the minors remarried, the father wanted to have the custody of the minor children back from the mother on the ground of her remarriage. Soon after the breakup he remarried while the mother looked after the

37 AIR 2019 Guj 175; AIR OnLine 2019 Guj 228.

38 AIR 2019 (NOC) 224 (P and H).

children. Later she also remarried. The father who had already remarried still considered himself as a parent fit enough to take care of the child from the first marriage, while the mother's remarriage was painted by him as an acquired disqualification to look after the child. The court preferred to look into the wishes of the child herself to take the decision in the matter. The court found the minor girl very comfortable with the mother and her younger brother and categorically showed her willingness to be with the mother. Her custody was allowed to be retained by her mother.

Father versus maternal uncle and aunt

While the primary responsibility to rear the baby in the marriage is that of both the parents, the family ties in India are very strong, and very often concerned relations step in to relieve the parents, in times of need. Small children are nurtured by them in case of inability of parents to do the same for serious reasons. These actions stemming from familial affection cannot translate into the nurturers acquiring any rights over the child. A curious issue arose in a case this year where due to serious illness of one and fatality of the other parent, concerned relations came to their rescue, and brought up their child for a certain time period. Can they claim guardianship or custody over the child whom they raised while the parents were unable to do so? In *Tejaswini Gaud* v. *Shekhar Jagdish Prasad Tewari*,[39] the wife, in the fifth month of her pregnancy was detected with breast cancer. Four months later amidst the treatment she gave birth to a baby girl. Her treatment continued and as she herself needed extensive care, she was in no position to look after the baby. The father stepped in to handle the situation including taking care of both the wife and the infant. When the baby was just three months old, the father was suddenly diagnosed with tuberculosis, meningitis and pulmonary tuberculosis. Now he also had to be hospitalised. While he underwent treatment, the wife's married sister took her and the baby to her house in Mumbai and looked after both of them. Later, they were shifted to the residence of her brother. Despite treatment, the mother could not survive and died when the baby was one year and two months old. All along the child was with the maternal uncle and aunt *i.e.*, the sister and brother of the deceased mother. The father recovered from the illness and was well enough now to look after the baby, but when he approached the maternal uncle and aunt who were taking care of the baby during his sickness, they did not allow him to do so. He first filed a complaint to the police station and then approached the high court with a writ of *habeas corpus* seeking custody of his minor child. The court observed that the child's father's incapability to look after her was not voluntary but was due to his hospitalisation with a serious ailment. In such circumstances the maternal uncle and aunts have looked after the baby, for a temporary time period or as a stop gap arrangement, but in the interest and welfare of the child, it was just and proper that the custody of the child is handed over back to the natural guardian, *i.e.,* the father. The high court also felt that since the maternal uncle and aunt had taken care of the child, they may be granted access to the child. In presence of the natural guardian of the child, and if he is fit to take care of his child, nobody else can claim a

39 AIR 2019 SC 2318.

40 AIR 2019 Karn 162: AIR OnLine 2019 Karn 863.

preferential right to the custody of the child. Similarly, in *M V Krishna Murhty* v. *Arun C*,[40] the parties were blessed with a daughter. All three met with an accident in which the wife died, the husband suffered head injuries, but the baby survived. In these circumstances the maternal grandparents took the baby to their home and brought her up. While the daughter was around four years old some differences surfaced with the father and the maternal grandparents. Thus he filed a custody petition in the court seeking the custody of his daughter from the maternal grandparents. He also deposed that though he had remarried, his wife could not conceive and therefore they both had decided to bring up his daughter. The court held that as the natural guardian of the child, the father cannot be denied the custody of his daughter and the maternal grandparents were given visitation rights.

Natural guardians *verus* other relatives

In two cases under survey, mothers won the custody battles from other relatives, such as maternal and paternal grandparents. In *Aswathy Udayan* v. *Prince Anand*,[41] the parents were in Australia while their four years old son was with wife's relatives in India. Ironically wife had strained relations, both with her husband as also with her relatives who initially had agreed to look after the child but later prevented her from meeting him. She presented a petition seeking her child's custody from her relatives with the court holding in her favour. As a natural guardian, they said, she cannot be denied the custody of her own child. In *Joginder Singh Chauhan* v. *Praveen Dulta Chauhan*,[42] an eight year old male child was with the mother who resided with her parents. She and her parents were being tried for abetment to the commission of suicide of the father. His parents applied for the custody of the child. Rejecting the custody demand of the paternal grandparents, it was held that the mother would retain custody while they were given visitation rights for 8 hours.

Mother versus father

In *Inderbir Singh* v. *Amandeep Bains*,[43] the father was an IPS officer and the mother a home maker. After marriage a son was born to the couple. Due to marital discord, the husband had initiated divorce proceedings against his wife on grounds of cruelty that she defended and levelled counter charges of his involvement in an extramarital affair. The petition was later withdrawn after successful mediation, but the wife started living with her parents and prayed for interim custody of the child. The father along with the son appeared before the court whereby custody for only two days was given to the mother with a direction to bring the child to the court after two days, that she failed to do. On the other hand she made serious allegations against the husband and his brother for sexually assaulting the boy.The father contended that he was a senior police officer and had adequate financial means to put the child in a good school. His contention was rejected by the court as the boy had expressed his willingness to be with the mother. Additionally the court also disregarded his contention that it was in the interests of the child that he should be put in a good school, which he could ensure because of his sound financial position. The court said that it is not in

41 AIR 2019 Ker 190: AIR OnLine 2019 Ker 242.

42 AIR 2019 HP 128.

evidence that if a child studies in a particular school, he would turn out to have better careers in comparison to less glamorous schools but otherwise respectable institutions. A good salary, status and perquisites are not sufficient grounds for holding that the welfare of child would be better served /ensured by retaining his custody to the father. Accordingly, custody was given to the mother with visitation rights to the father.

Additional complications surface due to cross border jurisdiction and issue of citizenship of minor children, as different from the parent who in defiance of the court orders of the nation of children's birth, bring them to India and tries to invoke jurisdiction of Indian courts only to suit her convenience. In *Lahiri Sakhamuri* v. *Sobhan Kodali*,[44] the marriage was solemnised in 2008 at Hyderabad. The parties were green card holders and living in United States (US). The wife was a biomedical engineer by profession and the husband was a cardiologist. The couple had a house in Pennsylvania and were blessed with two children, who were United States citizens, by virtue of their birth there. The wife filed a petition under the Divorce Code, 1980 prevalent in United States in 2016, praying for divorce and custody of their school going children on the ground of irretrievable breakdown of marriage. The parties appeared for the mandatory conciliation proceedings as per the rule and were also directed not to change the residence of the children that may affect the custodial rights of the parents. The wife came to India along with the children, due to the death of her maternal grandmother, and, filed a prayer in the court at Hyderabad seeking exclusive custody of the children and restraining the father from taking them away. The husband was informed about it at a very late stage and also the fact that the wife along with the children would not be coming back to the US. He filed an application in the same court in US, that had heard their matrimonial and custody petition, stating the complete facts and the court re-iterated their continuing jurisdiction over the matter, directing the wife to bring back the children to US and also pay to the husband 10,000 dollars.

The appeal filed by the wife as against this order was rejected by the High Court at Hyderabad, and she took the matter to the Supreme Court. The apex court held that since the children were not ordinarily resident of India as envisaged under section 9 (1) of the Guardians and Wards Act, 1890 (GWA), the high court was right in rejecting the application filed by the wife before the Family Court at Hyderabad, and she took the matter to the supreme court. They were of the view that when the orders have been passed by the US courts, the parties cannot disregard the proceedings instituted before the US court filed at the instance of the mother who is supposed to participate in those proceedings. Both the minor children, from their birth till removal from US were living with their parents in US and even the courts had directed the mother, against changing their residence. As there was no history of physical or mental abuse, the court hoping for reconciliation, said that the best interests of the children would be served if they stayed in US and enjoy their natural environment with love, care and attention of their parents, resume their school, be with their teachers and

43 AIR 2019 P and H 93.

44 AIR 2019 SC 2881.

peers. Thus, directions were issued to the mother to return along with the children within a period of six weeks from the date of the judgment with the responsibility of the father to make all arrangements for their travel and stay in US. In case the mother was not interested in leaving for US, the husband was directed to deposit Rs 15 lakhs in the bank account of the mother and the children were to be taken at the consulate general at Hyderabad along with their travel documents, passport etc to be handed over to the father and submit to the jurisdiction of the US courts. The mother was held free to utilize the amount for her travel or otherwise.

VI HINDU LAW

Presumption of joint-ness

Under Hindu law, every Hindu family is presumed to be joint in food, worship and estate until contrary is proved. The term 'contrary' refers to a partition that disrupts the joint status of the family. If there is concrete evidence of the proof of a partition taking place, a presumption that the family is joint cannot be raised, since a property that is once partitioned fully cannot be partitioned further. In *Gurudeo Mandal* v. *Sukurdeo Mandal*,[45] a suit claiming partition of the suit property was filed by the legal heirs of fourth and fifth degree from the common ancestor. The property comprised of the residential houses of both the parties. Evidence showed, that a partition between the families had already taken place in the year 1943. The ancestors of both the parties had transferred and mortgaged their shares to different persons. It was held that since a partition had already taken place, there was no presumption of the properties being undivided and no further partition can take place of the properties that were no longer joint.

Where the property held by *Karta* is joint family property, it cannot be alienated by one of the coparceners without seeking the consent of the others. At the same time mere attempted alienation by one of the coparceners can never destruct the presumption of jointness annexed to every joint Hindu family. In *Bhagwat Prasad Dhritlahre* v. *Teerath Ram Dhritlahre*,[46] one of the coparceners executed a sale deed of the joint family property in favor of his daughter in law without consenting the other shareholders. The other members took objection to this and gave him a formal notice. He admitted in his reply to the notice that it was originally the joint family property and that all members were residing jointly. In addition, the revenue records showed that A had held this property along with other members of the family. The khasra numbers and areas of land was earlier recorded in the name of four persons and later more names were struck off. In addition the character of the property as ancestral was proved with the help of documents by B. The court held that it would lead to a presumption that it was the joint property of all of them, and was liable to be partitioned amongst all the members. Similarly, in *Parmila Bai* v. *Narad Ram*,[47] it was held that the sale of joint family property by one coparcener would be invalid and not binding on the shares of other coparceners. However the same pronouncement does not sever

45 AIR 2019 (NOC) 250 (Pat).

46 AIR 2019 (NOC) 262 (Chh).

47 AIR 2019 (NOC) 265 (Chh).

the ties of others automatically and the other coparceners would not be deemed to have an exclusive title to their respective shares in the property. In *Subrata Kumar Chattopadhyay* v. *Subodh Kumar Chattopadhyay*,[48] the issue again was relating to the partition of the joint family property. Here, a Hindu man, A, died leaving behind his widow and two sons. During his life time A had transferred his one property in favour of one of his sons through the medium of a gift. His wife and the other son had also relinquished their rights over the said property. After the death of A, a suit for partition was filed in the court claiming one-third share in the rest of the properties owned by A. It was held that each one of them is entitled to one-third share in the complete property left by A except the one that had already been gifted to one of the sons.

Often in the family for sheer convenience of the parties, possession of the entire property may be handed over to just one coparcener. It may be due to his senior position in the family or with the expectations that he would be in a better position to discharge some of the liabilities that the family may incur, or may be due to his better management skills. At the same time since the property is legally owned by several coparceners, mere handing over of the property voluntarily, or its continued possession for a long time does not create any special rights in favour of such a coparcener. Consensual possession and even management in an informal capacity for a long time, would not translate in conferring superior rights in favour of the holder, as in a family, such obligations are totally unremunerative. In *Lakhjman Bhimabhai Daki* v. *Kadviben Bhimabhai Daki*,[49] the Hindu joint family comprised of brothers and sisters, and possessed four agricultural fields. The possession of the complete property was with the eldest brother, A. A suit for partition of these fields was presented by the other brothers and sisters as against the eldest brother who was holding the complete property with him. A declined their request and claimed that after their father was murdered, there was a huge expense incurred in the trial following it. Since he had born the complete expenses of the trial, all the brothers and sisters had handed over their shares to him. Therefore, they were now incompetent to claim its partition. The trial court as also the high court held that handing over the property due to financial reasons does not amount to any relinquishment or waiver of right by the plaintiffs and even though the defendants were in possession of the property for a period of more than 20 years, it was entered into the joint names of the parties in the revenue records and therefore the plaintiffs were entitled to have partition and separate possession of the property.

Alienation of joint family property

A Hindu Joint family is headed by the *Karta*, who has powers superior to those of other coparceners. These powers and responsibilities include management of the joint family property and to provide for each and every member of the family. Since the *Karta* is responsible for ensuring the welfare of all family members, his powers include an assessment of what would be the best possible course of action in a given

48 AIR 2019 Cal 272; AIR OnLine 2019 Cal 244.

49 AIR 2019 Guj 110.

situation. If money has to be raised for the benefit of members of the family, how and from where it should be raised, would be his decision. He has to decide whether the property can be alienated to meet a financial exigency, or not and what should be the mode of alienation. Should it be mortgaged or sold out-rightly. Since the property does not belong to him exclusively, and there are other coparceners who own it as well, *Karta's* powers are said to be qualified powers. Law requires that normally, he should consult other coparceners if in his opinion the property has to be sold. At the same time he can sell it without consulting any other coparceners in three situations, *i.e.*, if it is for a legal necessity, or the transaction would amount to benefit of estate or if it is for the performance of certain indispensable religious or charitable duties. In such cases he can bind with his actions the shares of all other coparceners including the minor coparceners. It is also provided that since *Karta* is presumed to act in the best interests of the family that he heads, if he plans to sell the family property, no injunction can be obtained against him restraining him from selling the property. Any coparcener having a grievance against his decision to sell the joint family property has two options, one that can be exercised before such a sale is effected and the other, after the sale is finalized. Prior to effecting an alienation, if he does not agree to the decision of the *Karta*, he can seek partition of his share, demarcate it, and after taking it leave the family. In that case his share would be protected as after partition *Karta* cannot touch his share, but such a coparcener would no longer be a member of the family headed by the *Karta* and would be a separate person. The second remedy to protect his share while continuing to be a member of the joint family would be to wait for the *Karta* to effect the alienation of the property and once it is complete , challenge its validity in a court of law as being unauthorized or without any necessity. In such cases the court assess its validity keeping in mind the circumstances that propelled the *Karta* to sell it, and whether they were covered under any of the three permissible situations or not. If the court comes to the conclusion that *Karta* was justified in selling the property, the coparcener's share would also be covered under it, and if the court decides that *Karta* had exceeded his powers and he was not justified in selling the property including the share of other coparceners, than in that case, he only would be liable to the extent of his share in the property while the share of other coparceners would not pass to the alienee. In *Arshnoor Singh* v. *Harpal Kaur*,[50] A, a Hindu man died in 1951, and his only son S inherited all his properties. S, during his life time in 1964, effected a partition of the entire property amongst his three sons, S1, S2, and S3 in equal shares. Thereafter all the three sons transferred one-fourth share of the property, back to their father for his sustenance. S died in 1970 and his one fourth share was inherited by his widow, all three sons and a daughter in equal shares. S1 had one son, SS, born to him in 1985. In 1999, S1 sold the entire property that he had received by way of partition from his father as also the share inherited from him later, to one X at a grossly undervalued consideration. Infact, it was in evidence that the amount was mentioned only for the purposes of registration, with no money passing hands in actuality. Subsequently, S1 married X, with property already transferred in

50 AIR 2019 SC 3098.

her name. SS on attaining majority in 2003, filed a suit in 2004, challenging the validity of the sale effected by his father, in favour of his step mother X, and prayed for a declaration, that since the suit property was coparcenary property, and there was no justified reason for the father to alienate the complete joint family property, hence the sale deed executed by the father in X's favour was illegal, null and void. He further prayed for an injunction to be granted as against X, restraining her from alienating the property or creating a charge on the same till the court's decision becomes final. S1 deposed that he had alienated the joint family property without consideration in favor of X, as she insisted it to be a pre-condition for marrying him. The lower court held that the sale was effected without any legal necessity, and was void. The high court overruled this judgment on the ground that the coparcenary ceased to exist after S effected a partition of the property amongst the sons, and therefore S1 as the separate owner of the property was competent to sell it as its exclusive owner. The matter thereupon went to the apex court, which held that the property upon partition retained the character of ancestral property *qua* his sons and therefore SS was a member of the coparcenary comprising of himself and his father. He was very much in existence when the sale was effected, and since he was a minor at the time, he had the *locus standi* to file a suit challenging the validity of the sale upon attaining majority. The sale was held as void and not binding on the share of the son. Meanwhile X had already sold the property pending litigation to C and D. This sale deed executed by X in favor of C and D, the court ruled would be hit by the rule of *lis pendens* and hence void.

The succession had opened here in 1951, *i.e.*, before the enactment of the Hindu Succession Act. In accordance with the principles of Hindu law, it was a well established rule that the character of property that a son inherited from his father and his immediate three ancestors would be coparcenary property and not separate property. Therefore, in 1951, when S inherited the property of his father, A, as his only son, he took it as a sole surviving coparcener. With his marriage and birth of his son, S1, the son acquired a right by birth in this property, the quantum being equal to that of his father. His share continued to diminish with the birth of two more sons. This is also apparent from the fact, that in 1961, it was a partition through which all the three sons, including S1, had acquired a share. If the partition of Hindu joint family property is effected, each of the coparceners, take the property as coparcenary property for their smaller joint families. Thus, the property that was to begin with ancestral in character continued to bear the same character in the hands of S1, when his son SS was born in 1985. S1 therefore was the *Karta* of the joint Hindu family comprising of him and his son SS. The sale of the property in 1999, when SS was already in existence and a coparcener, was of the joint family property that was not owned exclusively by S1 but by SS as well, who had an equal share in it. The high court pronouncement that it was separate property of S1 was clearly erroneous, as there is no automatic conversion of ancestral property into separate property. *Karta* is obviously not competent to do that. Transfer of property as an inducement to marry is again not covered under the expression 'legal necessity' and effecting the same to the detriment of the rightful

shareholders of the same, especially when the other owner of the property happens to be a 14 years old minor would be impermissible and hence void.

VII THE HINDU SUCCESSION ACT, 1956

Right over separate property of father

Despite the presumption that every Hindu family is a joint Hindu family, there is no presumption that the property held by the family members is joint family property. Therefore, if anyone claims partition of the property on the ground of it being ancestral, they have to prove that the property is ancestral in character. Failure to prove that would lead to dismissal of their claim. In *Chandribai* v. *Tulsiram*,[51] the Hindu joint family comprised of two brothers A and B. A had daughters, son and a wife. Upon a partition of the property A and B got their respective shares. A effected a further partition of the share in his hands, took a share himself and gave the respective shares to his daughter, son and his wife. The property that remained in his hand was claimed by his daughter, who filed a suit against him pleading that the same was ancestral property and she as a coparcener had a share in it. The court held,[52] that in separate property of the father, the right of the daughter would arise only after his death and not before that. Further, that in accordance with the legal principles, there is no presumption that every Hindu family possess joint family property and therefore the party who asserts the character of the property as joint has to prove that. In the present case, the court held that the daughter failed to prove the character of the party as ancestral or that it was bought with the help of the joint family property funds. Secondly the character of the property that the father retained with him was his own and succession in that would open at the time of his death and not during his life time. The suit of the daughter was therefore dismissed.

It is a cardinal rule of Hindu law, that the character of the property may vary depending upon from whose perspective it is seen and would also be different before and after the partition. The character of property that the father receives after partition would be separate *vis-a-vis* his children from whom he has separated and therefore none of them can claim further rights in it. At the time of partition of the joint family property, if a partition has taken place between the father on one hand and the coparceners (son or daughter) notwithstanding on the other, the character of property would be separate with respect to each of them, but the character of property in the hands of the sons and daughters would still be coparcenary or ancestral property with respect to their descendants as they would be coparceners with their respective parents having an equal interest in the property. But in no case can the children once partition is effected claim that the character of the property in the hands of their father is still coparcenary property or that they have any right over it. It is the separate property of the father and upon his death would go by succession and therefore during his life time no one can claim any right over it.

51 AIR 2019 MP 206; AIR OnLine 2019 MP 843.

52 *Id*., para 22.

Succession rights of the daughter prior to 2005

The Act of 1956, had retained the concept of Mitakshara coparcenary but realizing the total negation of rights of a daughter in it, had brought in the concept of a notional partition to be effected at the time of a death of a Hindu male who died as an undivided member of Mitakshara coparcenary leaving behind a class-I heir. In presence of such an heir that included his daughter, it was presumed that before his death he had asked for partition of the joint family property. This was done to prevent the application of doctrine of survivorship on his share as otherwise it would have gone to the surviving coparceners and the females would be left empty handed. After the partition is effected, the deceased would be allotted a share, that would constitute his separate property and would go under succession to his class-I heirs. In *Gannu* v. *Dhanmat Bai*,[53] the issue was whether the daughter of the Karta is entitled to have an equal share in the property after the amendment of section 6, even when her father had died prior to the Amendment, making daughters coparceners? Here, a Hindu man died prior to 2005, as an undivided member of Mitakshara coparcenary leaving behind ancestral property, and was survived by his one son, and two daughters. The daughter filed a claim to the property as a coparcener after the coming into force of the Amendment of 2005 making daughter coparceners on par with sons. Her contention was that the situation should be governed as on the date of filing the claim, and not when it had actually arisen. The court rejected her contention and held that since the death was prior to 2005, in accordance with the pre-amended section 6, a notional partition was to be effected between the father and the son, giving each one of them one half share of the property. This half, that went to the father would be treated as his separate property and would go as per the inheritance rules under section 8 of the Hindu Succession Act, 2005 out of which each of the child would share equally. Thus the son would get a total of one half and 1/6, and each of the daughter would get 1/6th of the total property.

Daughters rights over coparcenary property

The historic Amendment to the Hindu succession Act, was passed 15 years back ushering in the era of equality of coparcenary property ownership in favour of Hindu daughters. Since the amendment was prospective in nature, special safeguards were provided with a view of prevent chaos in upsetting established claims. Thus despite the daughters now being on par with their brothers in acquiring the title of coparceners, with eligibility to become *Karta* if the situation so transpires, and capable to acquire a right by birth in the coparcenary property, there were some constraints that remained, Two of them are noteworthy here, one that a daughter despite being a coparcener could not reopen a partition of the joint family property that took place prior to December 20, 2004, and second that she could not challenge the validity of any alienation that might have been affected by the *Karta* of the joint family property prior to this date even if, in her opinion, it was unauthorized. In *Jayaraman Kounder* v. *Malathi*,[54] a Hindu joint family comprised of a Hindu male, and his two children, a

53 AIR 2019 Chh 148.

54 AIR 2019 Mad 113.

son and a daughter. The coparcenary property belonging to the family was sold by the father and the brother in the year 1994. After the amendment to the Hindu Succession Act, 2005, the daughter filed a challenge to this alienation, on the ground that as a coparcener, she is competent to do that. The court dismissed her suit and held that the amendment of the Hindu succession Act, in 2005, creating coparcenary rights in favor of the daughters is prospective in nature. It is clearly intended to exclude all legitimate transaction effected prior to December 20, 2004. Since the alienation was effected in the year 1994, much before the amendment had come into force, the same cannot be challenged by her it, as it created vested interests much before the enforcement of the enactment. In *Raghavan* v. *Padmavatihy*,[55] a Hindu father died leaving behind a son and a daughter. In resisting the claim of the daughter over one half of the portion of the property, the son contended that his father had bequeathed his entire share in his favor and consequently the daughter is not entitled to any thing. The trial court raised serious doubts with respect to the authenticity of the Will and refused to accept the claim of the son. Accordingly it was held that each of them is entitled to the property in equal shares.

Absolute ownership to Hindu females

A major change brought in by the Hindu Succession Act, 1956 was conferment of absolute ownership in the property in favor of Hindu females. It is surprising that even after around more than 64 years, cases keep on coming under this section. Hailed as an extreme progressive move by the independent legislature, this was touted as the first major move by the legislature to economically empower Hindu women. Their inability to hold property as an absolute owner was removed by one stroke of pen, by abolishing the concept of a Hindu women's estate, where the sole purpose of giving her property was to ensure her maintenance. The ownership terminated with her remarriage or death and the property was to vest in the coparceners who took it as reversioners. The rule under section 14 was that 'any property possessed by a Hindu female whether acquired by her before, at the time or after the enactment of the Act would be held by her as an absolute owner thereof'. Now, she was able to transmit her property to her heirs instead of it passing to the reversioners. Therefore, the property held by a female Hindu in *lieu* of her pre-existing right of maintenance after coming into force the Act, blossomed into complete ownership and she could deal with the same in any manner , though, in accordance with the law . No hurdles or fetters could be placed on such ownership.[56] In *Jagannath Waman Undre* v. *Yamunabai Sitaram Kadam*,[57] a Hindu man died in 1944, and was survived by a widow, son and daughter. His property was registered and mutated in the name of his minor son with the name of the mother appearing as the guardian. In 1965, the mother disappeared and was feared dead. She had lost her balance of mind. Apprehending that the brother may sell the property, the sister filed a petition praying for her share in the property on the ground that even if in 1944, she had acquired a limited interest in the property of her

55 AIR 2019 Ker 162.

56 *Jethu Ram* v. *Bhimu* AIR 2019 HP 104; AIR OnLine 2019 HP 333.

57 AIR 2019 Bom 143.

father, the same would now crystallize into an absolute share and it should be given to her. The court held that both she and her mother after the coming into force of the 1956 Act by virtue of section 14 had become the absolute owners of their respective shares. She as the daughter would also be entitled to inherit the share of her mother along with her brother on the same ground.

VIII CONCLUSION

The year 2019 saw some important judicial pronouncements in the area of domestic relations. the court distinguished ability to marry and a right to seek the protection of person and liberty under the Constitution as the basic right of all Indian citizens even if they had acted in violation of law by getting married without acquiring the requisite age. For the first time the High Court of Madras recognized the rights of a transgender to marry under Hindu law and held that marriage where one of the parties is a biological male and the other, a transgender who determines her identity as a female, would be valid. The existence of a valid marriage was termed essential for presenting a prayer for restitution of conjugal rights. The court went by the statutory dictates of a mandatory wait for a period of one year within which the petition for divorce was not permitted to be filed but adopted a humane approach and granted divorce to couples trapped in unhappy marriages with long separate habitation on grounds of irretrievable breakdown of marriage. While granting maintenance to economically active spouses, the court adopted a pragmatic approach and aptly thwarted the attempts of a guilty spouse who wanted to start a new relationship by extracting money from her former husband. Natural parents were preferred as having superior rights of custody and guardianship even where for some time the child was exclusively within the custody of concerned relations. Recognizing the importance of court orders passed by the foreign courts in matters of children who are foreign national, the court came down heavily on the parent who in violation of the court orders wanted relief from the Indian courts, by ordering the guilty party to take back the children to their ordinary place of residence and subject herself to the jurisdiction of the foreign courts. The issues under Hindu law related to partition of joint family property and the court re-iterated that the qualified powers of *Karta* to alienate the joint family property cannot stand the test of judicial scrutiny if alienation is effected without or for a nominal consideration without a permissible purpose. Daughters enforced their rights of inheritance and of coparcenary property ownership, though in accordance with the provisions of the Amendment, she was prevented from challenging an alienation of the coparcenary property in 1994, *i.e.,* effected much before the dead line of December 20, 2004.