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HINDU LAW

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I INTRODUCTION

IMPORTANT JUDICIAL pronouncements in the area of Hindu law relating to marriage, adoptions, maintenance, custody, guardianship, Hindu joint family and succession reported during the year 2020, have been briefly analyzed here.

II THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

Conditions of a valid adoption

Besides giving and taking of the child with intent to transfer the parentage, no specific mandatory procedure has been prescribed under the Act for validity of an adoption. In cases where special rules are mandated, adherence to them,[1] should be coupled with demonstration of giving and taking of the child. Even though law does not require that the process of giving and taking should compulsorily be followed by the execution of a registered adoption deed, courts in some cases have emphasized its importance for assessing the validity of an adoption. For example, adoption, followed by a registered adoption deed, execution of which is duly authenticated by registry clerk, attesting and other witnesses would be valid.[2] It should be noted that section 16 of the Act, speaks of presumption relating to adoption and postulate that a registered adoption deed, signed by the person giving and the person taking the child in adoption will give rise to a presumption that adoption has been made in compliance with the provisions of this Act unless it is disproved. In *Bhim Singh* v. *Sunita Devi*,[3] it was held that no presumption of validity of adoption can be raised in absence of non production of a registered adoption deed. Section 16, actually has two parts, and comprise first the formality of giving and taking of adoption, and second execution of a registered deed , that is signed by both the persons giving the child and the one taking it in an adoption. It does not simply speaks about registration of adoption deed but provides for signing of the deed by both the person giving and taking of the child thus making giving and taking of the child crucial for the validity of adoption.

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1 See *Sharanayya* v. *Shekharayya* AIR 2020 Karn 168: AIROnLine 2020 Kar 1469 (Dharwad Bench) wherein it was held that the factum of adoption indicated in a consent decree, would not be sufficient to prove a valid adoption in absence of proof of giving and taking of the child.

2 *Ramesh Kaushik* v. *Mohit* AIR 2020 (NOC) 710 (P&H): AIROnLine 2020 P and H 377.

In Indian social culture, with unique family affinity, it is not uncommon to see concerned relations stepping in to the aid of a family member or relations facing harsh/adverse circumstances. Helping hands of the grandparents or uncles/ aunts come forward and take such infants and young children under their care and protection who are unfortunately rendered orphans owing to death of both of their parents. Such nurturing for a short/temporary or even a longer duration does not transform their status from a relation to adopted parents, nor does the child acquire the status of the adopted child. Since several legal rights flow from a valid adoption including inheritance rights and therefore unless there is cogent evidence that the child was taken with intent to be adopted , adoption cannot be sustained. In *M Vanaja* v. *M Sarla Devi*,[4] upon the untimely death of both of her parents, a little girl, G was taken by her maternal grandmother and raised by her. After sometimes, the child was entrusted to the care of the grandmother's another daughter, M, *i.e.,* the sister of the deceased mother of G. M was married and lived with her husband in their own house. G was brought into that house, was given love and care and good education. G later married and shifted to her matrimonial home to be with her husband while her maternal aunt and uncle continued living in their own house that stood in the name of the maternal uncle. After the death of her uncle, G filed a suit in a court of law seeking partition of his property including the house claiming the status of his adopted daughter. Her contention was that since she was too small at the time of her adoption, she was unable to bring the proof of her actual giving and taking of in adoption by the alleged adoptive parents but sought to prove adoption by the conduct of the adopted father in treating her as his daughter. G supported her claim with two documents, *viz,* one that showed that her alleged father (maternal uncle), F had shown her to be his daughter in his service records and second, that he had made her a nominee for availing his pension benefits. According to her, father's conduct in publically acknowledging her as his daughter and additionally making her and not his wife a nominee in the service benefits were sufficient pointers to prove a valid adoption.

Her claim was vehemently opposed by her maternal aunt, M, who had raised her. M contended that G was never adopted by them but they took care of her out of compassion as i) she was her sister's daughter and ii) she was rendered orphan. Their relationship was one of love and affection and they had ensured that she gets a loving home, caring nurture and sound upbringing and good education. Both the trial court and the high court dismissed the claim of G and held that except for a bare statement of hers, there was no evidence of giving and taking of her in adoption or any other evidence of any sort authenticating her claim. Her contention that she was too small at the time of her adoption was rejected by the courts as even the grandmother , *i.e.*, her mother's mother had deposed that she was taken care of by her mother's sister but was never formally adopted by them. The house in which she was raised by her maternal uncle/aunt continued to be occupied by M. G wanted to have a partition of the property in occupation of M under an alleged claim of adoption and as the adopted daughter of F that was negative by the court.

3 AIR 2020 Jhar 118: AIROnline 2020 Jha 534.

4 AIR 2020 SC 1293; 2020 (4) ALD 53; 2020 (140) ALR 207, Mar. 6, 2020.

Age requirement

India displays a wide variety in terms of its customs and traditions that are being observed from time immemorial. The statutory accommodation of customs contrary to the written postulations of the enactment has enabled the communities to retain and observe their customs legally. Even though, the maximum permissible age of the child to be adopted, stipulated under the Act continues to be 15 years, one of the exceptions is the relaxation in this age requirement, if the custom in the community to which the child belongs permits an adoption even after the attainment of the age of 15 or even after getting married. In contradiction to the statutory requirements, the Act in itself provides that the same would be valid. However, since it is against the statutory provisions, a strict proof of the existence, prevalence and adherence of the custom on a consistence basis must be demonstrated. Failure to do the same would lead to dismissal of the case of adoption. In *Ratan Singh* v. *Raja Ram*,[5] a person A claimed to be the adopted son of another man X, an assertion that the later denied. A went to the court; filed a suit for declaration of him as the adopted son of X, and wanted an injunction from the court restraining X, from alienating his self acquired property. The court dismissed his contention on two counts, one, that the consent of his natural mother at the time, the alleged adoption took place was not proved and second, that by his own admission he was more than 15 years of age at the time he pleaded, the alleged adoption took place. When called upon to establish a custom in his community sanctioning such an adoption, the testimony of the witnesses stood in sharp contradiction to the documentary evidence that he produced. Since he failed to establish the existence of any such custom to the satisfaction of the court, the court held as against his claim of adoption and refused to give the desired injunction to him.

Both the cases surveyed above were heavily loaded with an aim to eye the property of the individuals whose progeny the claimants, pleaded they were.

Harmonious construct of HAMA and the JJA[6]

The exclusive privilege of the facility of adoption hitherto available to the members of only the Hindu community is presently extended to all Indians irrespective of their and the child's religion under the Juvenile Justice (Care and Protection) Act, 2000 (hereinafter JJA), with one basic distinction. Adoption here is strictly administered and completed under the supervision of the authorities constituted under the Act and not the parents. While adoption under the Hindu Adoptions And Maintenance Act, 1956 (hereinafter HAMA), can be a totally private affair with the giving and taking of the child by the natural and intending parents, though in compliance with the provisions stipulated in this regard in the Act, adoption under the JJA has a broad framework of regulatory mechanism and adherence to extensive procedural technicalities. At the same time, both the enactments operate in their own separate spheres without overlapping with each other.

5 AIR 2020 MP 135: AIROnLine 2020 MP 655.

6 The Juvenile Justice (Care and Protection) Act, 2000.

Therefore, if a person decides to adopt a child under the HAMA, he need not follow the procedure specified in the JJA, and conversely, if he proceeds under the JJA, the procedural requirements specified in black and white, call for their mandatory compliance but without any additional home based, religious or community sanctioned ceremonial formalities. In *Sivarama K* v. *The State of Kerala*,[7] the natural parents of an infant through a registered adoption deed signed by them gave their one year old child in adoption to a childless couple. The adoptive parents took the child to their home, but soon thereafter one X, acting on behalf of the child care committee forcibly took the baby and placed it in a child care institution. He then filed an FIR against the adoptive parents for doing what he alleged was an illegal act, as in contravention of the JJA. The adoptive parents filed a writ of *habeas corpus* praying for production of their adopted child, and its handing over to them. The court held that the action of X on the directions of the child welfare committee was illegal and they directed the baby to be handed over to the adoptive couple. They further said,[8] that both the HAMA and the JJA are central enactments occupying their respective fields. While HAMA deals with adoptions and maintenance amongst Hindus, JJA is an act to consolidate and amend the law relating to children found in conflict with law and children in need of care and protection. There is no repugnancy between the two legislations. A child, who is given by his natural parents to the adoptive parents willingly in accordance with the procedure laid down in HAMA, can never be labelled as an orphan, abandoned or surrendered child and therefore the action of the personnel on behalf of the child Welfare Committee was totally unwarranted. Both legislations are enabling legislations and it is totally up to an individual or a couple to choose under which Act to proceed. Once they decide that, then the procedure laid down under that enactment as the case may be, has to be followed. If they decide to adopt a child under the HAMA, willingly giving and taking of the child followed by a registered adoption deed duly signed by the parties (though optional) is sufficient. It would be a private act and the government machinery need not be involved at all. On the other hand if they decide to adopt a child under the JJA, they have to proceed involving the child welfare committee and the other procedural requirements. It is totally the option of the adoptive parents and they can never be compelled to proceed under the JJA, if they do not want to. Again in *Amit Singh* v. *Union of India*,[9] the court held that the provisions of JJA are in aid of and not in conflict with HAMA. Here, a couple had adopted a two year old daughter who had been declared free for adoption under the JJA from the *Matrichaya Shishu Grah*, Varanasi. The court held that the *Matrichaya Shishu Grah*, would constitute as a guardian under section 9 of the HAMA, and should seek the permission of court before giving the child in adoption. They also directed Central Adoptions Resource Agency (CARA) to complete the adoption process.

7 2020 (1) KLT 294; 2020 (1) KHC 285; 2020 (1) KLJ 641. High Court of Kerala at Ernakulum.

8 *Id.*, para 19.

9 2020 1 AWC 293 (All).

III THE HINDU MARRIAGE ACT, 1955

Solemnization of a valid marriage and its consequences

Solemnisation of marriage confers the status of husband and wife on the parties, if it is in conformity with the other conditions stipulated under the Act. Besides creating mutual rights of inheritance, it ensures economic security to the wife and legitimacy to the children. A valid marriage has to be proved in order to claim the status of a widow after the death of the man in order to claim his property through inheritance. In *Rathnamma* v. *Sujathamma*,[10] a woman put forward a claim to succeed to the property of a deceased man as his widow. The other side, opposed her claim on three grounds:

i) the marriage was never formally solemnised. No rites and ceremonies were ever observed and the relationship between the deceased and the claimant was based on only an agreement of marriage;

ii) that the deceased was her maternal uncle by relation and this relationship was in contradiction of the conditions relating to validity of marriage provided under the Act, *viz,* degree of prohibited relationship and therefore void; and

iii) the relationship also contradicted the age requirement under the Act. Admittedly the relationship commenced when the claimant was 14 years old as opposed to the mandate of 18 years. The marriage was alleged to have been performed under the Special Marriage Act, where the marriage of underage parties is void.

The claimant pleaded that she was married under the Hindu Marriage Act, 1955 (HMA) where the child marriages are allowed but it was only registered under the Special Marriage Act. Secondly, that she belonged to the vokkaliga community that permits solemnisation of a valid marriage between a maternal uncle and his niece. Travelling through the hierarchy of courts the matter reached the apex court that noted that she had failed to prove the solemnisation of her marriage and also the existence of the custom sanctioning marriages between an uncle and his niece in the community to which they belonged and held that,

i) a mere assertion that in the Vokkaliga community such marriage can be performed validly, could not be accepted and the parties must prove existence of a custom or precedent.

ii) The burden of proving the marriage was on the claimant that she failed to discharge. Since the entire case was based on an agreement of marriage in which there was no assertion of solemnisation of the customary ceremonies or the rites or that the parties had performed saptapadi in the manner contemplated under s. 7 of the Act, therefore it cannot be held that there existed a valid marriage between the deceased and the claimant.

10 AIR 2020 SC 541.

The pronouncement highlights the importance of a valid solemnisation of marriage and essentiality of proof despite the long time gap between the alleged commencement of the relationship and the time of its requirement of proof. Inheritance rights can be ensured only through a valid marriage, and despite long cohabitation or an open acknowledgement of living together in an intimate union like spouses, unless the union is brought in through a valid marriage the conferment of the label of a spouse would not be given to the partner.

Underage parties: protection of life and liberty

The enactment and promulgation of the Prohibition of Child Marriages Restraints Act, 2006,(PCMA) notwithstanding, child marriages continue to be solemnized, both at the behest of the parents of underage children and in some cases by minors themselves after elopement as against the wishes of their parents and guardians. The scenario in India is still not conducive to the later and incensed parents refuse to accept such alliances. On the other hand a marriage of a girl child brought about by the parents themselves more often remains valid as in a typical patriarchal setup a young/adolescent girl would not be in a position to defy both her natal and matrimonial family to get out of a relationship consented to and brought about by them. On the other hand the validity of child marriages solemnized prior to the enactment of the PCMA was unquestionable.[11] Even presently, maximum concerns are raised by the parents over the elopement of their teenage girls as they try to bring with maximum force the argument of the marriage performed by the children as void and as a consequence of it, seeking their custody. For fear that they may not be killed in the name of (dis)honour killings; the couple desperately seeks police protection with varied results. In *Rajeev Kaur* v. *State of Punjab*,[12] a girl aged 17 years and six months eloped and married a boy of 20 years. In wake of vehement opposition of the parents of the girl and apprehending threats to their life, they approached the court for protection of their life and liberty. The court held that irrespective of the fact that they may not be of marriageable age, it would not deprive them of their fundamental right being citizens of India to protection of their lives. Directions were issued to the superintendent of police to provide them necessary protection *qua* their life and liberty.

It is a welcome judgment as what the children seek in such situations is that they be left alone and not be persecuted by their own parents/ relatives with full societal approval. Shunned by virtually every familiar face and accused of bringing dishonor and shame to the family and sometimes by the entire village the commonality of sentiments favour their execution. Notwithstanding what they have done and whatever may be the status of their marriage, they are constitutionally entitled to the protection of their life and liberty.

11 For instance, in *Vilasini* v. *Prasanna,* AIR 2020 Ker 145: AIROnLine 2020 Ker 202, it was held that the marriage of a 14 years old girl solemnized in 1974, in accordance with the customary rites and ceremonies would be valid and she would be entitled to the pension benefits of her husband on his death.

12 AIR 2020 (NOC) 619 (P&H).

Registration of marriage: cancellation of entries upon divorce

Under Hindu law, solemnization of marriage is a widely attended affair and is witnessed by several people including the parents, relations and friends of the bride and the bridegroom, yet its formal documentation is more in nature of memories of a special event rather than authenticating its legality aspect. Even though several states have made it mandatory for registration of marriages performed within their territorial limits, registration under the HMA, is largely still optional and a failure to get the marriage registered has no adverse repercussion on its validity. Registration of marriage remains a very strong proof of solemnization of a marriage as between the parties whose names appear on the register. However, in certain circumstances, peculiar situations may arise owing to the fact that once an entry is made in the register it cannot subsequently be cancelled or deleted later. The fact of the general perception of marriage as a onetime affair has its own limitations. In most of the cases it does last a lifetime, but since divorce remains a factual reality in case the relationship goes awry, in official documents, the marriage may still be shown as existing, while in fact it might have had a judicial death. This becomes very important as the fact of marital status in case one of the parties wants to remarry cannot be concealed and an inspection of the register by the prospective spouse can always lead to a factual clarity. At the same time if one of the spouse feels uncomfortable with the fact that a failed marriage is still depicted on papers can he/she insist on its deletion from the register on the ground that since the marriage has ceased to exist the entry of it should also be deleted? In *Binu Raj G* v. *Sandhya Lakshmi R*,[13] the parties married in India, got the marriage registered here, went to United States, lived there for sometimes and then got divorce by mutual consent from a court in Massachusetts United States, six years later. Since the lady now wanted to remarry she made an application to the registrar's office to remove/delete the earlier marriage registration, on the basis of the divorce decree issued by the court. As per the circular issued by the registrar general, the entry cannot be deleted once made, but a foot note entry of divorce decree can be made in the register. Upon the refusal of the registrar's office to accede to her request she filed a writ in the High Court of Madras. The court held that even though the marriage is dissolved with the help of a decree passed by a competent court, the factum of solemnization of the marriage does not vanish and therefore the entry of registration of marriage cannot be deleted. At the same time to record the fact of its judicial dissolution, an entry by way of a footnote can be made. This would lead to a factual clarity and remove ambiguity or confusion about its existence. Accordingly directions were given to the registrar's office to make an entry by way of a foot note as per the rules.

Restitution of conjugal rights

Essentiality of existence of a valid marriage

Existence of a valid marriage, is a pre-condition for bringing in a prayer, seeking the matrimonial relief of restitution of conjugal rights. It is therefore mandatory that

13 *Vidhya* v. *Inspector General of Registration, Chennai* AIR 2020 Mad 137: AIROnLine 2020 Mad 282.

the parties must have been married to each other. Where the relationship of husband and wife is in itself disputed, the petitioner must prove the relationship as the courts cannot direct cohabitation otherwise. Once the spousal relationship is established then only the court helps the couple to resume cohabitation.[14] Therefore proving relationship gets a priority over the main matrimonial petition if the matrimonial relationship in itself is disputed by one of the parties. If the marriage has already come to an end by a decree of divorce, an application filed subsequently praying for restitution of conjugal rights would be dismissed. Thus in *Anita Agarwal* v. *Ramesh Agarwal*,[15] the wife approached the court praying for a decree of restitution of conjugal rights. The court dismissed her application, as the husband had already secured an *ex-parte* decree of divorce as against her after establishing her cruelty. Since the relationship had already come to an end, the relief was denied to her.

On the other hand and strangely enough, the court did admit the claim in a relationship created through a bigamous marriage. In *Sudarshan Yamaji Pandhare* v. *Pallavi Sudharshan Pandhare*,[16] the petition for restitution of conjugal rights was filed by the wife as against the husband and he took the plea that at the time of their marriage she already had a subsisting marriage. The present marriage was a void marriage, *i.e.,* no marriage in eyes of law and therefore no petition for restitution of conjugal rights can be prayed for as this remedy is available in case of a valid marriage only. The wife admitted that she had a subsisting marriage at the time she got married to the man, but also pleaded that since he married her with full knowledge of her first marriage, and now had been cohabiting for a period of seven years with two sons from this union, he would be stopped from pleading its nullity and that he had no responsibility towards her or the children. The relief of annulment that he sought was barred by the law of limitation. She further deposed that she was willing and ready to cohabit with him. The court held that she was entitled to the relief of restitution of conjugal rights.

The judgment is very surprising and does not appear to be correct. What is void from its inception cannot be validated subsequently, by the conduct of the parties in merely living together as couple and having children. It would at the most be called a live in relationship and what is statutorily illegal cannot be legalised by a judicial pronouncement. No matrimonial relief of restitution of conjugal rights is available in case of a bigamous marriage, more so to the bigamous party and the present judgment appears to be clearly in violation of the written law. In forcing or directing the man to go to the woman to whom he is not legally married is ironical. Since there was no legal relationship between the two the fact of their seven years of cohabitation and with two children would not make them husband and wife. The woman here was guilty of committing a criminal offence of bigamy and the mere fact that the husband

14 See *Sonal Aashish Madhapariya* v. *Aashish Harjibhai Madhapariya*, AIR 2020 Guj 146: AIROnLine 2020 Guj142 wherein it was held that if there is no clarity as to when and under what circumstances the wife withdrew from the society of the husband as per his allegations, withdrawal without reasonable excuse would not be proved .

15 AIR 2020 P and H 108: AIROnLine 2020 P and H 148.

16 AIR 2020 (NOC) 69 (Bom); AIROnLine 2019 Bom 929.

knew about subsistence of her first marriage would make it as creating any relationship in contradiction to the legal provisions.

Both of them were guilty of committing a crime under section 494 of the Indian Penal Code, 1860 the woman was the primary offender and the man an accomplice as he helped her in the commission of this crime of bigamy as the evidence showed that he knew of her marital status at the time of getting married to her.

Plea of cohabitation and enforcement of reproductive rights

The first casualty of strained marital relationship followed by separate habitation is suspension of sexual relations between the spouses. Although it has been consistently held that the object of RCR remedy is not to enforce sexual relations between the parties but is to restore cohabitation and restoration of marital ties. As between the spouses, the active role in consummating the marriage is played by the man while the wife is often described as a passive partner. An interesting issue arose this year in *KGP* v. *PKP*.[17] Here, the wife presented a suit for restitution of conjugal rights in response to the husband's petition praying for a decree of divorce on grounds of her cruelty. The relations between them were very strained. During the pendency of both the petitions, the wife filed a prayer in the court to the effect that she wanted to have another child from the husband. The couple already had one son. She sought to enforce her reproductive rights under articles. 21, 226 and 227 of the Constitution of India, and maintained, that husband be asked to restore sexual relations so that she can bear a second child from him and if he was not ready to have physical relations with her, he be subjected to in-vitro fertilization so as to let wife give birth to a child. The Family court accepted her plea and directed the husband to visit a doctor expert in in-vitro fertilization (in IVF procedure) to fulfill the desire of the wife to enforce her reproductive rights without taking into account the fact that the husband was not willing to have the second child with the wife. The order of the family court was quashed by the high court when the matter was taken in appeal by the husband. the high court also termed the order of the family court as perverse.

It is a prudent reality that the courts cannot and should not enforce sexual intercourse on the parties even in light of the willingness, eagerness or even desperation of one of the spouse to have a child. It is purely a personal matter and included in the right of privacy guaranteed to every individual under article 21 of the Constitution, the same provision that the wife attempted to invoke for enforcement of her reproductive rights. This remains a very sensitive sphere where intervention of any outsider, be it a person or a statutory authority, remains unwarranted.

Bigamy and a decree of nullity

It has been more than 65 years when monogamy was made the primary rule for all Hindus subject to the application of the HMA, yet instances of commission of bigamy continue. It is despite the fact that the violation of absolute monogamy provisions have both civil and penal consequences, and knowledge of the fact that at the time of marriage, one of the parties is incompetent to get into it due to his/her

17 AIR 2020 (NOC) 535 (Bom); AIROnLine 2019 Bom 1254.

marital status is irrelevant. The legal validity of the second marriage is not dependent upon the knowledge or consent of the other party and it remains void *ab initio* and continues to be so inspite of it[18] If a party enters into wedlock with a married person with full knowledge of him/her being married, that cannot prevent him from getting out of it unilaterally, for the simple reason that this relationship is not recognised by law at any point of time except for bringing penal action against the bigamous individual. At the same time knowledge would make the party an accomplice to the commission of the offence of bigamy. A couple of cases made their way to the High Courts of Kerala and Bombay in this connection this year. In *Namitha S Nair* v. *V Ravikanth*,[19] the parties married in 2010 in accordance with the rituals and ceremonies prevalent in their community. She learnt later that the husband was already married and had two children from his first marriage. The first marriage was not dissolved at the time of performance of his second marriage to her. She filed a petition praying for a declaration that she was not the legally wedded wife as their marriage was void. She stated that she was made to believe that the husband was eligible for marriage and the fact that he was a party to a subsisting marriage was hidden from her. She learnt that he was married earlier and continued to do so, by looking at the endorsement in his passport wherein the name of his first wife was mentioned as his spouse. She contended successfully that,

i) Concealment of the first marriage amounts to fraud;

ii) Subsistence of the first marriage which is not dissolved invalidates the second marriage and it becomes no marriage in the eyes of law.

Interestingly, the passport that showed the name of the first wife was obtained by the husband after his second marriage.

The main issue was; whether an entry in the passport is sufficient by itself to discharge the burden of proof? The court held in the affirmative as it was obtained subsequent to his second marriage and pronounced that the marriage was void.

Pregnancy at the time of marriage

Marriage ushers in responsibility and mutual commitments of fidelity, faithfulness and togetherness in an amiable environment. One of the dominant purpose of it remains procreation of children as well. Establishing sexual relations post marriage is a very normal and legitimate expectation as starting a family with full parental responsibility usually follow a marriage. In a patriarchal setup, birth during the subsistence of a marriage establishes paternity and legitimacy. Therefore in case the husband has not fathered the child carried/delivered by the wife, options are given to him to rebut the presumption of paternity. If the bride at the time of marriage was pregnant by a person other than the husband and he was ignorant of it, he can bring the matter to the court and disclaim paternity, by filing for a decree of nullity that at the same time helps him to get out of this marriage. In *Manas Kumar Kar* v. *Binaya*

18 *Sudharshan Yamaji Pandhare* v. *Pallavi Sudharshan Pandhare* AIR 2020 (NOC) 69 (Bom); AIROnLine 2019 Bom 929.

19 AIR 2020 Ker 19; AIR OnLine 2019 Ker 303.

Mishra,[20] the husband filed a petition praying for a decree of nullity on the ground that the wife was pregnant at the time of marriage by another person without his knowledge. She gave birth to a healthy full time baby after six months and seventeen days of marriage and the husband claimed that the child was not his. In order to substantiate his claim, he sought a DNA test to be performed on the baby to determine its paternity. The court gave directions for conducting the test but at the same time ruled that there has to be a balance between the rights of the man to clarify his genuine suspicions about the paternity of the child and also to prevent the tarnishing of the reputation of the wife and stigmatization of the child. To ensure the genuineness of his assertions having such grave consequences, the court directed the husband to deposit Rs 200000/ in the family court. The money was to be returned to him in case his allegations tuned out to be true, but if the truth went in favor of the wife, the money was to be given to the wife and the child equally.

The decision appears to be very balanced and has the potential of being a deterrent in case of hasty, unsubstantiated and temperamental conclusions. Both genuine doubts in relation to the paternity of the child as also unwanted aspersions caused on the wife are very serious matters. A man should never be put in a condition where he is compelled to father someone else's child through such fraud and at the same time besides an admonishment and loss of face, monetary reprimand is a befitting punishment for him for having made false allegations against an innocent wife.

Cruelty and desertion

Cruelty by the respondent remains usually a main ground for filing a petition for divorce in case of contentious litigation. While keeping this as a ground, the legislature has simply used the term 'cruelty' without defining it and therefore, what conduct of the respondent would amount to cruelty depends on multiple factors. The totality of facts and circumstances have to be seen to conclude whether the conduct would or would not be accepted by the court as grave enough to terminate the marriage. Normal wear and tear of married life would not fetch a decree of divorce and therefore inability to prove cruelty[21] such as suppression of mental illness of epilepsy by wife would not amount to cruelty.[22] At the same time there are certain extreme set of conducts that would constitute cruelty in virtually all situations, an illustration of it being, forcing a newly wedded bride by the husband to share the bed with his friends and colleagues. In *Monika Gupta* v. *Jitendra Gandhi*,[23] the husband made unsubstantiated allegation as against the wife of having illicit relations with her brother-in-law. Owing to marital differences the spouses were living away from each other for a period of more than seven years, while the actual marital life had existed for a very short time period. All attempts for an amicable mediation failed. Family court dismissed the petition of the wife seeking divorce, but on appeal, the High Court of Allahabad

20 AIR 2020 Orissa 35; AIROnLine 2020 Ori 4.

21 *Sanchita Pramanik* v. *Sujoy Pramanik* AIR 2020 Cal 129; AIR OnLine 2020 Cal 180, a case under the Special marriage Act, 1954; *Sanket Mishra* v. *Urvashi* AIR 2020 All 136: AIR OnLine 2020 All 1009.

22 *Haridas* v. *Jayasree* AIR 2020 Ker 108: AIROnLine 2020 Ker 100.

23 AIR 2020 All 13; AIROnLine 2019 All 1426.

granted divorce to her while holding that the marriage had broken down irretrievably. The plea of the husband that the high court does not have the power to grant divorce on grounds of irretrievable breakdown of marriage was negated by the high court. They held that there was no use of keeping the spouses tied by matrimonial relations when they cannot live peacefully and divorce was granted to the wife.

Of late the courts have started taking a pragmatic approach and rather than forcing the parties to be together in a dead marriage, help them to resolve their differences and if nothing works enable them to separate amicably. In two cases under survey, on the grounds of proven cruelty and the fact of short cohabitation period and long separation post matrimonial turbulence, the court granted divorce to the petitioner despite opposition from the other party. In *N V* v. *AV*,[24] the wife filed a petition praying for divorce on ground of husband's cruelty. Her testimony remained unimpeachable as the husband chose not to cross examine her. She was beaten, threatened, and there were attempts to even kill her for not fulfilling dowry demands after receipt of dowry articles, car and cash at the time of marriage. The same was held as amounting to cruelty and since the parties were living away from each other for a long time and marriage had broken down irretrievably, divorce was granted.

In *Anita Gaur* v. *Rajesh Gaur*,[25] the wife made unsubstantial allegations that she had to borrow money to the tune of Rs 10 lakhs as the husband had failed to provide adequate finances to her for running the household, and that he was a characterless person , had illicit relations with another woman, whom he later married. All these were baseless allegations. It was in evidence that the wife used to borrow money from many persons, making purchase on credits and used to steal ornaments and valuables from the house. When the money was not paid, the moneylenders who were gangsters started threatening the husband to capture his flat. He along with his wife had to ultimately wind up his business in Mumbai and return to his hometown in Dehradun. The quarrels started on this account. The wife admitted her mistake in writing before the panchayat that she had borrowed money at the rate of 10 % of the interest. In addition she lodged a false complaint against the husband in the women's cell, alleging that he had committed the offence of bigamy. The court held that the conduct of the wife amounted to cruelty as a reasonable apprehension was raised in the mind of the husband that it would be harmful or injurious for him to live with her. As all efforts of mediation failed, it was held that the wife was responsible for the irretrievable breakdown of marriage due to her conduct and divorce was granted.

Patriarchal stereotypes

Conduct of the parties is still to a large extent guided by the patriarchal stereotypes. Compulsory matrimonial migration of the woman post marriage is one such custom enforced and reinforced by the society and the judiciary. In addition, the newly married girl is expected to live with the matrimonial family/ extended family, with no room for general privacy and insistence of the wife for a separate habitation is judicially frowned upon. A man can seek divorce if the wife insists that he stays

24 AIR 2020 (NOC) 58 (Delhi).

25 AIR 2020 Utr 161: AIROnLine 2020 Utr 292.

away from the parents.[26] In addition, one of the expectations in an Indian setup is that the bride must be docile in her behavior and be subservient to everyone in the matrimonial family. This is an enforcement of the gendered stereotype of the superiority of status of the bridegroom's family and their grandeur gesture in accepting her hand in marriage by the male. *Suchitra Kumar Singha Roy* v. *Arpita Singha Roy*,[27] is an important pronouncement in this connection though not a happy one.

The husband filed a petition praying for a decree of divorce on grounds of wife's cruelty. Three instances of matrimonial misconduct specified by him were, i) that she was rude and cruel to his family members; ii) she aborted her pregnancy without his consent and iii) she was an active member of the Mahila Samiti. The wife denied all the allegations, and stated that since the financial status of her natal family was lower in the comparison of her in-laws, they used to treat her like a maid servant, look down upon her and she was made to do the complete house work. The court granted divorce to the husband, accepting his plea that she is guilty of cruelty.

The first argument of the husband was that she was rude and cruel to his family members. The terms 'rude and cruel' are very general and vague in character and are usually used when the in-laws are unable to pinpoint a specific misconduct. Except subservience, no other behavior emanating from the daughter-in-law is permitted or tolerated in the patriarchal families. The same coming from the mother or the father-in-law would be a genuine attempt to induct her into the family labeled adjustment instructions and permissible. Adjustment to the habits, behavior and cultural practices is to be done by her and that too, to the satisfaction of these in-laws. Therefore, if in their opinion she is rude and cruel to husband and family members right from inception, it would amount to cruelty. The acceptance of these arguments bares the hypocrisy of the society and the judiciary.

The second misconduct pointed by the husband was that she aborted her pregnancy without informing him and without his consent. It is noteworthy that the couple already had a son from this marriage and the allegation was directed against her with respect to her second pregnancy. Aborting a pregnancy without informing the husband has been repeatedly held by the courts as amounting to cruelty. This also opens up a debate on the reproductive rights of a woman in a marriage as the apex court has always held in favor of a woman. Recently, in *Justice K S Puttaswamy* v. *Union of India*,[28] as also in *Suchitra Shrivastava* v. *Chandigarh Administration*,[29] the court held that reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. These rights form part of a woman's right to privacy, dignity and bodily integrity. It is the constitutional right of women to make reproductive choices, as a part of personal liberty under article 21 of the Indian Constitution. Earlier the High Court of Bombay in a case in

26 *Binu Raj G* v. *Sandhya Lakshmi R* AIR2020 Ker 126; AIROnLine 2020 Ker 222.

27 *Suchitra Kumar Singha Roy* v. *Arpita Singha Roy* AIR 2020 Cal 177: AIROnLine 2020 Cal 303.

28 See, Sep. 26, 2018. Supreme Court of India. para 72, 46 38.

29 (2009) 9 SCC 1.

2016 *suo moto* had upheld the right of a woman to terminate her pregnancy. The righteous judicial attitude was apparent as the Bombay high court held that a woman alone should have the right to control her body, fertility and motherhood choices…..since pregnancy takes place within a woman's body and profoundly affects her health, mental wellbeing and life, an unborn fetus cannot be put on a higher pedestal than the rights of a living woman.

The right of the woman to personal autonomy , reproductive rights , that entail the rights to make sexual and reproductive decisions are recognized by the 1994 United Nations International Conference on Population and Development (UNPIN 1994). these rights specifically include a right to access to contraception, and right to have legal and safe abortion and above all the right to make decision concerning reproduction free of discrimination , coercion and violence and a right not to coerced bearing of children including with the spouse.

It is important to note that under the present MTP Act the only silver lining is that it permits a woman to terminate her pregnancy, and at the same time provides that if she happens to be a major and of sound mind then notwithstanding her marital status, it is only her consent that is required and not that of her husband or any other person, so much so that for maintaining confidentiality, the register in which her name is entered is mandated to be used only for medical purposes and is to be destroyed after a period of five years. The language and the spirit of these provisions definitely appear to be in favor of a woman, but the egalitarian approach stops here. A woman has to provide reasons to the doctors at a medically approved termination of pregnancy center about why she wants to abort the pregnancy. It is upon the satisfaction of the doctors and of course the duration of the gestation that would have the impact on her decision to either being able to do what she intends to or otherwise knock at the doors of the court for a favorable order. Opting for the later would mean compromising on the anonymity. Medical conditions record usually the possible physical trauma of the woman and mental or other congenital conditions of the baby. It does not take into account the preparedness or willingness of the woman to carry the baby and nurture it post birth. Motherhood is not merely a physical endurance of the body of the female. It involves her complete mental faculties as well and post birth it transforms the life of the new mother. It is a full time job and majority of which she has to do herself. It has a huge impact on the career of the mother and all her future plans.

We need to take into account the practical reality. All the progressive pronouncements notwithstanding a reality remains that a man gets complete control over the body of his wife after getting married to her. Even if he forces himself upon her daily with or without contraceptives while she may not want it , he cannot be held guilty of rape. Thus becoming pregnant may not necessarily be a decision of the woman. She may actually be not prepared for it. Courts have repeatedly held that she is a mere passive partner in the act of sexual intercourse. If she has no right over her

30 *Suchitra Kumar Singha Roy* v. *Arpita Singha Roy,* AIR 2020 Cal 177: AIROnLine 2020 Cal 303.

own sexuality in marriage, no right to determine when the husband can have sexual intercourse with her, no right to decide when to give birth to another human being, and to top it all no right to abort the baby and still retain the marriage, then it is futile to talk about her reproductive rights. Where are the reproductive rights in reality specially for a married woman? If the husband has a right to rape her, and also has a determining voice in deciding about the abortion, it is futile to even suggest that the woman has any reproductive rights in a marriage. She has none at all as the present judgment says, that if a woman decides to abort the child without the consent of the husband, it is a serious misconduct and the marriage can be broken. It is ironic that the husband has a right to impregnate her without her consent and also control over the birth/abortion of the child. Her rights in the marriage about something that affects her fundamentally both physically and mentally are non-existent. The fact that she already had a son and had allegedly aborted the second pregnancy was grave enough for the court to terminate her marriage.

The third aspect of her matrimonial misconduct was that she was a member of Mahila Samiti, and was taken cognizance of by the court as amounting to cruelty.[30] Interestingly, in what way her membership had come in conflict with her matrimony was not explained by the court, except that she was unable to prepare food in time on some occasions for the entire family. One needs to examine if being a member of any Mahila Samiti, that presumably work in the area of upliftment of women in need of help is detrimental to the matrimonial home . This was despite the fact that the father of the husband was an influential man being the Pradhan of the local Panchayat. The possibility of procuring witnesses to testify the quarrelsome nature of the daughter-in-law might not have been difficult for them. Further the argument of the wife that since her natal family's financial status was lower in their comparison and they used to treat her like a maid servant was ignored by the court. Her contention should have been taken by the court as serious as the same appears probable because in the Indian patriarchal families, the expectations from a bride whose natal family is financially weaker than the bridegroom is very high. The amount of subservience expected from her would be unnaturally high almost to the level of perfection, an expectation which is impossible for a mortal to fulfill as her attempts to lead a life of dignity would in itself be unimaginable for the in-laws.

The present judgment therefore is parochial, rudimentary, unwarranted and above all a big disappointment in the present era.

Condonation

The offence of cruelty even if established may not help the aggrieved party to obtain the relief of divorce if it is condoned by him or her. At the same time, it is not totally wiped off as even if once condoned, the offence may be revived, if either the same or similar offence is repeated or another matrimonial misconduct is committed by the guilty party. In such an eventuality the aggrieved spouse can successfully take the benefit of the matrimonial offence that he/she had condoned. In *Anita Agarwal* v. *Ramesh Agarwal,* the wife was guilty of cruelty towards the husband and his family members. She admitted her mistake and promised not to repeat them in the compromise

executed as between the parties, but even after this promise, she again harassed the family and indulged in quarrelsome and bad behavior including throwing a slipper at her father-in-law. The court held that the fresh acts of cruelty would revive her earlier misconduct even if condoned previously by the husband and divorce was granted in his favor.[31]

Desertion

Law requires a minimum of two years of separation with an intention never to join the spouse immediately preceding the presentation of the petition seeking divorce on grounds of such spouse's desertion. This withdrawal should be not only without a reasonable excuse but must also be against the wishes and consent of the petitioner. Wife's withdrawal due to illicit relations of the husband with another woman would be justified, and she would not be held guilty of either cruelty or desertion.[32]

If the husband leaves the wife at her natal place for child birth and then refuses to take her back, he is not entitled to a decree of divorce on grounds of her desertion.[33] On the other hand he himself would be guilty of constructive desertion. Similarly, where the husband remained away from the matrimonial company for more than 10 years and never tried to bring back the wife, he would be guilty of deserting her.[34] If the wife expresses her willingness to live with the husband, displays an eagerness to reunite with him for resumption of cohabitation, but the husband remains unresponsive or discourages her, it is the wife who has been deserted and not the husband and his petition praying for divorce on ground of her desertion would be rejected.[35] In *Padmavati* v. *Bhimappa Venkappa Nadagouda*,[36] the wife left the husband on account of his affair with another woman. The husband went through a second marriage with his paramour one year after the wife left him and had a son from her. He then went to the court and sought divorce on the ground that the wife had deserted him without a reasonable excuse. The court dismissed his petition, refused to grant divorce in his favour and held that the wife cannot be expected to join him in these circumstances.

At the same time, unjustified withdrawal by the wife would amount to desertion without a reasonable excuse and the husband would be entitled to a decree of divorce on grounds of her desertion. Similarly, adamant attitude of parties and breakdown of marriage,[37] conduct of the wife showing that she had no desire to live with the husband even after 27 years of marriage and separation extending to more than two decades, the wife renouncing her marital obligations and duties,[38] failure of the wife to provide valid reasons for not living with the husband for more than 20 years despite signing

31 AIR 2020 P and H 108: AIROnLine 2020 P and H 148.

32 *Jethu Saw* v. *Bhawani Devi* AIR 2020 Jhar 68: AIROnLine 2020 Jha 106.

33 *Harish Taneja* v. *Nidhi* AIR 2020 P and H 40; AIROnLine 2019 P and H 29.

34 *Sunita Devi* v. *Ramesh Chand* AIR 2020 HP 68: AIROnLine 2019 HP 1317.

35 *Basanta Das* v. *Shyamali Das* AIR 2020 Cal 47.

36 AIR 2020 Kar 23.

37 *Praseena* v. *Girish Kumar* AIR 2020 Ker 134: AIROnLine 2020 Ker 200.

38 *Renuka Sangappa Hunchikatti* v. *Sangappa Somappa Hunchikatti* AIR 2020 Karn 35; AIR OnLine 2019 Kar 2467.

compromise in suit for restitution of conjugal rights would entitle the husband to a decree of divorce.[39] Where the wife leaves the house of the husband for no rhyme or reason and despite his efforts, failed to join him, she would be guilty of desertion and cruelty and the husband would be entitled to get a decree of divorce.[40] In *Vibhore Singh Gautam* v. *Deepika*,[41] the husband prayed for divorce on grounds of wife's cruelty and desertion. He alleged that the wife was not treating him well and not fulfilling her marital obligations. The parties were referred for compulsory mediation but the wife wilfully and deliberately did not appear before the mediation centre and failed to adhere to the order passed by the court. The court held that the conduct of the wife leads to the inference that she is not willing to live with the husband and discharge her matrimonial obligations. In addition she was also trying to intentionally prolong the litigation. Under these circumstances the wife was held guilty of wilful desertion and cruelty and the husband was granted divorce.

Divorce by mutual consent: waiver of one year separation time period

In order to prevent hasty separations and enable the parties to reach a decision to break the marriage after assessing the complete pros and cons of the situation and its consequences, divorce by mutual consent provides a minimum separation of one year before the parties can approach the court for a peaceful and amicable terms based divorce. In conformity with the spirit of the legislation, section 14 also mandates that no court would entertain any petition praying for a decree of divorce within a period of one year of the solemnization of the marriage unless the case is of exceptional hardship or results in exception depravity. The language and the tenor of the two sections show, that while section 14 does admit of some accommodation based on exceptional hardship situations, section 13 does not do so in any case. Further as section 14 covers all kinds of petitions, *i.e.,* contentious ones primarily; section 13 is solely applicable to mutual consent based petitions only. Nevertheless, parties desirous of culminating their marriage soon after its solemnization feel issues of non adjustment as cases of exceptional hardships and in order to get out of the marriage try to invoke both the exceptional depravity clause of section 14, and at the same time plea for waiver of mandatory one year separation period under section 13. Three cases went to the level of the courts this year pleading similar grounds of exceptional hardships, and while two were dismissed, one was successful in convincing the court and getting the relief. In *Manpreet Kaur* v. *Navdeep Singh Gill*,[42] the petition for divorce was filed within one year of marriage on the ground that the parties had failed to adjust with each other and the same would constitute a reason for them to separate. The court held that failure to adjust with each other would not amount to an exceptional circumstance within the meaning of section 14. In *Neha Singh* v. *Sajan Raghavan*,[43]

39 *Srinivasan* v. *Padma* AIR 2020 Mad 81; AIROnLine 2019 Mad 13.

40 *Bidyut Kumar Saha* v. *Tapa Saha* MANU/TR/0138/2020, in the High Court at Tripura at Agartala , Mat App 7 of 2015 on Mar. 11, 2020.

41 AIR 2020 (NOC) 23 (P and H) ; AIROnLine 2019 P and H 969.

42 AIR 2020 (NOC) 363 (P&H); AIROnLine 2019 P and H 566.

43 AIR 2020 Chh 76: AIROnLine 2020 Chh 235.

an application for waiver of six months waiting time period filed on the same day when the first petition praying for a divorce on grounds of mutual consent was filed was again dismissed. On the other hand the demonstration of the inability to live with each other in *Surjeet Singh* v. *Babita Devi*,[44] convinced the court. Here the parties had reached a financial settlement after successful mediation, the court agreed to waive off the statutory requirement of a mandatory one year separation requirement and granted divorce by mutual consent.

Remarriage of divorced persons

Post grant of the divorce decree by a court, the parties are free to explore other matrimonial options. At the same time, if the decree is pronounced by a court other than the apex court, the possibility of it being challenged by filing an appeal to the higher court exists. In case the appeal is admitted, the divorce decree pronounced earlier becomes meaningless and the marital status of the parties revives, with the consequence of restoration of marital ties. In such cases, the parties are still married to each other for all purposes with their fate of separation in the hands of and depended upon the outcome of the continued litigation in the higher court. The time for filing an appeal here becomes crucial. If an appeal against the judicial pronouncement granting divorce to them is filed within the time stipulated for it, there is a specific statutory direction that parties should not remarry. Once the time for filing an appeal is over the parties can remarry without any adverse consequences, but if one of them marries soon after the grant of divorce decree in clear violation of section 15, and the other party files an appeal against the judgment granting divorce, complications may arise with respect to the status of the second marriage and the consequences that may follow for the person responsible for such a deviance. If the husband remarries after the limitation period to file an appeal had expired, his marriage would be valid and cannot be declared as null and void.[45] The bar of section 15 does not apply to a case where the appeal is filed almost after a year after the expiry of the period of limitation for filing an appeal and the bar applies only if there is an appeal filed within the period of limitation, and not afterwards upon condonation of delay in filing an appeal unless of course, the decree of divorce is stayed or there is an interim order of the court, restraining the parties or any one of them from remarrying during the pendency of appeal. A second marriage contracted during the pendency of appeal from decree of dissolution of her marriage with ex-husband is not *ab initio* void particularly when such appeal is filed after expiry of limitation period. In *Krishnaveni Rai* v. *Pankaj Rai*,[46] a Hindu male and female, H and W, married and following matrimonial turbulence, the same was culminated by the court. When the time for filing an appeal was over, W married H2. At the same time H, filed an appeal after praying for condonation of delay that was allowed. Meanwhile, the second marriage of W did not work and she applied for maintenance claiming it from the second husband H2. He took the plea that her marriage with him was void as she had married

44 AIR 2020 HP 73; AIROnLine 2020 HP 220.

45 *Archna* v. *Satish Kumar* AIR 2020 HP 75; AIROnLine 2020 HP 279.

46 AIR 2020 SC 1156; AIROnLine 2020 SC 239.

him during the pendency of appeal as against the decree of divorce granted to her with respect to her the first marriage. Since the second marriage with him was void, she was not entitled to claim maintenance from him under section 125 Cr PC. The court dismissed his contention and held that the second marriage was valid and the husband,(H2) was bound in law to maintain the wife.

***Ex Parte* divorce decree**

A fair litigation involves and requires adequate representation and presentation of the respective version of events and evidence from both the sides. Unless the court hears both the parties and is satisfied with examination and cross examination of both of them, it would not be possible for them to come to an equitable and just conclusion. Therefore a decree is passed by the court on being satisfied about the truth of the matter after both the parties have led evidence and established their side of the facts. For this, it is necessary that both the parties must be present and be heard on an equal platform. One of the essentiality in matrimonial litigation therefore is that the notice should be issued and summons be served on the respondent to file a written statement and put forward the case before the court. At the same time, instances cannot be ruled out where in full connivance of the concerned persons involved or even otherwise, one of the party deliberately in order to get a favourable outcome prevents the other party to appear before the court to contest or refute the allegations or be adequately represented. The courts do take these malicious connivances very seriously and can even overturn a decree passed by them in the event the other party is able to satisfactorily establish that her /his non-representation was owing to lack of service of summons. This might be irrespective of the consequences that might have followed owing to the passing of the decree. In *Shravan Kumar* v. *Revti Devi*,[47] the husband filed a petition in the court praying for a decree of divorce and secured it *ex-parte*. When the wife came to know of it, she filed a prayer for setting aside this *ex-parte* decree of divorce on the ground that neither summons were issued nor any notice was send to the wife by registered post. There was no evidence to show that the wife avoided the service of summons therefore the court held that this *ex-parte* decree of divorce passed without giving an opportunity of hearing to the wife is liable to be set aside and the mere fact that the husband has entered a second marriage cannot be the reason for sustaining the decree. Similarly, in *Prema M* v. *Gururaj*,[48] an ex-parte divorce decree passed without contest and without hearing the wife was set aside later. But where the wife was duly served but chose not to appear, the decree cannot be set aside.[49]

In *Rashmita Vishikeshan Patel* v. *Vivekanand Motilal Patel*,[50] the wife alleged that the decree of divorce was obtained by the husband by playing fraud on the court by producing an imposter in her place. The court treated the allegations as very serious in nature and held that the same needs to be proved via detailed investigation as there were two conflicting reports by the registrar (vigilance). Since there was filing of

47 AIR 2020 Raj 33; AIR OnLine 2019 Raj 1.

48 AIR 2020 Karn 87: AIR OnLine 2020 Karn 400.

49 *Archna* v. *Satish Kumar* AIR 2020 HP 75; AIROnLine 2020 HP 279.

50 AIR 2020 Chh 50.

application by the wife and her appearance had two different pictures, the wife was directed to invoke the family court jurisdiction for an investigation into the allegations.

Taking advantage of one's wrong

It is a cardinal rule in matrimonial litigation that whoever approaches the court for a remedy must do so with clean hands. He or she should not have been responsible for the state of affairs that led to the presentation of the petition. The rule is enforced with such gravity, that if at any time during the proceedings at any level, if it is brought to the notice of the court that one of the party is trying to take advantage of his or her own wrong or disability, the same would not be allowed by the court, and any order or decree passed would be suitably modified or even dismissed. The courts as courts of equity, justice and good conscience have to ensure that it is only the aggrieved party which in fact is aggrieved, who can have the benefit of securing a remedy, and the person who himself is guilty cannot be the beneficiary of the court litigation. In *Taruna Kumar Gadabad* v. *Subhalaxmi Lenka*,[51] the parties married in 2008 and had a son from this marriage. They stayed together for a short period in the father-in-law's house and then went to the place of husband's posting. The parties stayed together for a short period of only two months. The husband in 2009 filed a petition praying for a decree of divorce on grounds of her cruelty and desertion and for conducting a DNA test on the baby refuting its paternity. His grievance was that during the 40 days that they lived together, the wife did not treat him well, did not give him food and on one occasion did not prepare food for his friend. His filing for a divorce petition was soon followed by a flood of complaints against her. The court held that the husband had not bothered to see his child till he came to the court. This along with his prayer for the DNA test, would amount to taking advantage of his own wrong as the same amounts to humiliation of the wife and the child in public. A person who is guilty of such conduct cannot be allowed to take advantage of his own wrong. The husband was also reckless and restless in filing complaint cases against the wife and her family members even after filing for the divorce petition. With respect to irretrievable breakdown of marriage as between the parties, the court said that till now it is not a ground for divorce and since the wife was not averse to saving the marriage, there was still hope of their union and the decree was refused to the husband.

IV MAINTENANCE

Interim maintenance and *res judicata*

Financial dependency of the wife over her husband in matrimony is an entrenched rule in Indian society. Often she faces huge challenges in even contesting a litigation filed against her due to her inferior economic status in comparison to the husband. The law irrespective of the sex of the parties provides two remedies to the economically weaker party; one to pray for interim maintenance and the other, the cost of litigation till the case is finally decided. Both the remedies can be clubbed together or may be prayed for one after the other. It is not mandatory that if the wife prays for interim maintenance, she forfeits her right to claim litigation expenses later. Her second

51 AIR 2020 Orissa 3. : AIROnLine 2019 Ori 209.

application in such cases would not be barred by the principles of *res judicata*. Law has also provided her multiple forums from where she can enforce her maintenance rights. She can do it simultaneously as well, secure an order from each forum, but must inform the respective forum about the pending applications. In *Priyanka Srivastava* v. *Vipin Bihari Lal,*[52] the husband filed a divorce petition and the wife brought in an application for interim maintenance stating that she had no source of income and had a 12 years old school going son to look after. She had also approached the court under section 125 Cr PC, under which she was granted an interim maintenance of Rs 3000/ p.m., She then filed an application under section 24 of the HMA, and prayed for enhancement of litigation expenses from Rs 1000/ to Rs. 2000/. The husband contended that she wanted to delay the divorce proceedings, and had filed a petition for maintenance which was disposed of on merit giving her Rs 1000/ p.m. and as she had not filed any appeal against it, the said order had become final. Since she had now filed a second application under the same section; the same was barred by the rule of *res judicata*. As she had not asked for interim maintenance, the rule of constructive *res judicata* would apply. The court held that not providing maintenance by husband to a deserving and needy wife without financial support is a violation of her legal rights and so long as such maintenance is not provided, this legal right continues to be violated. Every such violation gives a fresh cause of action and it cannot be adjudicated keeping in view the technicalities of the procedure. Applying the principles of *res judicata* and principles of constructive *res judicata* to frustrate the maintenance rights of a deserving wife is too harsh and have an effect of depriving such wife from her right to live with dignity. Instead of laying emphasis on the just claim of a wife, using the procedural law to frustrate the same is not warranted in the scheme of the Family Courts Act. The courts have been given special powers to evolve tools to do justice. Without a maintenance amount, there is always a possibility that the claimant side may be deprived of his or her opportunity of fair hearing in absence of such financial support. The High Court of Allahabad further noted that, the wife here had a minor child and it was the duty of the family court to protect the interest and welfare of the child which cannot and should not be overlooked on the basis of technicalities. Such authority is specifically conferred on the family courts under section 26 of the HMA, and they must exercise it for according benefit to them. They further noted that the principle of *res judicata* cannot be applied to frustrate the right of maintenance as the wife had claimed only litigation expenses in the earlier application under section 24, and was granted Rs 1000/ per month. Maintenance for herself and son was not claimed by her in the earlier application, and therefore the rejection of second application under section 24 claiming *pendente lite* by applying principles of *res judicata* was completely erroneous.

The primary requirement for bringing in a claim of maintenance is that the claimant must be incapable to maintain himself/herself. If the wife has sufficient income of her own to support herself, she is not entitled to claim maintenance from her husband. A woman, employed as a nurse, after receiving a substantial amount of

52 AIR 2020 All 31.

money, by way of compromise is not entitled to further claim maintenance as it cannot be said that she is living in a vagrancy situation.[53] Similarly, hiding the income and deliberately misleading the court would result in negating the claim of maintenance of a woman. This is due to a basic principle, that the approach to the court must be *bona fide*. In *Khushi* v. *Ankit*,[54] the husband secured a decree of divorce on grounds of wife's cruelty. She later applied for maintenance but concealed from the court the fact that she was running a play school and had a bank account and a PAN card. Her refusal to divulge details of her bank account etc, led the court to observe that she is not approaching the court with clean hands. Observing that even though section 125, is a part of a social welfare legislation, the first basic condition for claiming maintenance is that the party seeking maintenance must not be in a position to maintain herself. Since, the wife had sufficient income of her own, her claim of maintenance was dismissed.

Maintenance to daughter

A daughter in all cases is perceived as financially vulnerable, her capacity for gainful employment as thin but a son's majority coincides with his expected ability to take up an avocation and be financially independent. This is the reason why under the Act, a parent cannot be saddled with the responsibility of maintaining his major son irrespective of his financial status, but a daughter retains her right to claim maintenance including her marriage expenses from the parents, even if she is a major.[55]

At 18, a son or a daughter would barely pass school and the real challenge comes in the way of paying the fees for higher education, or coaching expenses ensuring admission in a desired course. Therefore, the right to claim education expenses, though not reflected in the legislation have been upheld in some cases for both a son and a daughter despite their attaining majority.[56]

Making a provision for a daughter's marriage expenses remains primarily the responsibility of the father. While he is not empowered to evade it, the quantum claimed can of course be contested and is also dependant on the economic status of the daughter. It is not her social status generally but her economic status that would have a reflection on the quantum of maintenance that she seeks from her father. In *Sadashivananda* v. *Padmini*[57] the application from the daughter as against her father claiming monthly maintenance and marriage expenses to the tune of Rs 15 lakhs was dismissed as the daughter was highly qualified and gainfully employed, as an electronic engineer with

53 *Mitesh Bhagat* v. *Shijy John* RPFC No. 225 of 2013 decided on Jan 14, 2020, in the High Court of Kerala at Ernakulum. MANU/KE/0162/2020.

54 in the High Court of Punjab and Haryana at Chandigarh Criminal Revision (F) No. 467 of 2017 (O&M) Decided on 28.02.2020. MANU /PH/0246/2020.

55 *Abhilasha* v. *Prakash* AIR 2020 SC 4355; AIROnLine 2020 SC 727; *Chandra Kishore* v. *Nanak Chand,* AIR 1973 Del 175; *Vishwambharan* v. *Dhanya* AIR 2005 Ker 91; *Baldev Singh v Pooja Devi* AIR 2007 HP 16.

56 See for example, in *Re Binata Pal*, in the high court of Calcutta CRR4070 of 2016 decided on Jan 14, 2020 MANU/WB/0061/2020, a case under s. 125 of the Cr PC. See also *Laxmi v Krishna* AIR 1968 Mys 288; *Satyadas v Sujata Das* (2009) 1 DMC 625 (Gau); *Wali Ram v Mukhtiar Kaur* AIR 1969 P and H 285.

57 2020 (1) KarLJ 563. High Court of Karnataka at Dharwad bench.

an income of Rs 30000/, per month that she suppressed from the court. It was held that as and when her marriage would be fixed, the father's contribution would not exceed Rs 5 lakhs. Similarly, in *Reghuthaman Nair* v. *Sindhu K V*,[58] a sum of Rs six and a half lakhs was considered reasonable for the daughter's wedding taking into account the income of the father and the status of the parties.

In *Kumar Jhalak* v. *Rahul*,[59] pursuant to a divorce between parties (with a daughter) through mutual consent, the wife got the custody of the child. On the application of the child seeking maintenance from her father, the family court directed him to pay maintenance to her from the date of the order till her marriage. The father created an FDR out of which interest amount was to be given to her. He further paid Rs 5 lakhs to the wife and daughter with an understanding to settle all present and future claims of maintenance. Post divorce, the father remarried, and then died. The second wife asked the bank to break the FDR and transfer the amount in her name. The daughter, now 19 years old, pleaded execution of the maintenance order as against the second wife. The court held that since the right of the daughter was created through a decree of the court to get the maintenance amount and the FDR was an estate of the deceased from which she is entitled to get maintenance, the money decree can be executed against his property in the hands of the second wife.

In *Bharathidasan* v. *State,*[60] it was held that a man is bound to maintain a child whom he had fathered (confirmed through DNA test) without marriage from a woman whom he had seduced on a promise to marry. In absence of marriage, often men to evade their responsibility of maintaining the child dispute paternity. In such cases, if the proof does not come through a concrete DNA test, the responsibility is on the putative father to prove that he has not fathered the child either through some preliminary evidence or through a civil court's declaration. In *Leon Thomas Kumar* v. *Mariam Sayanora Thomas,*[61] it was held that when a minor child files an application against a person seeking maintenance, while the other denies paternity, the court has two options: one that if the claimant proves prima facie the paternity, (he can do so by adducing evidence), the family court should decide the case as an incidental matter. But it must be remembered that proceedings under section 125 are summary in nature and a civil court is the appropriate forum to decide the paternity issue. The second option is to seek a declaration from the civil court and prove that the child was not born to the person and therefore, he is under no obligation to maintain him.[62]

Obligations of a daughter-in-law to maintain mother-in-law

Maintenance obligations are usually fastened on an able bodied and gainfully employed male in a family as the females in general and of all categories are as a rule

58 In the High Court of Kerala at Ernakulum Mat Appeal no 524 of 2015 decided on Feb 25, 2020 MANU/KE/0752/2020.

59 2020 (1) MPLJ 600; 2020 (1) JLJ 147.

60 In the High Court of Madras, Crl A No. 231 of 2013, MANU/TN/2100/2020 decided on Feb. 28, 2020.

61 Cri M.C. No. 1713 of 2020 (D), decided on Mar. 3,2020 in the High Court of Kerala at Ernakulum.

62 See *Dukhtar Jahan* v. *Mohammed Farooq,* AIR 1987 SC 1049.

perceived as financially vulnerable. An approach deviating from this general perception was adopted by the apex court way back in 1987, in *Vijaya Manohar Arbat* v. *Kashi Rao Rajaram Sawai*,[63] when they had held a gainfully and economically active daughter under an obligation to maintain her dependant old father in light of section 125 of Cr PC. Under the Hindu Adoptions and Maintenance Act, the liability to maintain the females and dependent children is again on the father including a father–in–law if he has in his hands the share of the deceased son. Often an issue arises, that if under the Act, a gainfully employed man is under an obligation to maintain dependant parents including his mother, if he dies and his entire service benefits are taken by his widow including a job on compassionate grounds in his place, does she take along with it his legal obligations to maintain the dependent parents as well? Does she step in his shoes for such purposes or only because she has not been specifically and statutorily ordained to do so, she cannot be made liable for it? In *Krishna Bai* v. *Priya Thakre*,[64] the claim of the mother-in-law seeking maintenance from her widowed daughter-in-law was dismissed by the court that held that the source of compassionate appointment is wholly unconnected with the statutory obligations arising under the personal laws. Here, a Hindu man, having a wife M and three children was employed and upon his death during employment, his son S was given a job on compassionate grounds in his place. After sometimes S also died and in his place his widow SW secured the job again on compassionate grounds. M, her mother-in-law pleaded that she was destitute, and since the source of the job bringing money emanated from her husband, the daughter-in-law was under a legal obligation to provide for her. The court held that a job on compassionate grounds is not an 'estate' within the meaning of the section 22 and rejected her claim.

In *Sangeeta Singh* v. *Bindhyachal Singh*, [65] the Patna High court held that a daughter-in-law, who has taken her share out of the property of her husband and remarried, is not entitled to claim maintenance for herself or for her children from the father-in-law.

V CUSTODY AND GUARDIANSHIP

Surname of father/mother

One of the typical features of patriarchy is appending of the surname/family name of the father to the child. Continuation of the family name through the son is also one of the main reasons for son preference in India. Presumption of paternity in lawful marriage and correspondingly the adoption of surname of the father have been treated as a normal custom in Indian patriarchal families and adoption of the name of the mother is largely unheard of. The surname of a woman in patriarchal setup largely depends upon her marital status. She carries her father's surname till marriage where after in many cases she may shift and adopt her husband's surname. Although an increasingly number of women in modern era continue using their pre-marriage surname, *i.e*., of their father as their surname for the sake of continuity in all official

63 AIR 1987 SC 1100; 1987 SCR (2) 331.

64 AIR 2020 Chh 170: AIROnLine 2020 Chh 491.

65 AIR 2020 Pat 97: AIROnLine 2020 Pat 306.

documents, in many cases women upon marriage retain their father's name and add the name of her matrimonial family after it. Be that as it may, the children in normally all cases take the surname of their father. Indicating and using the name of the father is treated as a symbol of legitimacy and is normal as opposed to some unusual scenarios.

The rigidity of this customary practice appears to witness a dilution at the instance of the children in modern era. Adult children are actually taking a call, of whether to retain a surname only because it is done as a matter of customary practice or whether they should opt for a surname of a person whose progeny they wish to be known as. In *Kaushal Ajay Kumar Chadva* v. *State of Gujarat*,[66] soon after the birth of a baby boy, amidst matrimonial discord, the mother committed suicide and the child was brought up by his maternal grandparents. After becoming a major and pursuing a course in MBA, he applied for a change in his surname. He prayed for replacing the name of his father and surname with that of name of his mother and her maiden surname and also prayed for issuance of a new birth certificate. The high court accepted his plea and directed the registrar to replace the name of his father and surname with the name of the mother and surname and issue a certificate within a period of eight weeks. He was permitted to drop his father's name and adopt his mother's name instead.

The apparent simplicity of this pronouncement is heavily loaded with an extremely important message. The rigid glass walls of patriarchal norms are no longer unbreakable. It is not the legal requirement for a wife to compulsorily adopt the family surname of the husband,[67] and is presently no longer incumbent for the children to do so as well. With increase in separation of couples due to marital breakup, or the fatality of one due to an act of the other spouse, the child having little or no interaction with either of their parents , it should be up to the children to take a call and decide with respect to both his first and family name. Social conditions have indeed advanced and it is no longer a stigma to not have a surname or the father's name.

Illegitimate child

The actions of the parents in cementing their relationship formally and legally have a huge impact on the rights of the children begotten from this relationship. A reflection of the status of the child and its legitimacy is visible in not merely property rights, but also in matrimonial matters and custody and guardianship issues. Mother is preferred to the father in matters of custody and guardianship of children begotten out of wedlock normally. In *Dharmesh Vasantrai Shah* v. *Renuka Prakash Tiwari,* [68] a child was born out of love relations between the parties and had special needs and since birth was being taken care of by the mother as the father was involved with his first family and had not visited the child for the past two years even once. The child and the mother were citizens of New Zealand and the mother had initiated the process of putting him in a special school for differently-abled children. The child had autism.

66 High Court of Gujarat, Feb. 20, 2020.

67 *Susmita Saha Majumder* v. *Susanta Saha* AIR 2020 Cal 232: AIROnLine 2020 Cal 257.

68 AIR 2020 Bom 233: AIROnline 2020 Bom 690.

In a battle of custody of this child, the mother was given its custody with the special instructions that the same was not to be disturbed.

If the child is of the age /discretion with ability to clearly demonstrate or express his views or indicate his preferences, the same has to be taken into account.[69] At the same time, if the parents are separated from each other, and one of them already has the custody of the child, there remains a strong possibility of the custodial parent poisoning the innocent mind against the other parent. Therefore, the court has to proceed with extreme caution in ascertaining the genuineness of the wishes of the child as against a tutored statement. Additionally, the view or interests of one spouse only cannot be taken into considerations.[70] Accordingly, as between the father who was a drunkard and would harass the children in an inebriated state, and the mother and her relations who were always available and ready to look after the children, the interests of the children would be best served if the custody was given on a permanent basis to the mother with visitation rights to the father. The court specifically noted that the father was not fit to take care of the children.[71] Similarly, where the child since the age of 3 years was constantly in the custody of the mother at her maternal grandparent's place and the father had never sought the custody nor visitation rights, a disturbance would not be in the interests of the child. In such cases, father cannot be given custody but can get visitation.[72] Since the father is the natural guardian of the minor children, a mere allegation that the mother died of torture by the husband and the in-laws, a fact that was negated by the report of the doctor, that she died of tuberculosis, would not deprive him from getting the custodial rights over his children in preference to the grandmother.[73] In *Jose Antonio Zalba Diez Del Corral* v. *Suchitra Mahapatra*,[74] taking into account the wishes of the children, the mother was allowed to retain their custody. Similarly, in *Hardeep Singh* v. *Paramjeet Kaur*,[75] the custody of two daughters of the parties was already with the father while the minor son was with the mother. The father's claim to the custody of the minor son was dismissed by the court on the ground that there was no evidence that his welfare was not taken care of by the mother. The custody was allowed to be retained by the mother while the father and the daughters were given visitation rights. In *Mandeep Kaur* v. *State of Haryana*,[76] the mother of the child was arrested on the complaint of the father on charges of theft. The two and a half years old daughter till that time was with the mother and was then taken away by the father. Upon his refusal to hand over her custody the mother filed for issuing a writ of habeas corpus to produce her daughter and prayed for her custody. The court granted the interim custody of the child to the

69 *Sandeep Singh Sangwan* v. *Ritu* AIR 2020 P&H 129: AIR OnLine 2019 P and H 1495.

70 *Soumitra Kumar Nahar* v. *Parul Nahar* AIR 2020 SC 1901; AIR OnLine 2020 SC 200.

71 *Shine Dad* v. *Deepthi* AIR 2020 Ker 105; AIR OnLine 2020 Ker 104.

72 *Jitendra Singhani* v. *Harneek* AIR 2020 (NOC) 623 (Raj) ; AIROnLine 2019 Raj 791.

73 *Sumitra* v. *Narender Phogat* AIR 2020 PandH 84: AIR OnLine 2020 P and H 299; see also *P Manjunath* v. *Jagadish* , AIR 2020 (NOC) 828 (KAR); AIR OnLine 2020 Kar 1020.

74 AIR 2020 Cal 33.

75 AIR 2020 P and H 173; AIR OnLine 2020 P and H 298.

76 CRWP 1423-2019 dated Nov 3, 2020.

mother, and held that the father was free to move the guardian court for pleading his case. In *Neha* v. *State of Haryana,*[77] the father clandestinely took away the daughter from the custody of the mother, it was held that though the custody with the father is not illegal, but, in the interests of the child who had a congenital condition, constant company of the mother was required. The mother was gainfully employed and had taken permission to work from home, to be with the daughter. Since the child was being looked after well by the mother and the maternal relations, custody was granted to the mother. In Siju *A* v. *Neethu A*, [78] at the time of divorce, an agreement was reached between the husband and the wife to share the custody of the child, and the marriage was dissolved on the basis of this agreement. Subsequently the husband stopped sending the child to the mother in violation of this agreement by making allegations that she was living with some other person. It was held that the parties cannot wriggle out of the agreement when there was no order passed by any court modifying or varying the terms of agreement.

The traditional societal perception of a man with kids marrying as normal but, unusual, for a woman, is undergoing a change and remarriage of mother by itself would not disentitle her to the custody of her minor child.[79] Where the child since the age of three years was constantly in the custody of the mother at her maternal grandparents place and the father had never sought the custody nor visitation rights, a disturbance would not be in the interests of the child. In such cases, father cannot be given custody but can get visitation.[80] In *T K Sreelatha* v. *S Madhumathi Secretary to Government Social Welfare Department, Chennai*, [81] the mother of the minors died in an accident and the father suffered severe cognitive impairment due to which he was unable to take up any employment and earn his livelihood. In these circumstances the sister of the father sought guardianship of minors, her brother and his property that was granted to her with requisite conditions.

Guardian of an adult in a comatose state

The legislations relating to appointment of guardians revolve primarily around the welfare of children, including those who are major but have special requirements such as those who suffer from mental infirmity/disability (retardation). No legislation in India[82] provides for a situation where an erstwhile head of the family, an adult male senior-most in age, looking after and providing for the spouse and children due to an accident reaches a stage of Comatose and needs extensive care and support. With the responsibilities of running his business and looking after his and the entire family needs of including the minor children, can his wife, who may be younger to him in

77 AIR 2020 P and H 118: AIR OnLine 2020 P and H 560.

78 AIR 2020 (NOC) 565 (Ker); AIR OnLine 2020 Ker 24.

79 *Kalpana* v. *Superintendent of Police, Office of the Superintendent of Police, Sivagangai* AIR 2020 Mad 217: AIR OnLine 2020 Mad 179.

80 *Jitendra Singhani* v. *Harneek* AIR 2020 (NOC) 623 (Raj) ; AIR OnLine 2019 Raj 791.

81 AIR 2020 (NOC) 558 (Mad) : AIROnLine 2020 Mad 96.

82 Reference is made to the GWA, HMGA, The Right of Persons with Disabilities Act, 2016 and the Mental Health Care Act, 2017 and The National trust Act for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

age, apply and be appointed the guardian of both his person and property arose in *Uma Mittal* v. *Union of India*,[83] this year. Here, a couple had four children, three daughters and a son. One daughter was married while the others were living with the parents. The husband suffered a fall resulting in internal bleeding in brain and the doctors opined that till his eventual demise, he would remain in comatose condition and would throughout require extensive medical supportive treatments. The bank accounts stood in the name of the husband and the wife was unable to operate any of them with the result that monetary obligations including loans, maintenance and huge medical expense were paid by exhausting the complete family savings and borrowing money from relatives. The approach to the benevolent agencies remained futile as a bed ridden comatose patient is not covered under the Disability Act or National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, and Multiple Disabilities Act 1999. In absence of any law and precedent in this regard, she filed a prayer in the court and pleaded that the court has the inherent powers under article 226, of the constitution to invoke the doctrine of *parens patriae* and to appoint her (the wife) as the legal guardian of the husband. This was necessary for her to take care of him, the children and the business that was their source of livelihood. While exercising their powers under the Constitution, the court appointed the wife as the legal guardian of the husband so that she can effectively discharge her responsibilities in this matter and issued the following guidelines:

i) A person/s who seeks to be appointed as guardian *vis-a-vis* an individual, who is lying in a comatose state shall in their petition to the high court disclose the details of all tangible and intangible assets of such an individual. The details as to their location and approximate market value shall also be disclosed. In case of Bank accounts, stocks, shares and debentures and other investments, concerned material particulars are to be provided;

ii) The court will have the person lying in comatose stage examined by a duly constituted medical board which would include a neurologists as well;

iii) the court would direct the concerned SDM/Tehsildar of that area to ascertain the veracity of the assertion and gather relevant information with respect to the relation of the person desirous of being appointed as the guardian and also if at all there may be a conflict of interests of the person in a comatose stage with the one wanting to be appointed as a guardian;

iv) ordinarily a spouse or a progeny may be appointed as a guardian or in their absence or abandonment, his next friend or a public official such as a social welfare officer can be so appointed;

v) the guardian to be appointed must be competent to act as a guardian;

vi) the order appointing a guardian must also specify the assets qua which the guardianship order is passed, which would be subject to modification in appropriate situations. Any sale of assets must be carried with the permission of the court;

83 AIR 2020 All 202; AIR OnLine 2020 All 1440.

vii) the guardian would be required to furnish a report of all the transactions done on behalf of the person to the Registrar General of the court for a period of every six months. The amount received and spent for the benefit of the patient need to be disclosed;

viii) the Registrar General would maintain a separate register containing the details of the particulars of the guardian so appointed, the relevant proceedings and orders;

ix) the court may appoint a guardian for a temporary time period or for a limited time period as it deems fit;

x) in case of misuse of the position of guardian and in the event he misappropriates the funds or siphons or misutilizes the assets of the comatose patient, he would be removed by the court and another person may be appointed in his place;

xi) such a guardian appointed in the place of the one guilty of misusing his position to the detriment of the comatose patient, would ensure that the transactions entered into by him comport with law;

xii) a relative or a next friend of the patient can approach the court for issuance of appropriate directions in case they find that the guardian appointed is acting adversely to the interests of the patient; and

xiii) the patient can be moved to another state or country only with the permission of the court.

VI HINDU LAW

Partition suit at the instance of the wife

Owing to the matrimonial migration, there are two classes of females in a Hindu joint family, *viz.,* one who are born to the coparceners, and the other who are married to them. Those who enter the family at a later stage by marriage to the coparceners, have secured right of maintenance out of the joint family funds and residence in the joint family home. Though the primary responsibility for their general maintenance is on the coparcener husband, their rights were secured in many other ways as well. In all school of Mitakshara, under the classical law, except Dravida or Madras school, the wives of coparceners, are entitled to get a share out of the coparcenary property in the event of its partition. This ancestral property can be partitioned at the instance of the coparceners and even an alienee of the coparcener's share. At the same time it must be noted that if and when an actual partition takes place, certain females amongst some schools of Mitakshara are entitled to get a share. If at the time of affecting a partition, they are not given the due share, then they can intervene or even file a suit to claim their share, but they are not permitted to file a suit for partitioning and ascertainment of their share in the joint family property. An issue arose this year as to whether a wife is entitled to seek partition of a property in the hands of the husband during his life time. In *Narayan* v. *Netram*,[84] a Hindu male, H was married to W. W

84 *Narayan Bhaklu Sahu* v. *Netram Narayan Sahu* AIR 2020 Chh 173: AIR OnLine 2020 Chh 539. In the High Court of Chhattisgarh at Bilaspur.

divorced him in the form of chhor chhiti as per the customary practices, and married anther Hindu male, H1. Thereupon H married W1 and a son S1 was born to him. During the subsistence of this marriage he married W2 and had three children from her. W1 filed a suit for partition for herself and on behalf of her son claiming 2/3rd property in the hands of H which was ancestral. The court held that a woman cannot demand a partition though she is entitled to get a share if and when a partition takes place. Therefore although she cannot file a suit for partition, but if the suit for partition is filed by her son, she would also be a necessary party to it as she is entitled to get a share if the court orders a partition and division of the ancestral property. With respect to the claim of W2 and her children, the court held that the children are illegitimate and neither W2 nor her children be entitled to any share out of ancestral property. But the children would be entitled to get a share out of the separate property of H upon his death. At the same time they cannot claim a share in the coparcenary property. The court further said, that the wife has no right to seek partition of the separate property of the husband during his lifetime.

VII THE HINDU SUCCESSION ACT, 1956

Live in relationship section 16 Succession rights of illegitimate children

Essentiality of marriage and its importance in relation to conferment of inheritance rights in favor of the spouse and the children is judicially enforced and re-enforced. Legislative accommodation of children born of void or voidable marriages under section 16 of the Hindu Marriage Act has a limited application. It though enables the children to inherit the property of their parents /father, it does not help them to succeed to the property of any of their relatives. It is primarily because their parents has at least cemented their relationship even though it was illegal in character. The fact is very risky as in ensuring statutory legitimacy to the children, the parents run the peril of being penalized for commission of bigamy which is a criminal offence. At the same time parties who do not marry at all are not able to give any statutory protection of property rights of the children begotten from this union, from the property of the father upon his demise as inheritance rights flow only from a valid marriage and in some cases and to some extent from a void or even a voidable marriage but not from a relationship that is short of marriage. Therefore, children born of live in relationship cannot claim any right in their father's property.[85]

Succession rights of the daughter

Despite the legal entitlement, social exclusion of daughters and its attempted enforcement by the male members of the family continues unabated. In an attempt to deny her, her due share, stories of archive customs are cooked up to retain control over property. Problems are further compounded if the family comes from a community that is outside the application of the statutory law. In *Maniyar Sai Dhola Ram Uraon* v. *Jangi Bai*,[86] a Hindu father A, had two sons and a daughter D. He belonged to the Oraon community. This is a community specified in the schedule of the Constitution

85 *Bharatha Matha* v. *R Vijaya Renganathan* , AIR 2020 SC 2685; *Chodan Puthiyoth Shyamalavati Amma* v. *Kavalam Jisha* , AIR 2007 Ker 246.

86 AIR 2020 Chh 183: AIR OnLine Chh 505.

of India as a scheduled tribe and therefore Hindu Succession Act is not applicable to them. The sons of the sons of A, *i.e.,* grandsons of A, upon his demise, claimed the entire property on the ground that their community practices the custom of total exclusion of daughters from inheriting the property of their father, and therefore D had no right in the property of her father and they alone are entitled to a share in it. The court dismissed their contention and held that the burden of proving to the satisfaction of the court the existence of such a custom in the community and its uninterrupted practice is on those who plead such a custom. If they fail to discharge the burden effectively, their case would not be accepted and the matter would then be decided in accordance with law. Further in light of the constitutional guarantees of gender parity, unfair exclusion of daughters is unjustified. It was held that in absence of establishing a custom that disinherits daughters and confines the inheritance only in favor of the sons, daughters would have a right to inherit the property of the father.

Daughters share in coparcenary property

Maximum attention was given to the case that came up for adjudication before the apex court this year in which the earlier pronouncements of *Prakash* v. *Phulawati*,[87] was expressly overruled and a daughter's rights in coparcenary property were further strengthened. In *Vineeta Sharma* v. *Rakesh Sharma*,[88] one A had constructed a house with his self acquired property in South Delhi and had later thrown it into the joint family hotchpotch. He had one daughter and three sons. Upon his demise as also of one of his sons (the brother), the daughter filed a suit for partition and a claim for 1/4th share of the house as the class-I heir. The suit for partition was filed in 2002 and the decree was passed by the trial court in 2007. The high court had held on (October 29, 2013) that keeping in view the intention of the parliament to enact the 2005 Act; she would be entitled to a share as per the latest law despite the fact that she had filed the case earlier to 2005. The Supreme Court also granted her the share on August 11, 2020.

A three judge bench of JJ Arun Mishra, Abdul Nazeer and M R Shah, held as under, [89]

i) The provisions contained in the substituted section 6 of the Hindu Succession Act, confer status of coparcener on the daughter born before or after amendment in the same manner as a son with same rights and liabilities;

ii) The rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in section 6 (1) as to the disposition or alienation, partition or testamentary disposition which had taken place before December 20, 2004;

iii) Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9.9.2005;

87 (2016) 2 SCC 36.

88 Civil Appeal no 32601 of 2018, dated Aug. 11, 2020.

89 *Id.*, para 129.

iv) the statutory fiction of partition created by proviso to section 6 of the Hindu Succession Act,1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining the share of the deceased coparcener when he died as an undivided member of Mitakshara coparcenary and was survived by a female heir of class-I as specified in the schedule of the Act of 1956 or male relatives of such female. The provisions of the substituted section 6 are required to be given full effect;

v) notwithstanding that a preliminary decree has been passed the daughters are to be given a share in coparcenary property that is equal to that of a son in pending proceedings for final decree or in an appeal;

vi) in view of the rigors of the provisions of Explanation to section 6 (5) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provision of the Registration Act, 1908 or effected by court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected by evidence alone cannot be accepted and to be rejected out rightly.

The court held that daughters cannot be deprived of the right to equality conferred on them under section 6, and expressly overruled the views to the contrary expressed in *Prakash* v. *Phulawati*,[90] and *Mangammal* v. *T B Raju*,[91] and also the opinion of *Danamma @Suman Gurpur* v. *Amar*,[92] that daughter of a living coparcener only would be a coparcener and held that a daughter is entitled to be a coparcener even if the father was dead, thus partly overruling it to the extent it was contrary to the present judgement.[93]

The points specifically considered and approved were as follows:

i. Act of 2005 is not retrospective but retroactive in operation.

ii. On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a joint Hindu Family governed by the Mitakshara law, a daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as a son.

iii. If the father dies the daughter does not cease to be a member of his joint family so how can she be ousted from coparcenary?

iv. Death of a coparcener and application of notional partition does not mean an end to the coparcenary, it continues even after that.

v. For daughters to be coparceners, a coparcenary should be in existence. If it is disrupted already by a partition, a daughter cannot be so included in it.

90 (2016) 2 SCC 36.

91 (2018) 15 SCC 662.

92 (2018) 3 SCC 343.

93 para 130.

vi. The pronouncement of *Prakash* v. *Phulawati*,[94] is incorrect. It is like adding to the text, a provision, something that is not there. And no words can be added by the court in a provision which is not there. It is arbitrary and non est in law.

For the past 16 years since the daughters have been conferred coparcenary rights in the same manner as a son, several judicial pronouncements have attempted to deviate from the clear written provisions putting unwarranted interpretations resulting in putting several superfluous obstacles in her path of securing her legislative rights. The apex court has put at rest the ambiguity and confirmed her entry into the coparcenary from the date of promulgation of the Act. It is irrespective of whether her birth was prior to or later to the promulgation of the amendment of 2005; is also irrespective of her marital status and also irrespective of the fact as to whether her father was alive on this date or not. Further nothing short of an actual partition can defeat her rights, as even a notional partition, the court said would not adversely impact her rights . In addition the rights were conferred/enlarged in her favour despite the fact that she had filed the petition before the promulgation of the Amendment Act, but enacted before the final culmination of her petition. It is a very welcome pronouncement indeed.

Succession to the property of a female intestate

The legal heirs to the property of a Hindu female are her children and her husband in the first instance. Special rules are provided in case the female intestate leaves behind property that she had earlier inherited from either her parents or her husband, in which case the rule of reversion applies if she dies issueless. In all other cases including the property that she receives from whichever source such as self acquisitions, gifts, or even Will, the general rules of succession apply. In *Kundanmal Munnalal Ji Oswal Sethiya* v. *Surendra Kumar*, [95] a Hindu woman owned property and left them under a Will to her daughter. Upon the death of the daughter, it was held that since she had received the property from her parents (mother) but under a Will, it would be treated as her general property and would be subject to the rules specified under section 15. The property would be inherited by her legal representative *i.e.,* her children and her husband.

In *Sewak Ram* v. *Soniya Bai Aanand Ram*,[96] a Hindu man A was the owner of the property. He had only one daughter D. Upon his death the entire property was inherited by D in the capacity of his daughter. D married H during her lifetime and had one daughter DD. Upon the death of D, H retained the possession of her entire property and later remarried W1, and had two sons born to him. These two sons claimed the entire property of late D, i.e., their step mother to the exclusion of even DD on the ground that after the death of D, their father H had become the absolute owner of the complete property, and they in the capacity of his sons would be entitled to the property. They further contended that DD being the step daughter of their father

94 (2016) 2 SCC 36.

95 AIR 2020 Raj 4.

96 AIR 2020 Chh 196: AIROnLine 2020 Chh 815.

would be totally excluded. The court dismissed their case in its entirety and held that this property originally belonged to D, the claimant's step mother. She had inherited this property from her father and upon her death; the entire property would be inherited by her daughter DD, to the exclusion of even her husband H. Thus the father of these claimants was at no point of time the owner of these properties that vested in her step daughter legally. In addition since the step sons cannot inherit the property of their step mother, the court declared DD as the owner of the entire property left by her mother D.

VIII CONCLUSION

The year 2020 saw some important judicial pronouncements in the area of domestic relations. The courts clarified the rules of adoption and the importance of proving a custom in contradiction to the statutory provisions in order to be legally enforceable. The desire of a wife to have another baby from her husband amongst matrimonial turmoil was negated by the Bombay High court. The court also re-iterated that in matrimonial litigation, no party should be allowed to take advantage of his own wrong or disability and that the condoned offence of matrimonial cruelty would revive in order the aggrieved party may get the benefit of it if it is repeated by the guilty party. Unfortunately a wife's attempt to retain her dignity, employment and enforce reproductive rights in having an abortion without the consent of the husband continued to be declared as a matrimonial misconduct serious enough to shatter her marriage. Judicial ambivalence continued in granting relief to some and denying to other in more or less parallel situations when parties in a hurry to get out of failed marriages pleaded waiver of one year mandatory separation while seeking divorce by mutual consent. The patriarchal practices of superiority of father's name took a jolt when a major son enforced his decision to append his mother's name as his surname rather than the usual practice of his father's. An important pronouncement clarified and laid down the rules for appointment of the wife as a guardian of her adult husband in a comatose stage so as to avoid hardship to the family. The most important pronouncement came in the shape of conferring and confirming the coparcenary rights in favor of daughters by the apex court.