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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 2021, have been briefly analyzed here.

II THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

Conditions of a valid adoption: Consent of the wife

Adoption can be a unilateral act only in case of a single parent wishing to give a child in adoption. The situation refers of course to a unmarried parents and also includes a case of mortality of one parent with the surviving parent offering to give the child in adoption. In such an eventuality, procuring the consent of anyone is unwarranted, but where the marriage terminates through a decree of divorce or is annulled via a decree of nullity, though the spousal relationship culminates, the parent child relationship continues. HAMA clearly provides that in order to affect a valid adoption, the parties desirous of giving the child in adoption must do it as a consensual act. Even if the matrimonial relationship comes to an end, it is not open to the custodial parent to unilaterally give the child in adoption to any person. The consent of both the parents is an imperative requirement unless one of them is disqualified due to reasons given under the Act. But if none of the parent is suffering from such legislative disqualifications, adoption effected by one parent without the consent of the other when the other is alive and not judicially disqualified would be totally invalid. *Bhanu Pratap Singh* v. *State of Uttar Pradesh*,[1] involved the case of two married brothers, A and B; one in a normal relationship with his wife while the other in strained marital circumstances. A, a government servant was married to W and living with her and B was married to W1 and had a son, S from this marriage, but the couple was estranged and were living away from each other, with B having the custody of the son. Since A and W were childless, they desired to take S, the son of the brother in adoption. The ceremony of giving and taking of the child was performed and a registered deed of adoption was drawn up. The deed depicted the parties taking the child in adoption as

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1 AIR 2021 All 19: AIROnLine 2020 All 2498.

A and W, but the biological father (B) of the child alone as the parent giving the child in adoption. In the deed, B was described as unmarried. Owing to strained matrimonial relations, he neither sought consent from the mother of the child, (his wife) nor even informed her about this adoption of their child in favor of his brother. Later upon the death of A, S claiming to be his adopted son filed for succession certificates seeking a share in his property as his legal heir and also applied for appointment of himself in his place on compassionate grounds. The claim of adoption was not accepted by the court as the adoption was carried without the consent of the biological mother of the adopted child as against the requirement of law. The court held that even if the relations between the parties are not cordial, the relationship did exist and as per law, the requirement that adoption could be effected only with the consent of the mother though can be initiated by the father was not fulfilled. The consent of the mother, who is alive and is not judicially disqualified cannot be dispensed away with. A child given in adoption by the father alone without obtaining the consent of the mother would be invalid and ineffective with the result, that the child would continue to be the biological child of the natural parents and would not be transported to the adoptive family irrespective of the duration for which he has been living with his adoptive parents or even bearing his name. Therefore in the present case, S would neither be entitled to claim any share in the property of deceased A nor would be entitled to compassionate appointment in his place as the adoption was invalid.

Effects of adoption: right of the parents to dispose of other property post adoption

Conscious of the fact that the process of adoption may not in all cases be only a spiritual one, the probability of important property issues coming up is an evident reality aptly taken cognizance of by the legislature. An adopted child may automatically assume a right over the adoptive parents' property, an assumption that is prevalent socially but incorrect legally. Section 13 of the HAMA, clearly provides that adoption of a child does not hamper the right of the adoptive parents to take a decision with respect to alienation of their property. Their ownership and property rights are not in any way hampered by adopting a baby in the family. Since the adopted child through the process of a valid adoption becomes akin to a natural born son, he acquires succession rights in the parental property but such rights are operative only on their demise when the succession opens. During their life time, no one has a right to interfere in any of the decision that they take with respect to their property including its total alienation. In *Puranjai Pandey* v. *Gopi Ram*,[2] post adoption, the adoptive son claimed a share in the property of his adoptive mother. His contention was that as an adopted son he was entitled to a share in the property held by his mother and sought its partition. The mother contended that since the property here had vested in her absolutely, she as the exclusive owner had all the rights over the property. The court ruled in her favor, dismissed the prayer of the son and observed, that the adopted son or his son cannot

2 AIR 2021 (NOC) 474 (Chh): AIROnLine 2020 Chh 773.

claim any right over it. If and when succession opens by way of the mother dying intestate, only then as legal heirs can they claim their share in the property but not in any other case.

Harmonious construct of HAMA and the JJA,[3]

Out of the three legislations enabling couples/ single persons to take a child under their care and protection, *i.e.,* Hindu Adoptions and Maintenance Act, 1956 and the Juvenile Justice Act, establish the relationship of a parent and child with full inheritance rights and certain disqualifications in matrimony owing to application of degrees of prohibited relationship, but the third enactment *i.e.,* Guardian and Wards Act, establishes a relationship of a guardian and a ward with no inheritance rights. Since both the HAMA, and the JJA facilitate and legalize adoption, the former for Hindus and the later cutting across all religions, often an issue arises whether in light of a systematic procedural mechanism provided under the JJA involving the child care committee, extensive home study reports, with suitability of the adoptive parent's evaluation in a professional manner, adoption under the HAMA, that is primarily a private act involving only the parties with no necessity of approaching any governmental authorities at all requires any formal nod/approval of the authorities under the JJA or the adherence to the procedural requirements, or are the two enactments and the requirements under both of them independent of each other?. Of late, the child care committee appointed for the welfare of the children and to facilitate their adoption encroaches upon the field of adoption under HAMA as well and their action results in unwarranted consequences involving children of tender ages who are separated from their parents and kept in children's home till the harassed parents are forced to approach the court and get the baby back. Though there have been decisions and clarifications given by the court in the previous years as well, it is unfortunate that the situation keeps on surfacing time and again. In *Kommuri Sriniwas* v. *State of Telangana, through Principal Secretary, Women Development and Child Welfare, Secretariat, Hyderabad*,[4] a childless couple, H and W registered themselves initially on CARA website expressing their desire to adopt a baby. Meanwhile they came to know through their relatives that another couple H_1 and W_1, who already had two sons and were expecting their third baby, due to strained financial circumstances, wanted to offer the expected child in adoption. The parties met each other and H_1 and W_1 agreed to give their child to H and W. All the parties were Hindus. Soon after the birth of the baby, both the parties organized a ceremony of Datta Homam and the biological parents formally gave their child to the adoptive parents. The child was then taken by the adoptive family and was nurtured by them. A few months later the child was taken to the vaccination centre by the adoptive parents. At the centre, the

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

4 AIR 2021 Tel 33: AIROnLine 2021 Tel1.

child was forcibly taken by the Child Development Project officer (CDPO) on the ground that:

i) the child was sold by the biological parents to the adoptive parents for a sum of Rs three lakhs; and

ii) the adoptive couple had not followed the proper and due procedure of law under the JJA.

The child was given to shishu grah, in the district Sangareddy. The biological couple refuted vehemently the allegations of sale and purchase of their child and were persistent about corroborating the fact of adoption to the adopting couple under the HAMA after duly performing requisite ceremonies including the giving and taking of the child, voluntarily and willingly. Further, since the child was neither a surrendered child nor an abandoned one within the meaning of JJA, they contended, that the entire process of adoption was a private affair without any statutory requirement of registration with or even inform CARA. In addition the biological parents also pleaded that the child be returned to the adoptive parents. The main issue before the court was: whether the action of the officials in taking away the child from the adoptive couple was valid and sustainable in law? Do the parties desirous of taking a child in adoption must necessarily proceed under the JJAct, even if there is no mention of the same under the HAMA?

The court at the outset observed:[5]

The applicability or non applicability of JJA and the CARA guidelines is no longer *res integra*. The Supreme Court while tracing the history of enactment of the JJA and the rules made there under and after analyzing the judgments rendered up to the date in Anokha,[6] case had noted the matters relating to adoptions and categorized them into three classes, viz.,

i) children who are orphaned or destitute or whose biological parents cannot be traced;

ii) children whose biological parents are traceable but have relinquished them or surrendered them for adoption, and;

iii) children living with their biological parents.

The above classification though was made in the context of international adoptions or adoption of children to outside of country couples the classification would throw light with respect to the scope and ambit of the JJA and CARA guidelines. In the same judgment, the Supreme Court further held that the third category was expressly

5 *Id.*,para 14.

6 *Anokha* v. *State of Rajasthan* (2004) 1 SCC 382: AIR 2004 SC 2820, para 8. See also *Sivarama K v The state of Kerala* 2020 (1) KLJ 641: *Jasmine Kaur* v. *Union of India* 2020 SCC Online P and H 1056: AIR Online 2020 Pand H 733, it was held that adoptions made under HAMA are outside the preview of the JJA.

excluded from consideration,[7] further recognizing the right of the biological parents to give their child in adoption to foreign parents. These observations of the apex court squarely apply to the adoptions made within the country as long as the adoptions are being made among the consenting parties and subject to their personal laws. In other words, the judgment of the supreme court is categorical and in unequivocal terms laid down that CARA guidelines apply to those children who have been or are sought to be relinquished or surrendered for adoption in general or placement agencies or other institutions where there is no contact between them and the adoptive parents at all and not to cases where the child is living with his/her parent/s and is agreed to be given in adoption to a particular couple.

The court held that adoption procedure under JJA, for resident Indians is restrictive in its application to the adoption of orphans, abandoned or surrendered children.[8] The same is expressly strengthened as JJA in itself categorically excludes the adoptions made under the HAMA.[9] They further observed, that in the present case, the adoption was not a sham one but a genuine adoption made under the HAMA between the biological and adoptive parents. They also dismissed the claim of the other party that since the adoption deed was not registered it cannot be an evidence to a valid adoption and observed that what section 16 of the HAMA, declares is the effect of a registered adoption deed but it nowhere says that adoption must be effected with the help of a registered adoption deed. In fact it is not at all mandatory that the adoption deed should be a registered one. The court directed that the baby be handed over to the adoptive parents in presence of the biological parents.

It is ironical that unawareness of legal procedure puts a vulnerable baby and the parents into an extremely awkward position. Proceeding as per law should not throw the intending parents into an unwanted and tiresome litigation by the over jealous action of the representatives of the child protection committee. The rule is not that all adoption henceforth have to be only in compliance with the procedure specified under the JJA. It is only in cases of abandoned, orphaned and surrendered children that the procedure laid down in the JJA would come into force. In all cases involving Hindu parties, if the biological and adoptive parents want to complete the process of adoption they can do so without bringing CARA into picture. Additionally, it is not mandatory that an adoption deed must be drawn up. The sphere in which both of these enactments apply are distinct without any contradiction.

III THE HINDU MARRIAGE ACT, 1955

Application of the Act to the members of scheduled tribes

The existence of multiplicity of matrimonial laws throws up unique challenges even amongst the parties professing the same religion. Hindu Marriage Act (HMA) is

7 *Lakshmi Kant Pandey* v. *Union of India* AIR 1984 SC 469.

8 Reg. 9, cha. 13.

9 S. 56, sub s. 3.

applicable to Hindus generally, with a specific exemption from its application in favour of members of scheduled tribes despite them professing Hindu religion. At the same time, for a marriage of two Hindus to be valid, the determining criteria is, not their tribe but their religion. It is noteworthy that this enabling law, permits a tribal or a non tribal to get married validly if the marriage was solemnized following the Hindu rites and ceremonies of one party's community even though such party may be a member of Scheduled Tribe , who are specifically exempted from the application of the Act. But since it is an enabling legislation providing matrimonial reliefs of specific nature, an issue arises; where both parties to marriage professed Hindu religion, but one of them came from a Scheduled Tribe, to whom this Act does not apply while the other was subject to the application of this Act, in the event of a matrimonial discord, can the party who is a member of scheduled tribe and who is specifically excluded from its application avail the matrimonial relief under this Act? In *Chittapuli v Union Government represented by its secretary, Ministry of tribal Affairs, National Portal Secretariat, Delhi*,[10] a Hindu woman, who belonged to the Bagatha tribe, which is a tribe specified in the article 342 of the constitution, married a Hindu man in accordance with the customary rites and ceremonies. It is pertinent to mention that while the wife came from a Scheduled Tribe, the husband was a non tribal. This marriage was duly registered before the Registrar of marriages, Vishakhapatnam in 2012, under section 8 of the HMA. She later faced matrimonial problems in her marriage and wanted to obtain relief under the HMA. The main hurdle was, can she being a member of Scheduled Tribe seek a relief under this Act in view of express exclusion of her tribe from its application? She prayed that the court issue a notification and permit her to avail the provision of the HMA so as to bring an end to her marriage under the same.

The court ruled in her favor and observed that though she was a tribal while her husband was not, both of them were Hindus and their marriage was not only solemnized under the HMA, but also registered under it. In such a case if she was a Hindu and her marriage was both solemnized and registered under the HMA, she would be entitled to seek the desired matrimonial relief under it. The court also noted that since her husband could not be subject to the customary laws of the tribe to which she belonged, he not being a member of her tribe, she would be lost and would be without a remedy in the eventuality of a denial of a remedy under the very Act under which she married. They held that the wife was entitled to move an application under section 13 of the HMA, for dissolution of her marriage as the husband is a non tribal, both are Hindus, and the marriage was both solemnized and registered under the HMA, 1955.

Solemnization Validity of marriage

Solemnization of a marriage remains one of the fundamental aspect of its initial validity, the other being its legality to be assessed in light of section 5 of the Act. The legal validity of a relationship that is short of solemnization cannot be determined at

10 AIR 2021 AP 121: AIROnLine 2021 AP 56.

all. It is rather inappropriate to call a relationship, "marriage" that has not been brought about by its valid solemnization. The status of husband and wife can be given to the parties only when the marriage is solemnized and in no other case. According to section 7 of the Act, that deals with solemnization of marriage, a Hindu marriage can be solemnized in accordance with customary rites and ceremonies of either the bride's community or the bridegroom's community and where the ceremonies include Saptapadi, the marriage would be final and binding on the completion of seven steps taken jointly by the couple amongst the chanting of mantras. It actually hints at solemnization of marriage as including saptapadi in some cases, and not all cases, by the use of expression "*where it includes saptapadi*" but does not provide as to what are the rites and ceremonies available in communities or what are the essential ceremonies and what are not. It compels the parties intending to get married to fall back upon their community elders or the priests to perform a marriage validly for them. In 1967, by an amendment known as the Hindu marriage (Tamil Nadu Amendment) Act, 1967, section 7-A, was introduced in the enactment and for the first time, a specific ceremony was described under the Act, performance of which would make the parties husband and wife. This very simple ceremony is confined to the state of Tamil Nadu and the union territory of Pondicherry, the implication being that the place of solemnisation of this form of marriage must be either of these two enlisted places. In *Ambedkumar* v. *Jaya*,[11] the parties exchanged rings with each other at the time of marriage in presence of their friends and relatives. On the issue of ceremonial validity of this marriage, the court held the marriage as validly solemnised, as it was in conformity of the process laid down under section 7-A of the Hindu Marriage (Tamil Nadu Amendment) Act, 1967.

On the other hand in complete ignorance of law, quite often youngsters may enter into intimate physical relationship after entering into a contract whose validity in itself be questionable, but perceive themselves as married with enforceable rights as against their parents and also vis-à-vis each other. In *Sadhna Kumari* v. *State of UP*,[12] a 17 years old girl entered into an agreement with a boy under 21 years of age to cohabit with him. The written agreement was styled as an agreement of marriage, and titled as "*Vivah Anubandh Patra*". They lived together for sometimes, but allegedly, she was taken by her father to her natal house. She then filed a writ of habeas corpus through her next friend, (her alleged husband) describing herself as a married woman and the boy with whom she had entered into such vivah agreement as her husband and claimed that she was detained against her wishes by her father. When asked to furnish a proof of her marriage, the alleged husband came forward with this marriage agreement, but could neither produce any other evidence of marriage, or any certificate nor even a date when they had married, or when her father had taken her away from

11 AIR 2021 (NOC) 484 (Mad);AIROnline 2020 Mad 529.

12 AIR 2021 All 150: AIROnline 2021 All 763.

his custody. The court held that such a petition cannot be entertained only on the basis of cohabitation based on an agreement that the parties being minor were incompetent to enter into. In fact such agreement even if they were major could not have given any legal sanctity to their relationship as nothing short of a valid solemnization of marriage is recognized to confer a legally enforceable relationship. Both under the HMA as also under the general law such agreements have no value and no sanctity especially when they are executed by minors. The court held the agreement to be void, and observed that no notice could be issued by the court on its basis for production of the girl in the court.

Marriage between a Hindu and a non- Hindu

The Act permits and facilitates a marriage between two Hindus only. A marriage would be valid only when both the parties are Hindus and a marriage between a Hindu and a non Hindu is not contemplated as valid. Even if the marriage is duly solemnised in accordance with the customary rites and ceremonies of the Hindu party, the marriage remains no marriage in the eyes of law, the parties would not get the status of husband and wife and they themselves can bring this relationship to an end as to begin with, it is not recognised in law as creating any relationship between the parties. They would not be entitled to claim any matrimonial relief from the court in case their marriage faces rough waters. The only prayer that may be entertained by the court would be for grant of a declaration that their marriage as being inter-religious, but solemnised under the HMA that does not permit it, is void. In *N Santosh Kumar* v. *B Mercy Anitha*,[13] a Hindu man and a Christian woman married as per the Hindu rites and ceremonies. The marriage was not registered. Later the man filed a prayer for getting a declaration of their marriage as null and void as it was not permissible under the HMA. The court granted him the declaration that the marriage was void as none of them had converted to the faith of other and were professing different faiths both at the time of marriage as also subsequent to that.

Bigamy

Absolute monogamy is presently the primary rule for all Hindus desirous of getting married under the HMA. The Act clearly lays down that one of the essential conditions for the validity of a marriage is, that neither party should have a spouse living at the time of the marriage, the relevant time being the time when the marriage is solemnized, and a marriage at the solemnization of which one of the parties had a spouse living, even if there was a petition pending in the court of law for his/her divorce, the marriage would be void.[14] In *Kusum* v. *Ankit*,[15] A Hindu woman got married to a man while concealing the fact that at the time of marriage she was already married to H_1. On

13 AIR 2021 (NOC) 721 (Kar): AIROnLine 2021 Karn 439.

14 *Bindra Devi* v. *Kumari Makni* AIR 2021 (NOC) 502 (Utr): AIROnLine 2021 Utr 27.

15 AIR 2021 (NOC) 97 (P and H); AIROnline 2019 P and H 1743.

coming to know of it, he filed a petition praying for a decree of nullity. The court accepted his petition and held that the marriage solemnised at a time while one of the party was already married is a void marriage and he was entitled to a decree of nullity of marriage.

The marriage of a Hindu man during the lifetime of his first wife with his brother's widow would also be null and void as violating the provisions of monogamy and hence a prayer for a decree of nullity can be filed for the second marriage.[16] The second woman who got married to a Hindu man during the lifetime of his first wife would not get the status of a legally wedded wife. She could not be called a widow after the death of the man/husband and hence would not be entitled to have a share in his property. If she cannot get a share of his property, she cannot execute a Will of her alleged share in her husband's property as the marriage in itself was void. Here A and B were two brothers and were married to W_1 and W_2 respectively. A was childless. Upon the death of B, A married W_2 while his marriage with W_1 was subsisting. A then died. W_2 assuming the role of his widow, executed a will of his property bequeathing the property in favour of P. The court held that the marriage of W_2 with A being void-ab-initio, due to its contravention with section 5(i) of the HMA, was void and consequently she was not eligible to get a share in his property. Any Will executed by her would be meaningless for want of title and therefore P could not derive any title from such a Will.

Restitution of conjugal rights: Essentiality of existence of a valid marriage

A matrimonial relief intending to bring the warring parties together, through the instrumentality of judicial process has little practical relevance when tested on the threshold of practical reality. Affairs of heart and the desire of the parties to live together or drift away from each other are matters in which judiciary can have little role to play. In practice it is used to establish a fault on the other party and show that the other has withdrawn from the society of the plaintiff without a reasonable excuse. Be that as it may, for bringing a petition for restitution of conjugal rights, the existence of a valid marriage is an essential criterion. Where the marriage falls short of a valid marriage the aforesaid decree cannot be granted. In *Banti Kumar* v. *Soni Kumari*,[17] owing to marital differences, the wife was allegedly driven out of matrimonial home, with the two and a half year old son born of this wedlock. She filed a petition praying for a decree of restitution of conjugal rights that was resisted by the husband claiming that there was no marriage as between them. The wife was able to prove the factum of marriage by the temple marriage receipt, their joint photographs taken at the time of wedding, child birth certificate and other related facts, that were also corroborated by her mother. The husband after the filing of initial written statement did not appear before the court. On the basis of the facts produced before it, the court concluded that

16 *Shankar Prasad* v. *Radheyshyam Devsharan* ,AIR 2021 Chh 135: AIROnLine 2021 CHH 574.
17 AIR 2021 Pat 30: AIROnline 2020 Pat 713.

a marriage did exist between the parties and that the wife was entitled to get a decree of restitution of conjugal rights passed in her favour as against the husband. They also held that a mere denial of marriage in the written statement would be meaningless if not corroborated with other evidence and would be unacceptable.

Reasonable excuse

The withdrawal of one party must be with a reasonable excuse as a counter to a petition for a prayer for grant of a decree of restitution of conjugal rights. If one of the party withdraws without a reasonable excuse, than only the decree of RCR can be granted, otherwise if the party is justified in leaving the company of the other, no remedy can be obtained by the plaintiff. What would be a reasonable excuse varies depending upon facts and circumstances of each case. An unsubstantiated plea that the husband was a drunkard and was not willing to take care of her would not amount to reasonable excuse for the wife to withdraw from his society,[18] but the husband abusing the wife in filthy language and inflicting unbearable torture on her that was testified by his own grown up daughters who also chose to leave the house and be with the mother[19] or the husband accusing the wife of suffering from unsoundness of mind, going to the extent of filing for a decree of nullity and inflicting physical and mental cruelty after the birth of the daughter[20] would amount to a reasonable excuse for the wife to withdraw from the society of the husband.

In *Mousami Sarkar* v. *Subhendu Sarkar*,[21] the husband filed a petition as against the wife praying for a decree of restitution of conjugal rights. He alleged that she left the matrimonial home and his company without any reasonable excuse as she wanted him to live with her parents as a ghar jamai. The father of the wife had gifted a piece of land and had even constructed a single storied house so that the couple could live together. However, the wife left the home of the husband with all her belongings and the little daughter that she had from this marriage. The court held that having failed to prove any torture or harassment at the hands of the husband, coupled with the delay in filing of any FIR about the alleged ill-treatment, the wife failed to prove her withdrawal due to a reasonable excuse. The decree of restitution of conjugal rights was granted in his favour by the court, that was confirmed by the high court. Similarly, in *Vandana Rajesh Mate* v. *Rajesh Shrinivas Mate*,[22] the wife filed a petition for restitution of conjugal rights and the husband filed for divorce on grounds of her cruelty. The lower court dismissed the petition of the wife but granted divorce to the husband and the wife filed an appeal. She was able to prove to the satisfaction of the

18 *Shobha Shivabasappa Nigadi* v. *Shivabasappa Gadigeppa Nigadi* AIR 2021 (NOC) 383 (Karn); AIROnLine 2020 Karn 634.

19 *Mani Gopal Saha* v. *Jhuma Bardhan* AIR 2021 (NOC) 494 (Tripura); AIROnline 2020 Tri 198.

20 *Santosh Kumar Gupta* v. *Radha Devi* AIR 2021 Pat 57: AIROnLine 2020 Pat 627.

21 AIR 2021 Cal 144: AIROnLine 2021 Cal 150.

22 AIR 2021 (NOC) 662 (Bom); AIROnLine 2021 Bom 287.

high court that she wanted and was willing to cohabit with the husband but he resisted all of her attempts to do so. The husband also failed to satisfy the court that the wife was indulged in any cruel conduct to him. The high court granted the prayer of restitution of conjugal rights of the wife and set aside the decree of divorce granted to the husband by the lower court.

Condonation ofdelay

The petition praying for restitution of conjugal rights must be presented within a reasonable time period. Attempts to get back to each other and save the marriage should be taken as soon as the realisation of the value of marriage and of the partner is dawned upon the parties. They are not expected to wait indefinitely or for a long time period before coming to seek the assistance of the court in putting the thing in the correct perspective as an inordinate delay may cast a heavy shadow on the genuineness of the claim of the party to seek the company of the other through the medium of the court. In *Sonal Aashish Madhapariya* v. *Ashish Harjibhai Madhapariya*,[23] there was a delay of 471 days in filing of a prayer for restitution of conjugal rights. The parties were in UK and could not come for deposition to India due to COVID-19. The father of the wife had the power of attorney for the case but he was also stuck due to the pandemic.The daughter of the parties was studying in United Kingdom and the wife had withdrawn an earlier case filed by her for divorce. The court held that the delay of 471 days in filing for restitution of conjugal rights was not due to any lethargy or malafide intention on part of the wife but was due to personal and extraneous circumstances and therefore she should be given an opportunity to put forward her case to be decided on merits. The delay was condoned by the court.

Decree of nullity: impotency

Impotency is incapability to perform the act of marital intercourse. It is the normal and legitimate expectation of the parties that after marriage sexual intercourse would take place between them. There may be conscious decision taken in respect to procreation of children, *i.e.,* when they should have children, whether they should have them or not are the decisions that are extremely personal to the couple and in normal course of time should be taken by them jointly. Bearing and rearing a child though affects a woman more than it does a man, has to be a joint decision as it leads to enforcement of joint responsibilities on both of them. At the same time, a decree of nullity is not about the bearing and rearing of the children but is about the very physical act of marital intercourse. If one of the party due to any physical or mental disability /challenge is incapable to perform the complete sexual act, the primary purpose of marriage is said to be frustrated and the party who is biologically and psychologically fit may get out of the marriage by securing a decree of nullity. In *Annapoorani* v. *S Ritesh*,[24] the husband filed a petition praying for a decree of nullity under section 12

23 AIR 2021 (NOC) 424 (Guj); AIROnLine 2021 Guj 31.

24 AIR 2021 Mad 137: AIROnLine 2021 Mad 248.

(1) (a) and (c), pleading that the wife was suffering from polycystic ovarian syndrome and was not fit for cohabitation or for procreation of children. The wife approached the court countering the allegations of the husband and stated that PSOS, is actually an endocrinal disorder and is not equivalent to impotency. It may affect the chances of bearing a child but cannot be equated to impotency which is incapability to perform the act of marital intercourse. The court dismissed her claim, upheld the contention of the husband and observed that,

> it is the normal and legitimate expectation of the husband to live with his wife and have cohabitation and children and if the same is not achieved owing to any physical or mental problem among them, it is quite logical that they would approach the court for divorce.

They further said that if there was an understanding between the parties, they may decide to go issueless or even resort to adoption but if one claims that the partner is incapable to produce a child then his legitimate expectations are shattered. The court granted relief to the husband and dismissed the objections of the wife.

The verdict appears to be not only problematic but also against the rule of law. Under which provision did the court reach such a conclusion is baffling. Section 12, permits the party to put an end to the marriage on satisfying the court that the other party is suffering from impotency which is not the same as difficulty in conceiving a child. The requirement that the marriage should not have been consummated owing to the impotency of the respondent was not fulfilled as the husband claimed that he was unable to get children due to the gynecological condition of PCOD the wife was suffering from. He nowhere said that the marriage was not consummated. This difficulty in getting children was due to a medical condition that nowhere hampered consummation of the marriage. It is the very act of performance of marital intercourse that hints at impotency and not where the parties do consummate the marriage but the wife cannot conceive a baby. Barrenness or sterility as it is popularly termed is not a ground on which any person can obtain a matrimonial relief. True, that adopting a baby has to be a consensual decision of the couple, but simply on the ground of inability to conceive, a decree of nullity cannot be granted.

Cruelty

Physical and mental cruelty

Cruelty as a ground for divorce under Hindu law can be both physical or mental, intentional or even unintentional. In case of mental cruelty, the enquiry must begin as to the nature of such cruel treatment and then assess the impact of such treatment on the mind of the other spouse. In order to constitute cruelty, the conduct complained of must be grave so as to conclude that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than ordinary wear

and tear of married life.[25] In *P Simhachalam* v. *Yasoda*,[26] the husband alleged that on more than one occasion the wife instigated her parents to beat him up and herself used to abuse him in filthiest possible language in front of children and outsiders. She made unsubstantiated allegations that since he was a labourer and she a teacher, he was jealous of her and would take away her entire salary, and indulge in extra marital affair. The couple had two daughters who refuted the claim of the mother. The court held that the marriage had broken down irretrievably and granted divorce and analysing the concept of cruelty, it observed, that the phrase "mental cruelty or even physical cruelty" is incapable of a precise definition that can be of universal application. In contrast to physical cruelty, which necessarily involves an element of corporeal torture , mental cruelty means inflicting mental torture on the spouse by another, by his/her words and conduct. The torture must be such so as to cause such grave mental hurt/ injury to the complaining spouse as would make it impossible for him/her to continue to have a matrimonial relationship with the other spouse. It is impossible to exhaustively enumerate what words/conduct of a party to marriage would amount to meting out mental cruelty to the other party to the marriage. One has to assess in a given factual matrix as to whether the words/demeanour of a spouse would amount to treating the other spouse with mental cruelty. The factors that are to be taken into account in ascertaining whether one spouse has treated the other with mental cruelty, include the social status of the parties, their educational level and the society they move in. A feeling of anguish, agony, disappointment and/or frustration caused in the mind of one spouse by conduct of another is normally what prompts the former to allege mental cruelty. To that extent, it is a state of mind and therefore subjective. Whether or not the complaining spouse has been able to establish mental cruelty being meted out by the other spouse can be objectively assessed by looking at the attending facts and circumstances in which the parties to the marriage have been living. If it appears to a reasonable man of ordinary prudence, that the conduct of one of the partners is such that the other partner cannot be expected to live with or continue matrimonial relationship with him/her, mental cruelty can be said to have been established. Naturally one stray incident of cruel behaviour will not suffice. The spouse must show that he/ she has been subjected to mental cruelty over a reasonable period of time causing such mental wound to him/her that it would be unfair and unjust to expect him/her to live with the other spouse. The court also proceeded to provide illustrations of what would normally be covered under the term "mental cruelty", *viz.*,

i) if a spouse is repeatedly abused, treated harshly and told that he/she is good for nothing , then that surely amounts to mental cruelty.

ii) Imputing mental infidelity to a spouse particularly in Indian social context would amount to treating the spouse with mental cruelty.

25 *K Kumarakrishnan* v. *T P Padmaja* AIR 2021 Mad 94: AIROnLine 2020 Mad 2025; *Tanmay Jaiswal* v. *Sapna Jaiswal* AIR 2021 (NOC) 326 (Pat); AIROnLine 2020 Pat 828.

26 AIR 2021 Cal 284: AIROnLine 2021 Cal 357.

iii) Lodging of false police complaint by a spouse against the other spouse amounts to mental cruelty.

In *Renu Das* v. *Bhaskar Das*,[27] wearing or refusal to wear sindoor was considered as a ground for cruelty as against husband as the wife was previously wearing it but stopped doing so and stated that she did not consider her husband as a husband. This the court noted would hurt the feelings of the husband and would amount to cruelty. He alleged that the wife had stopped him from visiting his relatives including his aged mother. The relations between them were strained and therefore a written agreement had to be executed between them that the husband would maintain the wife in a separate rented accommodation where his family members would not be allowed to come. The court held that this in itself would amount to cruelty towards the husband and since the marriage has irretrievably broken down, it was appropriate to grant a divorce. The wife applied for review but the court refused to entertain her plea and confirmed the decree of divorce.

An unsubstantiated plea taken by the husband that the wife's brother had given him beatings[28] or that the wife was having an affair with another man with a statement that he had come to know about it from the diary that she wrote in her own handwriting, but without either producing the diary or authenticating that what was written in the dairy was in her handwriting, or the wife pleading that the husband would extract money from outsiders to her embarrassment as she held an executive position,[29], unsubstantiated and vague allegation of adultery against the wife made after 19 years of alleged commission,[30] or of cruelty by wife some of which he had already condoned,[31] or failed to prove,[32] or of the wife's relations quarrelling with the husband and his family members, her insistence on living separately or talking to strangers on phone for long time,[33] pledging her own ornaments for obtaining loan for her brother without his or his parent's consent,[34] would not be accepted by the court as amounting to cruelty.[35] A mere allegation of strained relationship with the wife during 41 years of marriage without listing out any instance of a cruel conduct except alleging that she is not a good human being and is of quarrel some nature, when the husband himself was found guilty of physical abuse would not entitle him to a decree of divorce on

27 AIR 2021 Gau 45: AIROnline 2020 Gau 536.

28 *Savita Ravindra Chougala* v. *Ravindra Bapuji Chougala* , AIR 2021 Kar. 162: AIROnLine 2021 Kar. 1613.

29 *Saraswati Banjare* v. *Dilip Banjare* AIR 2021 (NOC) 620(Chh); AIROnLine 2020 Chh 777.

30 *Murlidhar Dattuji Thote* v. *Pushpa Murlidhar* AIR 2021 (NOC) 584 (Bom; AIROnLine 2021 Bom 284.

31 *Vishall Singh* v. *Priya* AIR 2021 Delhi 10: AIROnline 2020 Delhi 1025.

32 *Prakash Babu Mishra* v. *Asha Prakash Mishra* AIR 2021 (NOC) 545 (Bom; AIROnLine 2020 Bom 540.

33 *Neelam Devi* v. *Vikas Singh* , AIR 2021 (NOC) 607 (All); AIROnLine 2020 All 2215.

34 *Shripal Meshram* v. *Urmila Meshram*, AIR 2021 Chh 184: AIROnLine 2021 Chh 785.

35 *Rakesh Kandpal* v. *Neelam Kandpal*, AIR 2021 Utr 81: AIROnLine 2021 Utr 103.

grounds of wife's cruelty,[36] but unsubstantiated allegations of demand of dowry and in consequence not only filing of criminal proceedings against the husband and his family members but also insisting on its continuation despite the fact that even after a full trial with respect to that, the charges against husband were not proved,[37] or lodging of false criminal cases under section 498A, 506 IPC and sections 3 and 4 of Dowry Prohibition Act, 1961 specially when the court held them as not proved,[38] or the husband playing the drama of committing suicide, being always suspicious in nature and would follow the wife to her college causing mental agony leading to abortion,[39] harassment by the wife to the family by pushing members down the stairs, treating them with cold insolence, threats of ensuring their termination along with false allegations of demand of dowry[40] or creating ruckus at the workplace of husband and snatching his vehicle,[41] attempting to commit suicide, assaulting mother-in-law and the son of her brother-in-law, pressing the neck of her husband and the daughter, jumping to neighbour's house from the roof of her matrimonial home,[42] would amount to cruelty.

In *Joydeep Majumdar* v. *Bharti Jaiswal Majumdar*,[43] the wife made several defamatory complaints to her husband's superiors in the Army for which a court of enquiry was held by the Army authorities against him. Primarily due to this, his career progress got affected. She also made complaints against him to the State Commission for Women and posted defamatory materials against him on other platforms. The husband had prayed for divorce and the wife had filed for restitution of conjugal rights. He contended that these malicious complaints had sullied his reputation, affected his career prospects and had resulted in a loss of face amongst his colleagues. The court held in favour of the husband, granted dissolution of marriage decree to him and dismissed the prayer of the wife for restitution of conjugal rights. In *Mahadeb Bandopadhyay* v. *Alpana Bandhopadhyay*,[44] the husband filed a petition as against his wife praying for a decree of divorce on grounds of her cruelty, but he was not able to prove any single instance or conduct of the wife amounting to cruelty. On the other hand facts revealed that soon after marriage the husband came to reside in the paternal house of the wife and lived with her. A daughter was also born to the couple. Later he

36 *Gorelal Swarnkar* v. *Mohini Devi Swarnkar*, AIR 2021 (NOC) 467 (Chh); AIROnLine 2020 Chh 762.

37 *Gautam Mahanty* v. *Jayshree Mahanty*, AIR 2021 Jhar 101: AIROnline 2021 Jha 240.

38 *V Saritha Kumari* v. *S Anbarasu* AIR 2021 (NOC) 434 (Mad); AIROnline 2020 Mad 1963; *Jatinder Singh* v. *Suman Devi*, AIR 2021 (NOC) 76 (P&H); AIROnLine 2019 P and H 1270.

39 *P Sudha* v. *Rajesh* AIR 2021 Karnataka 195: AIROnLine 2021 Kar. 1361.

40 *Bindu* v. *Kuldeep* AIR 2021 Delhi 67: AIROnLine 2021 Delhi 212.

41 *Shivani Gupta* v. *Piyush Sugandhi* AIR 2021 Chh 28: AIROnLine 2020 Chh 849.

42 *Rajeshwar Prasad Kaushal* v. *Gayatri Kaushal,* AIR 2021 Chh 98: AIROnLine 2021 Chh 346.

43 AIR 2021 SC 1165.

44 AIR 2021 (NOC) 320 (Cal); AIROnLine 2021 Cal 183.

left the wife at her paternal place only and went to live elsewhere and did not keep in touch with her. Rather, he remarried and also fathered a child from the second marriage. The first wife was able to prove the fact of his paternity regarding a baby from the second marriage with the help of the birth certificate issued by the authorities. The court held that since he himself was guilty of committing cruelty to the wife, he was not entitled to get a decree of divorce.

Desertion

Desertion as a ground for divorce must be for a minimum period of two years immediately preceding the presentation of the petition,[45] with a mandate to prove that the withdrawal by the spouse allegedly in desertion is without a reasonable excuse with an intention to permanently forsake or abandon the other spouse.[46] Thus, an unexplained and unjustified separation on part of wife for a period of 25 years,[47] or leaving the spouse for no rhyme or reason,[48] or when the husband was in dire need of care and company after developing cancer in eye and losing his sight, leaving him and filing cases thereafter against him under Dowry Prohibition Act, 2005 and under DVA,[49] would amount to desertion on her part. Guilt on part of the petitioner such as mmaking unsubstantiated allegations of adultery, cruelty and desertion against other,[50] so as to force the other party to leave the matrimonial home would be fatal to a charge of desertion and would result in dismissal of his prayer to get the decree.[51] Husband himself withdrawing from the society of the wife, indulging in cruelty and having illicit relations with another woman, being guilty of physical violence against the wife under section 323 of the IPC,[52] or having the names of three different women in the voter's lists showing them to be his wives, amidst allegations of torture and cruelty on his part,[53] or subjecting the wife to torture and maltreatment after she lost her two newborn children and branding her a witch as a result of which, after the birth of the third child she started living separately with the newborn would not amount to desertion

45 *Tek Chand* v. *Ratu Devi* AIR 2021 HP 142: AIROnLine 2021 HP 706; *Tanmay Jaiswal* v. *Sapna Jaiswal* AIR 2021 (NOC) 326 (Pat); AIROnLine 2020 Pat 828.

46 *Jatinder Singh* v. *SUMAN Devi,* AIR 2021 (NOC) 76 (P and H); AIROnLine 2019 P and H 1270.

47 *P C Kunhinarayanan* v. *Vijayakumari* AIR 2021 Ker 177: AIROnline 2021 KER 1006.

48 *Bidyut Kumar* v. *Tapa Saha* AIR 2021 (NOC) 481 (Tri); AIROnline 2020 Tri 97.

49 *Aparna Dey* v *Alok Dey* AIR 2021 (NOC) 414 (Tri); AIROnline 2020 Tri 282.

50 *Suman Mandal* v. *Rajesh Kumar Mandal* AIR 2021 (NOC) 418 (Pat); AIROnLine 2020 Pat 522.

51 *Suman Mandal* v. *Rajesh Kumar Mandal* AIR 2021 (NOC) 418 (Pat); AIROnLine 2020 Pat 522.

52 *Gorelal Swarnkar* v. *Mohini Devi Swarnkar* AIR 2021 (NOC) 467 (Chh); AIROnLine 2020 Chh 762.

53 *Murlidhar Dattuji Thote* v. *Pushpa Murlidhar* AIR 2021 (NOC) 584 (Bom; AIROnLine 2021 Bom 284.

on part of the wife,[54] but where the wife deserted the husband after living with him for 41 days and then refused to join him and this refusal to cohabit continued even at the trial stage,[55] the court held her guilty of desertion and the husband was granted divorce. Where the parties had gone to Canada willingly, but the husband came back to India while the wife chose to stay there for better prospects, it would not amount to desertion more so as the husband was not able to satisfy the court as to why, he was not inclined to join her in Canada besides merely citing health issues. He had not produced any medical certificates *etc*. The court dismissed his charge of cruelty and desertion against his wife and rejected his petition for divorce. [56] Similarly where the wife could not join the husband in USA due to her little baby, it would not amount to desertion.[57]

Divorce by mutual consent

A speedier and appropriate remedy with minimum bitterness is divorce by mutual consent. Should something go wrong with the marriage, it tends to avoid fighting in courts an ugly, tedious and an extremely time consuming battle, and encourages the parties to come to the negotiating table. If as mature persons , they come to an agreement to culminate their marriage, they need to file a mutual consent based petition praying to the court that since they have mutually decided to put an end to their marriage the court may facilitate the process. They are given thereafter a time of six months to rethink about their decision and come back to the court. If they are still firm on going their separate ways, they can move a second motion and request the court to dissolve their marriage.

A petition for divorce by mutual consent can be signed, filed and prosecuted by a power of attorney.[58] So, where at the time of fling of a mutual consent based divorce petition, the husband was abroad and due to Covid-19, restrictions, could not come to India, his application filed through power of attorney was rejected by the family court but the high court in appeal held in his favour and directed the family court to accept the petition and hear it.[59]

All that the parties need to inform the court is, that they have not been able to live together and have mutually decided to put an end to their marriage. Therefore, existence of a serious matrimonial dispute is not a prerequisite for the filing of a petition for divorce by mutual consent.[60] The provisions relating to mutual consent are a ground

54 *Dumeshwari Dewangan* v. *Devendra Kumar Dewangan* AIR 2021 (NOC) 142 (Chh); AIROnLine 2019 Chh 1894.

55 *V Saritha Kumari* v. *S Anbarasu* AIR 2021 (NOC) 434 (Mad); AIROnLine 2020 Mad 1963.

56 *Prakash Chandra Joshi* v. *Kuntal Prakashchanra Joshi,* AIR 2021 Bom 249: AIROnLine 2021 Bom 1945.

57 *K Kumarakrishnan* v. *T P Padmaja* AIR 2021 Mad 94: AIROnLine 2020 Mad 2025.

58 See ss. 13B 20(2), as also Kerala civil rules of practice (Ker) R. 23.

59 *Sethi P V* v. *Nil* AIR 2021 Ker 220: AIROnLine 2021 Ker 1237.

60 *Sandhya Sen* v. *Sanjay Sen* AIR 2021 Chh128: AIROnLine 2021 Chh 389.

for divorce and a decree of Judicial separation cannot be granted on the basis of mutual consent, it is only divorce that can be so granted.[61]

Section 13 B reads as under:

13 B Divorce by Mutual consent

(1) Subject to the provisions of this Act, a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to the marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976,[62] on the ground that they have been living separately for a period of one year or more , that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

The first requirement for availing the benefit of this section is, that the parties must demonstrate that they were living away from each other for a period of one year or upwards. Living away means physical separation or can it include a situation where the parties may be living under one roof yet not living together as husband and wife? Would that be sufficient to fulfill the requirement of the section was discussed this year in *Himanshu Pradeep Patil* v. *Nil*.[63] Here, the parties stated in the petition that they were living away from each other for a period of one year before presentation of the petition for mutual consent out of free will and they had mutually agreed to dissolve their marriage. Their marriage was solemnized on April 6, 2018, and they started living away from each other physically, *i.e.,* separate habitation since January 13, 2019 and the petition was filed in Aug 2019, *i.e.,* seven months after their physical separation. Nevertheless, the couple pleaded that even though they were prior to their physical separation, lived under one roof, they were not cohabiting in the real sense of the term. They were not living together as husband and wife and if the complete period including the time when they stayed under the same roof but distanced themselves from each other's society was also included, it exceeded one year from the date when they filed the petition together. The court accepted their plea and observed that it is not necessary that the parties must live away in separate habitation for a period of more than one year before filing a petition for divorce by mutual consent. There may be cases where they may be living under the same roof, yet don't live as husband and wife and on the other hand they may be living under different roofs or even different cities yet may cohabit. What the law requires is that they should be living away from each other as husband and wife for a period of one year or upwards and not that they should be living in separate accommodation for this period. Absence of cohabitation is the requirement and not living under the same roof. The court on being satisfied that despite the fact that they were living under the same roof they

61 *Sandhya Sen* v. *Sanjay Sen* AIR 2021 Chh128: AIROnLine 2021 Chh 389.

62 (68 of 1976).

63 AIR 2021 Bom 33: AIROnLine 2020 Bom 1393.

were not cohabiting and did not live as husband and wife concluded that their separation exceeded the one year requirement postulated under the law and therefore their mutual consent based divorce petition may be accepted. They set aside the family court decree refusing to give them relief and dissolved the marriage.

Plea for waiver of six months wait

The second imperative condition for availing the decree of divorce by mutual consent is that after the initial petition, the parties have to wait for a period of a minimum of six months and maximum eighteen months. This is called the cooling time period to evaluate the decision and ensure the possibility of revoking it, if taken in haste. Very often, the parties view this waiting time period as further harassment, as the desperation to get out of the matrimonial bond, becomes increasingly evident. The argument most often floated is that the marriage has broken down, the parties are mature and that there is no possibility of their coming back together and that it would prolong the agony of the parties if they are asked to wait for another six months The courts have shown considerable ambivalence in this regard and have in many cases granted them a waiver and in several other cases refused it to others. This ambiguity in light of the clear provisions of law is not healthy as the suffering of one is the most exceptional agony to oneself and creates a sense of entitlement, only giving to extreme dismay in the event of denial. Out of twelve cases surveyed this year on this issue, the judicial response was mixed. Even though the apex court under article 142 has the power to waive off the requirement of cooling period of six months, only two cases[64] reached its level and the court waived off the period taking into cognizance the fact that the marriage between the parties was dead and an adequate settlement acceptable to both the parties was reached. In both of these cases, the parties were living way from each other for a long duration. In ten other cases, the refusal to waive off the cooling time period was in two cases only, while in eight cases the period was waived off.

In *Bharti Arya* v. *Rakesh Arya*,[65] the court rejecting the plea by the parties for waiver of six months cooling time period, held that cooling period should not be waived of till there is a strong possibility of rehabilitation of parties. Every attempt should be made to save the married life, while *in Sapna Singhal v Piyush Singhal*,[66] the argument that the father of the wife being a heart patient had undergone operation twice was not consider sufficient to grant a waiver. On the other hand, where the parties were living away from each other for a long time period with a dead marriage with no possibility of a reconciliation, the court granted them relief by waiving off the six months time period after they reached an amicable settlement and on being

64 *Sabita Shashank Singh* v. *Shashank Sekhar Singh* AIR 2021 SC 3341: AIROnLine 2021 SC 289; *Hironmoy Sen* v. *State of Bengal,* AIR 2021 SC 5235: AIROnLine 2021 SC 929.

65 AIR 2021 MP 61: AIROnLine 2021 MP 65.

66 AIR 2021 (NOC) 82 (MP); AIROnline 2019 MP 1597.

satisfied that there was no pressure on the parties. In majority of the cases they were literate and they had lived with each other.[67] The court said that six months time period between the two motions is merely directory and not mandatory and can be waived.

Appeal against decree of divorce by mutual consent

Dissolution of marriage is a very serious and often despondent issue and the courts should be approached only as a last resort when no other alternative is on the anvil. The Family Courts Act has also made it mandatory to explore all possibilities of conciliation and mediation and if there is the remotest possibility of reconciliation, than saving the marriage has always been a preferred option with the courts as well. This holds true not merely for contentious litigations but even for those opting to put an end to their marriage through mutual consent based petition. It appears extraordinary, that the parties make up their minds to culminate their marriage and go their separate ways, work towards obtaining a matrimonial relief by engaging lawyers and visiting courts, and after the decree is awarded, have a change of heart and attempt to go back to the partner with whom they stated before the court, that they were not able to live with. Nothing prevents them from remarrying each other soon after they obtain a decree of dissolution of marriage from the court, but can they go in appeal against the decree of divorce granted to them at their own asking through mutual consent was an interesting issue, that came up for adjudication before the court this year in *Rajwinder Kaur* v. *Palwinder Singh*,[68] married in 2015, on account of marital differences, the parties started living away from each other in 2017. They filed a petition praying for divorce by mutual consent in 2019 and ultimately got a decree of dissolution of their marriage in 2020. After getting divorce, they reconciled their differences and started living together again as husband and wife along with their minor child. They then filed an appeal against the decree granted to them (at their behest only) in the High Court, for setting it aside and supported it by affidavits. The court held after citing an earlier case on identical facts,[69] in which the same issue had arisen and it had been decided that an appeal against the consent decree passed by the court under section 13 B is appealable under section 28, of the Act and sub section of section 96 of the CPC has no bar. Since this issue was no more *res integra*, and set aside the divorce

67 *Suresh S* v. *Lakshmi* AIR 2021 Kar. 180: AIROnLine 2021 Kar 2784; *N Murali Krishna* v. *K Nirmala* AIR 2021 (NOC) 160 (Karn); AIROnLine 2020 Karn 2305; *S Sujata v D P Sanjay Kumar* AIR (NOC) 373 (Kar); AIROnline 2020 Kar 2412; *C G Mamatha* v. *M Praveed Kumar* AIR 2021 (NOC) 788 (Karn); AIROnLine 2021 Karn 725; *Saroja Kumar Mohanty v Family Court, Cuttack* AIR 2021 Orissa 135: AIR 2021Ori 188; *Rishabh Jain v Nitakshi Jain* AIR 2021 Delhi 36: AIR OnLine 2021 Delhi 55; *Kavita Malik* v. *State of NCT, Delhi* AIR 2021 Delhi 88: AIROnLine 2021 Delhi 516; *Priyanka Chauhan* v. *Principle Judge, Family Court* AIR 2021 All 164: AIR OnLine 2021 All 156.

68 AIR 2021 P and H 201: AIROnLine 2021 P and H 1057.

69 *Krishna Khetrapal, Headmistress, Government Girls High School, Bhuna, Tehsil, Fatehabad, District Hisar* v. *Satish Lal*, AIR 1987 P and H 191: 1986 (2) PLR 608.

decree so as to enable the parties to live together once again as husband and wife. They categorically said that an appeal against the decree of divorce based on mutual consent is maintainable in the court of law.

Irretrievable breakdown of marriage

The grounds for divorce are quite exhaustive and well defined in the Act. The theories of matrimonial misconduct, disability and grave illness form primarily the backdrop of the grounds. Later additions of presumptions of breakdown of marriage after availing the matrimonial remedies of restitution of conjugal rights and judicial separation and their failure to save the marriage and that of mutual consent have been well listed. Nevertheless, in the very first instance approaching the court with a plea of irretrievable breakdown of marriage, till date has not found a place in the divorce grounds presently specified in the enactment. Yet a number of matrimonial petitions are filed in the court praying for dissolution of marriage by one party to the marriage pleading that their marriage has broken down irretrievably and they should be allowed to terminate the marital bond. Though the matter can only be decided on this issue if it reaches or makes it way to the apex court, where the apex court under article 142 of the Constitution of India can in order to do complete justice in the matter may pronounce a decree of divorce even in absence of such a provision in the Act, yet taking the analogy of the notion of doing fair and complete justice to the parties in the given situations, the high court's and even the family courts have started granting divorce on the ground of irretrievable breakdown of marriage. This year, four cases under survey showed divorce being granted by the family court, high court and the apex court respectively. In *Reeta* v. *Ankit Kumar*,[70] the family court had granted divorce to the parties on grounds of wife's cruelty and also irretrievable breakdown of marriage The high court on appeal noted that the family court presumed that only because the wife had filed a criminal case against the husband, she was guilty of cruelty. The high court reversed the decision of the family court stating that the family court has no power to grant divorce to the parties on grounds of irretrievable breakdown of marriage as this is not yet specified a ground in the Act. It is only the apex court which can do it. Similarly, the High Court of Calcutta, also reversed a decree of divorce on grounds of irretrievable breakdown of marriage by the lower court despite the evidence that the wife loved her husband and was living with him. They noted that the husband had proceeded to the court on grounds of wife's cruelty but the court dissolved the marriage stating that the marriage has been broken irreparably.[71] The High Court of Madhya Pradesh on the other hand dissolved the marriage, on ground that it has irretrievably broken down since the parties were not living with each other for a long time.[72]

70 AIR 2021 All 225: AIR OnLine 2021 ALL 2209.

71 *Mukul Ray* v. *Samar Bijoy Roy* AIR 2021 (NOC) 871 (Cal); AIROnLine 2021 Cal 98.

72 *Nidhi Gangele* v. *Sudhir Gangele* AIR 2021 (NOC) 150 (MP); AIROnLine 2020 MP 1515.

In *Subhransu Sarkar* v. *Indrani Sarkar*,[73] the husband filed a prayer seeking divorce on grounds of cruelty and desertion by the wife. His primary grievance was his inability and unwillingness to accept to abide by the insistence of his wife that he live away from his parents. The wife countered his allegation by accusing him of adultery. At the same time, none of them could prove the allegations to the satisfaction of the court. The court noted that despite the deposition by the wife that she was willing to live with the husband she made no sincere attempts to live with him. Since the parties were living away from each other for a period of more than 16 years, the marriage was practically dead, the apex court after exercising their powers under article 142 dissolved the marriage directing the husband to pay a sum of Rs/. 25 lakhs to the wife.

IV- MAINTENANCE

Maintenance under the Hindu Adoptions and Maintenance Act, 1956

The primary condition for the applicability of multiple family laws in India, remains the religion of the parties. Indians adhere to five major religions, *i.e.,* Hindus,[74] Muslims, Christians, Parsis and Jews. For each of these religious community, there are disparate laws. The applicability criterion are well defined and the law available to one religious community is not available to a member coming from another religion subject only to one exception. This is true even in those cases where an inter religious marriage exists validly amongst the couple. The Hindu Adoptions and Maintenance Act applies only to Hindus. The rule is applicable so strictly that if a Hindu wife ceases to be a Hindu by conversion to another faith, an express provision in the Act disqualifies her from claiming maintenance from the Hindu husband. Thus, Hindus only can benefit from the provisions of the HAMA. In *Pradeep Ramteke* v. *Suchitra Pradeep Ramteke*,[75] the wife was a Muslim and the parties had a daughter from this marriage. The wife applied for maintenance under HAMA, both for self and the daughter, and the husband contented that she being a Muslim, cannot avail the provisions of the HAMA, that is essentially available only to Hindus. The court accepted his contention and held that the Act is applicable only to the Hindus, Buddhists, Jains and Sikhs and is not applicable to non Hindus. The daughter's birth certificate showed the Hindu man as her father, so presuming that she was a Hindu she was allowed maintenance claim but the wife in absence of any proof of conversion to Hindu faith was denied maintenance as HAMA does not apply to non Hindus.

Interim maintenance: able bodied rule

One of the primary rules of natural justice is that both the parties before the court should be on an equal platform and be equally heard. Since litigation involves engaging a lawyer, to be heard on more or less the same level, the economically weaker spouse

73 AIR 2021 SC 4301: AIROnLine 2021 SC 716.

74 The expression including Hindus, Buddhists , Sikhs and Jains.

75 AIR 2021 (NOC) 630 (Bom): AIROnLine 2021 Bom 283.

must have adequate finances to be able to engage a good representation, lest the risk of losing the case becomes evident. The financially strong party therefore is directed to pay not only interim maintenance but also the cost of litigation to the financially vulnerable party otherwise with an uneven representation, the ability to procure the services of a good and expensive lawyer will tilt the balance in favour of the stronger leading to unjust consequences. It is noteworthy that, the enactment places both the spouses on an equal footing as far as their financial responsibility is concerned. If the husband is financially weaker and the wife is in a strong position, he can claim maintenance from her, while other wise in a reverse situation, the wife can claim maintenance from the husband. The only pragmatism that needs to be displayed is that the party having sufficient means is directed to maintain the other. He/she should possess adequate finances to maintain himself/herself and also provide for other. If the party is not earning he/she is not expected to maintain the other. Visualising the social pattern in India, it is no wonder that most of the cases claiming maintenance including interim maintenance, emanate from women. At the same time one of the requisite before a direction comes from the court to pay maintenance to the spouse in indigent circumstances is, that the party so directed must possess necessary or adequate finances to maintain other. An issue often arises, that the presumptive stronger financial position of the husband may not be true in all cases and therefore, if the husband is unemployed or is not economically active otherwise, would he still be under a legal obligation to maintain his wife. In situations when he is unable to maintain himself, can he be fostered with an additional responsibility to maintain his dependent wife? The verdict of the courts seems to be in the affirmative. In *Baiju k* v. *Sivanunni v Hema Baiju Sivanunni*,[76] the husband was a contractual employee, working as a Captain in a foreign shipping company. He pleaded that his contract was terminated due to a criminal case filed by his wife against him, with the result that he was forced to quit the job and work as a visiting faculty in a private college. Here again, the wife intervened resulting in a discontinuation of the service. The court dismissed his contention, ruled in favour of the wife and observed that the husband even if not employed if able bodied, is under an obligation to provide maintenance to the wife and child and confirmed the maintenance allowance of Rs 4500/ per month to the child till his attainment of majority and Rs 4000/ each to both of them. Similarly, in *Santosh Singh Airi* v. *Sunita Aithani*,[77] owing to matrimonial disputes the wife had filed criminal cases against the husband. Married in 2019, they were blessed with a son in 2020. Pursuant to a divorce petition filed by the husband she applied for interim maintenance and costs of litigation. The husband contended that his employer had threatened him that since there were criminal cases filed against him he would be dismissed from his service. The court held that despite the fact that the husband may

76 AIR 2021 (NOC) 47 (Ker); AIROnLine 2020 Ker 404.

77 AIR 2021 Utr 115: AIROnLine 2021 Utr 242.

be out of employment, he is legally under an obligation to maintain his wife. The wife had no source of income and was living with her widowed mother along with the little son amongst allegation of torture and forceful eviction from the matrimonial home. She claimed that she was unable to maintain herself and her son. The court rejected the plea of the husband and granted maintenance to the tune of Rs 6000/ per month to the wife.

Thus the responsibility of the husband is well entrenched and even if he has meagre means as he was simply a MNREGA labour,[78] or no means at all he would still be under a legal obligation to maintain his wife and child.

Eligibility to claim interim maintenance: application of fault theory

Interim maintenance as the term suggests is an interim measure to secure a specific purpose. It is suggestive of an emergency situation, to prevent the indigent spouse from starvation and to be able to present her /his case on more or less the same platform as is to be done by the financially comfortable party. Any other approach would be counterproductive and would result in frustration of the judicial redressal system. Therefore, when a matrimonial remedy in the nature of any of the four reliefs is sought by any party, the one in indigent circumstances is allowed to make an application praying for interim maintenance and cost of litigation. Interim maintenance helps the indigent spouse to look after oneself and meet the cost of litigation, to adequately represent the case filed in the court either by herself or by the other party. These are steps contemplated in the very initial stages and are regardless of the outcome of the case on merits. Even if the petition is later dismissed or awarded as against the indigent spouse, the interim maintenance and litigation expenses cannot be denied to her. Who was at fault or whose conduct forced the spouse to file for a matrimonial relief, are irrelevant considerations? Unfortunately, the High court of Madras differed from the written rule and ruled otherwise in *Perumal* v. *Saraswathi*.[79] The husband here had filed a petition praying for a decree of divorce on grounds of wife's adulterous behaviour. The wife applied for interim maintenance. The Family court granted interim maintenance of Rs 3000/ per month to the wife without taking up the divorce petition filed by the husband. The high court held that the family court ought to have tried both the prayers together, *i.e.,* the divorce petition and also the interim maintenance as if the charges were established by the husband prima facie, that the wife was indeed leading an adulterous life than she would not have been entitled to any interim maintenance as an undeserving party cannot be held entitled to claim any maintenance.

The verdict of the court here unfortunately does not appear to be correct, rather is against the well entrenched rule that the conduct of the party claiming interim maintenance is totally irrelevant. The rule is reasonable as the courts are supposed to take the interim maintenance application first and then only take the main petition

78 *Babu Lal* v. *Anita Devi* AIR 2021 (NOC) 415 (Raj); AIROnLine 2019 Raj 1389.

79 AIR 2021 (NOC) 754 (Mad); AIROnLine 2021 Mad 643.

praying for a matrimonial relief. It actually goes a step further. If the interim maintenance application is granted, then its compliance or non compliance has serious and important consequences. The main petition may be put on hold if the petitioner fails to pay the interim maintenance awarded by the court to the respondent and if the party so directed to pay interim maintenance is the respondent, his/her defence may be struck down in case of non compliance with the directions of the interim maintenance order. These provisions make it clear that the case needs to be discussed on merits at a later stage with the detailed investigation into the truth of the allegations but the interim maintenance application has to be decided first. Even otherwise, if the case has to proceed on an equal footing for the petitioner as also the respondent, the costs of litigation have to be provided to the wife, as a failure on her part due to economic reasons to engage the services of the lawyer would tilt the balance in favour of the husband. How would she be able to counter the allegations of adulterous behaviour as made by the husband if she cannot have a legal professional to defend her? The court said,

> if the charges were established by the husband prima facie, that the wife was indeed leading an adulterous life than she would not have been entitled to any interim maintenance as an undeserving party cannot be held entitled to claim any maintenance

This observation of the court is totally in contradiction to the legal provisions providing for interim maintenance and litigation expenses. Section 24 of the HMA, reads as under

> 24. Maintenance pendent lite and expenses of proceedings: where in any proceeding under this Act, it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband , order the respondent to pay to the petitioner the expenses of the proceedings , and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent , it may seem to the court to be reasonable. [Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding , shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.]

The language of the section nowhere speaks about the matrimonial misconduct. On the other hand, it shows that the situation is such that calls for an interim measure in order to prevent vagrancy and ensure sustenance of the economically weaker party. The only condition for availing the benefit of this provision is that

i) A matrimonial petition must be pending in the court;

ii) The party makes an application seeking interim maintenance and litigation expenses;

iii) The party demonstrates that he/she is unable to maintain himself/herself;

iv) The other party is in a position to maintain the other.

v) As far as possible the application should be disposed of within a period of sixty days from the date of the service of the notice to the concerned spouse so directed to pay the interim maintenance and /or cost of litigation.

Then notwithstanding who is the petitioner or who is the respondent, what is the nature of matrimonial misconduct that is complained of, who is responsible for the breakdown of marriage, the application seeking maintenance has to be decided first as was done by the family court here. On appeal the verdict of the high court stands in sharp contradiction to the statute and the spirit of the enactment.

Permanent alimony or maintenance

Economically active claimant

The predominant social reality is that the husband would be economically active and the wife would either be in a supportive role or a full time homemaker. Even if professionally well qualified, household work and the responsibility of bringing up children takes away much of the time that a woman could otherwise devote to her profession or gainful employment. There are certain professions that demand considerable dedication and time due to its nature and can bring diverse results depending upon whether they are pursued by a man or a woman. Legal profession is one of such profession that is very time consuming and if a person (man or a woman) is shackled with domestic responsibility, she would not be in a position to pursue it in the same manner as a person who pursues it without any domestic obligations. Therefore, only because a person is a qualified legal professional may not in all cases ensure a decent income, if she is saddled with the responsibility of a house including looking after a special child. In *Paresh Kumar Parichha* v. *Anita Kumari Parichha*,[80] the wife was a practicing advocate at the Bar but had a physically and mentally differently abled daughter, who was completely looked after by her only. She filed an application for claiming maintenance for self and her daughter but the husband contended that she being a professional lawyer is economically active and is not in need of maintenance. The court did notice that when such a daughter who required constant company and attention, was being taken care of by her, it was a matter of fact as to how much time the mother could have spend at the court in her avocation. Her professional activities as also prevailing tensions and apprehensions at home would not leave her with much time to devote to her avocation. She applied for enhancement of maintenance that was allowed by the court. An appeal against such enhancement was dismissed by the high court that held the enhancement of the maintenance amount

80 AIR 2021 Orissa 151: AIROnLine 2021 Ori 283.

as proper and rejected the contention of the husband that she being gainfully employed as a practicing advocate can look after her financial interests.

Maintenance to the daughter-in-law

The death of an economically active person, though extremely tragic for his near relations often throws up ugly battles for a share in the legacy left by him. Those who are supposed to grieve together often scheme to get maximum out of the property that he leaves. In such cases, though the distribution is usually governed by the inheritance rules, it may not be in all cases that the legal postulates are in reality adhered to. Further, if the property is taken by one, he is under a legal obligation to maintain the other dependants of the deceased, Often in a hurry to get the benefit, people either consciously or inadvertently forget their obligations. In *Megha Amol Padole* v. *Vasantrao Govindaji Padole*,[81] upon the death of a Hindu married man, his death benefits were claimed and taken by his father. It was alleged by his daughter-in-law (widow of the deceased), that after receiving the complete amount relating to his death, the father-in-law, drove her out of the matrimonial home, did not give out of this amount any share to her, and also retained her complete jewellery and other items received at the time of marriage. She was able to convince the court about her inability to maintain herself as the father-in-law had neglected or failed to maintain her. The court held that the father-in-law was under a legal obligation to maintain her and awarded her maintenance to the tune of Rs 7500/ per month.

V CUSTODY AND GUARDIANSHIP

Welfare of the child and *bonafide* of petition

The primary rule in deciding the custody and guardianship application has always been the welfare of the child and bonafide of the petition. If the order has been obtained by the parent suppressing a material fact or after securing a favorable conditional order, the parent violates the condition the apex court has the power to recall any order that has been obtained either on false pretexts or where the conditions sought to be followed have been violated by the party.[82]

Secondly, the issues of custody and guardianship actually determine the responsibility of bringing up the child rather than the rights of the parents. Therefore, time and again the courts have clarified, that it is the welfare of the child rule that is predominant and out of the two natural guardians, the mother can be preferred to the father or the father can be preferred to the mother as the situation requires. Father was thus preferred to the mother in two cases while the mother was preferred over the father in yet another two cases, while in one a joint custody was directed. In *Aditya Divedi* v. *State of Uttar Pradesh*,[83] a seven year old son and five year old daughter of

81 AIR 2021 (NOC) 578 (Bom); AIROnLine 2021 Bom 298.

82 *Smriti Madan Kansagra* v. *Perry Kansagra* AIR 2021 SC 5423: AIROnLine 2021 SC 860.

83 AIR 2021 All 7: AIROnLine 2020 All 2176.

estranged parents were living with the father after failed mediation attempts. The mother filed a writ of habeas corpus praying for production of the children and to be handed over to her as she was the natural guardian. The court noted the comfort level of the children due to continuous living with the father, the constant company of each other, their paternal grandmother and aunt and their emotional/psychological, educational and financial being that was well taken care of. Though aged 7 and 5, they were fairly intelligent and stated that the mother beats them, chastises them and they were averse to being with her. Keeping in view the welfare of the children principle and not the right of the parents, the court held that the custody would be allowed to be continued with the father while the mother would get the visitation rights, morning and evening twice a month. Similarly, in *Sapavath Usha, Boda Usha* v. *Sapavath Nagulu*,[84] the children were with the father who was looking after their education. The mother, sought their interim custody making an unsubstantiated claim of their kidnapping by the father. The children were of tender ages, but the court ruled in favour of continuation of the custody with the father and noted that it is not an absolute rule that the children below the age of five years in all cases would be with the mother as it is the welfare of the children that has to be looked into and not the right of any parents The mother was very aggressive in nature and refused to hand over the children to the father while the children wanted to continue living with the father. The custody was directed to be with the father while the mother was given visitation and access right on weekends. Mother was preferred to the father in *Meenakshi* v. *State of UP*,[85] where she had to file a writ of habeas corpus for production of her minor son who was with the father. She alleged that her son was kidnapped by force by her brother and delivered to the father of the child against her wishes. The child being very young he needed the company and care of his mother. The court held that the mother was educated and was not unfit to nurture the child. On the other hand, the father was not interested in raising the child. The court directed the custody of the child to be handed over to the mother. Since the allegations of the kidnapping of the child were very serious the court held that the writ was maintainable. In *P Nandhakumar* v. *S Sathya*,[86] the wife was thrown out of the matrimonial home along with her eight year old daughter. They were multiple litigations pending between the parties including one of divorce. Right from the birth of the child, the mother was looking after and providing all necessary facilities to her, while the father displayed complete unconcern for the baby. The father's application seeking custody of the child as her natural guardian was dismissed in view of his total indifference towards her with the court observing that he cannot be called a suitable person to have the child's custody. Similarly, in *Megha Sood* v. *Amit Sood*,[87] the mother's claim of being thrown out of matrimonial home was believed

84 AIR 2021 (NOC) 285 (Tel); AIROnLine 2019 Tel 102.

85 AIR 2021 (NOC) 382 (All); AIROnLine 2020 All 2535.

86 AIR 2021 Mad 237: AIROnLine 2021 Mad 1065.

87 AIR 2021 P&H 93: AIROnLine 2021 P and H 184.

by the court over the husband's charges of her desertion. The custody of two children, a boy of around 11 and a half and a 4 years old daughter was given to the mother as she was well educated and financially secure and was in a position to look after and take care of her children. In *Vimlesh* v. *Mukesh Kumar*,[88] the verdict saw a separation of two siblings, one each going to one parent. The elder son continued with the father while the younger was taken away by the mother at the time of separation. The father under section 26 of GWA filed a case seeking custody of the younger son that was granted to him by the family court under an *ex-parte* proceedings. The wife filed an appeal against the order of the family court, wanting to keep the custody of the younger child. No maintenance was paid to the wife and the younger child, but she undertook to forego the maintenance claim for herself and the child, took it upon herself to provide for the child but on the condition that he should not be taken away from her. She even undertook not to claim any maintenance from him in future. The high court ruled that custody of the younger son would continue to be with the mother while the elder one would continue to be with the father.

Parents vs grandparents

Mother lost the custody of her child to the paternal grandparents, when she faced the charges of conniving to murder her husband and was arrested along with her paramour. In *Gyanmati Kushwaha* v. *State of UP*,[89] the wife was booked for her husband's murder and the infant was taken away from her by the paternal grandfather before she was sent to prison on charges of murder. After her release on bail, as the trial was still going on, she filed a writ of habeas corpus asking the paternal grandfather to produce the baby in the court to be handed over to her. She pleaded that under the Hindu Minority and Guardianship Act, after the demise of the father, she alone is the natural guardian of the child and no one else can claim to have that right so long as she is there. Secondly, the child was less than five years in age and so she has a preferred claim over the child's custody. The court dismissed her contention and held that if she was handed over the custody of the baby, the child's welfare will be deeply affected if she was sent to prison again. The court noted that charges against her were already framed in the murder trial that she faced. If the charges were proved correct and she was sent to prison, it would create havoc in the life of an innocent baby. The court reiterated that it is not the right of the parent but the welfare of the child which is to be taken into consideration at all times. The child would not have a normal and healthy development if given to the mother due to the trial related uncertainties and its outcome. The custody was allowed to be remained with the paternal grandfather.

The court reiterated the principle that when confronted with the claims and counter-claims of the parents in case of custody of the child, it has to be borne in

88 AIR 2021 Utr 163: AIROnLine 2021 Utr 173.

89 AIR 2021 All 138: AIROnLine 2021 All 182.

90 *Roxann Sharma* v. *Arun Sharma* (2015) 8 SCC 318: AIR 2015 SC 2232.

mind that there are no rights of parents as far as custody of the children is considered, but only responsibilities and the main focus for determination of who gets the custody is the welfare of the child. Thus, where the father was facing charges of murder of his wife, the custody of his two children were given not to him or his parents but to the maternal uncle.[90] On the other hand in *Nagarajan* v. *Ashwin*,[91] the father was permitted to have the custody of two sons even after their mother committed suicide and the maternal grandfather took the children to his home and was raising them. His plea that since he was fit/competent and willing to take care of his children, whose natural guardian he is in law, nobody else can seek a preference over him as far as his own children are concerned, was accepted by the court and the maternal grandfather was directed to hand over the custody of the minor children to the father.

Sale of minor's property by guardian

The task of rearing a child can be economically taxing and therefore the parents before bringing a child in this world should ensure that they possess necessary finances to be able to give their child an adequate upbringing. Almost all parents love their children and go out of their way to provide for them. Instances are aplenty where parents willingly or are forced to sell their belongings to take care of their children and provide them the best of education and medical care in conformity with their means. Since the child needs special care, rules prohibit the parents or guardians from selling the property of the minor without the leave of the court. The court would grant them permission only upon satisfaction that the sale would be beneficial to the interests of the minor and its interests would not be adversely affected by such sale. In this context an interesting issue arose this year in *Master M Yashas (Minor)* v. *Nil*.[92]

Here, a piece of property originally belonged to a lady A. she had gifted this property to her daughter's son when he was 12 years old and made the mother M as the guardian of property. The mother of minor M, filed a petition in the court at Bengaluru, seeking permission to sell a portion of the property belonging to the minor son and use the amount for the benefit of minor, for his day to day necessities, his school fees, his books etc and to deposit the remaining amount in his name in the Bank to be utilized later. M said that she was a homemaker, had no income of her own, her husband was employed as a driver and due to COVID-19, he had lost his job. They had no other source of income and therefore wanted to sell the land gifted to their son by her mother to tide over the financial difficulties in general and for the benefit of the son as well. She further claimed that they did not have a house of their own and the owner had asked them to vacate the house upon their failure to pay rent, hinting that the purchase of an independent house with the sale proceeds was also contemplated. Thus according to her petition, the sale would be for legal necessity.

91 AIR 2021 Mad 132: AIROnLine 2021 Mad 216.

92 AIR 2021 Kar 198: AIROnLine 2021 Kar 2610.

The trial court dismissed the petition and the matter went to the high court at the instance of the mother in appeal. The mother further contended that the property in the name of the minor child was the only property that was in their possession and their financial problems could be solved only after its sale so that the minor child can also lead a normal life. The court dismissed her contention and held that the property of the minor cannot be sold by the parents so that they can tide over their own financial problems. It is the duty of the parents to look after and provide for their children but they cannot sell the property of the minor to secure their financial mess. Legal necessity of the child and not of the parents can be a ground for granting permission for the sale of the minor's property and not otherwise and thus the permission was denied.

VI HINDU LAW

Alienation of the joint family property

Legal Necessity

The existence of a permitted purpose in law, for the validity of sale of joint family property by Karta under Hindu law is an imperative requirement. As the head of the family *Karta's* power to manage the joint family property include the power of its sale though for specified reasons only and therefore this power of sale is termed as a qualified power and not an absolute power. These instances under which he is permitted to sell the joint family property even to the extent of beyond his share and without seeking the consent of the other coparceners, or shareholders are, in order to meet a legal necessity, or if the sale would bring or amounts to a benefit of estate and if the sale proceeds are intended to be utilized for performance of certain indispensable religious and charitable duties. The powers of *Karta* cannot be challenged except in cases where the coparceners bring an allegation of fraud on him. Otherwise, there are two remedies in the alternative, one that the coparcener who disagrees with the decision of *Karta* to sell the property may seek its partition, take his share and cease to be a member of the joint family. In such cases, *Karta* can proceed only with the rest of the property but cannot sell the share of the coparcener who has already taken it by partition. The other remedy is, that once the sale is effected, the coparceners whose shares have been sold and who feel that it has not been done in accordance with the permitted purposes, can challenge the validity of the sale. If it is proved that the sale was effected without the permitted purpose the court would pronounce the sale as invalid but if it is proved that the requisite purpose did exist, then the sale would be held valid and the coparceners would be bound by it. In *Janak Ram* v. *Ganesh Ram*,[93] the *Karta* sold the family property claiming that it was done for maintenance of the family members. He deposed that this was the only source of income that he could raise for the upkeep of the family members. The coparceners did not object to the sale nor filed any petition for cancellation of the sale deed, but challenged the validity of sale and his powers to

93 AIR 2021 (NOC) 94 (Chh); AIROnLine 2019 Chh 842.

effect it, claiming that *Karta* had sold the property by exercise of fraud as there was no justification for such sale. However they were neither able to substantiate any of their allegations nor were able to establish as to from which source the entire family was being maintained. The court concluded that there was no fraud, rather the sale was concluded after consideration and therefore an inference can be drawn that it was done for maintenance of the family. The court held that legal necessity for the sale was established as there was no other source of income for the maintenance of the members of the joint family. The sale was held as valid and that the *Karta* was within his powers to effect it.

If one of the coparcener has already sold his share prior to the *Karta* effecting a sale of the entire property, the sale would not be binding on the share of the coparcener who has already sold it to an alienee. In *Nagarathinam* v. *P Duraisamy Gounder*,[94] a Hindu Joint Family comprised of the father F and four of his sons. One of his sons S sold his respective share to the alienee X. Later the father executed an agreement to sell the entire property to Y in ignorance of the previous sale by S. Even though S was major, he was neither a signatory to this agreement to sell nor had consented to it. In a claim of the property as between X and Y, it was held that since the sale deed executed by S was prior in time, it is valid as in favour of X. The sale agreement executed by the other members would be valid only to the extent of their respective shares but would not affect the share of S that had already passed under the sale deed to X. Thus X was held entitled to 1/5th share and Y was entitled to 4/5th of the total property.

Partition of the joint family property

The property that has been partition once cannot be further partitioned. There must be cogent proof if any erstwhile coparcener attempts to reopen the partition with respect to some of the properties that he claims were not partitioned. Failure to do so would result in the dismissal of the suit.[95]

In *Puranik Chanrakar* v. *Jivrakhan Chandrakar*,[96] one A, a Hindu man, had four sons. The Karta had during his life time, in 1967, partitioned all of his properties. However, one of his son claimed that though all the properties were partitioned equally amongst the sons, the house in which the Karta lived was not partitioned and should therefore be partitioned again. Except for the self statement that he had made, there was no proof that the house was kept by the karta for his own use or for his maintenance. The court held that once the partition has taken place, anyone seeking a further partition has to come with proof that some of the property was left out of the partition effected and only then a further partition would be ordered. Since the plaintiff was unable to

94 AIR 2021 (NOC) 543 (Mad: AIROnLine 2020 Mad 394.

95 *Venkatachalam* v. *P Pachamuthu* AIR 2021 (NOC) 379 (Mad); AIROnLine 2020 Mad 1882.

96 AIR 2021 (NOC) 111 (Chh); AIROnLine 2020 Chh 1125.

prove that the house was left out of the original partition, it was held that no partition of it can be directed and he is not entitled to a decree of a partition of the suit property.

Under classical law, the father has special powers to effect a partition not only as between himself and his sons but also among the sons. It must be noted that a Hindu father is the exclusive owner of his separate property and a son has no right to demand a partition of such property, but he can demand a partition of the coparcenary property in the hands of his father.[97] Even in absence of such a demand coming from any of the sons, the father can on his own, effect a partition amongst his sons and the same would be binding on them. In *Nil Kumar Dahal* v. *Indira Dahal*,[98] a Hindu joint family comprised of a Hindu man, his sons from his first and second wife respectively. The family adhered to the Mitakshara school of law. The father in exercise of his powers under the Mitakshara law, effected a partition of his complete movable and immovable properties giving equal shares to his sons and also reserved a share to himself for his sustenance in his silver years. With respect to this share that he had reserved for himself he provided, that it would go to such of his sons who would look after him in his old age and would perform his funeral rites. He did not specify which of the son he had referred to in his will and thus it was concluded that the sons from both the wives were referred to. It was in evidence that all the sons visited him regularly, even assisted him financially and maintained very cordial relations with him till his demise.

The court held,

i) Under Mitakshara law, the father during his life time has the power to effect a partition of the joint family property between himself and his sons;

ii) that such share that the father reserves for himself after making an equitable distribution of his property in favour of his sons would constitute his separate property over which he would have full powers of disposal. He was competent to make a Will of the same;

iii) the said partition deed would actually constitute a family arrangement, pertaining to partition of the ancestral properties as well as a bequeathment by Will; and

iv) since all the sons fulfilled the wishes/desire of the father to look after him in the old age and had maintained very cordial relations with him, they all were entitled to an equal share of the father's property that he had retained for himself upon his death.

VII THE HINDU SUCCESSION ACT, 1956

Live in relationship and Succession rights of illegitimate children

Validity of marriage and the issue of succession to the property of parents is closely related. If the marriage is not valid, the inheritance rights of the children from

97 *Bhagela Sahu* v. *Raju Sahu* AIR 2021 (NOC) 617 (Chh); AIROnLine 2020 Chh 490.

98 AIR 2021 (NOC) 390 (Sikkam); AIROnLine 2020 SK 49.

such an invalid marriage are vastly curtailed. In this connection it must be understood that a Hindu marriage has to pass a double validity test. It must be validly solemnised, and must also conform to the legal requirements specified in section 5 of the Act. The importance of a valid solemnisation lies in the fact, that even if the marriage fails to conform to the legal validity requirements specified in the enactment, the issue of such marriage, that is solemnised validly between two Hindus, is protected to a considerable extent. Such issue is termed legitimate for the purposes of inheritance to the property of both his parents. Nevertheless, the restriction /bar to be a member of father' coparcenary/joint family of such issue continues to display judicial ambivalence. It is noteworthy however, that in order to attract section 16, of the HMA, it is necessary that a marriage must have been solemnised between the parents of the claimant, since the children of live in relationship would not be entitled to any protection available to the children of void or voidable marriages. It is only where the requisite rites and ceremonies have been duly observed that the rights of children born of the union are protected. Indian laws still insist on a formal solemnisation and therefore a relationship short of formally solemnised marriage has nothing to offer legally by way of intestacy to the issue born of such relationship. Their rights can best be secured by the parents themselves through the medium of a testamentary disposition should they so wish. In *Rameshwar Prasad v Tara Bai*,[99] H a Hindu man started living with another woman W after the death of his wife. No ceremonies were performed either in customary form or otherwise and they were living in an intimate physical relationship with each other. A son was born to them out of this relationship. Upon the death of the man, the son claimed the property and sought the benefit of section 16, to be applied to him. It was held that since he was an illegitimate child due to absence of any ceremony of marriage between his parents, he cannot take the benefit of section 16 and would not be entitled to inherit the property of his father. Similarly in, *Savitri Jaiswal* v. *Saroj Jaiswal*,[100] a Hindu man A had a wife W and a son S. He also had a daughter D from a woman with whom he had intimate physical relations but no marriage. S was married with SW and had five sons from this marriage. Upon the death of A, his wife W and his son, S inherited his property. Later S died and his five sons and his widow, SW, took possession of the property. At this juncture D, stepped in and made a claim that she was the daughter of A, and upon his death was entitled to get 1/3rd share in his property. She confirmed that her father A and her mother were in an intimate physical relationship, and she was born while A was still lawfully married to W, but contended that despite being an illegitimate daughter, she was entitled to the benefit of section 16. The court held that it was in evidence that her parents were never married and at the most it can be said that they were in an intimate physical relationship. Since there was no marriage, section 16, could not be attracted as it speaks about a void or a

99 AIR 2021 (NOC) 479 (Chh).

100 AIR 2021 Chh 112: AIROnLine 2021 Chh 223.

voidable marriage but does not give any protection to the children of a union that is short of a marriage. The court dismissed her claim and held that section 16, cannot be applied to a case, where there was no marriage. On the other hand as aforesaid if the marriage has been validly solemnized then notwithstanding that it has failed to pass the legal validity test, the children would have a right to inherit the property of the putative father. In *Bindra Devi* v. *Kumari Makni*,[101] H, a Hindu man died leaving behind his daughters born to him from his first marriage. After the death of his wife, he remarried W_2, who was already married to another man. H had a daughter from this union as well. Upon his death, all three daughters and his second wife claimed his property and retiral benefits. The court held that all the three daughters would get a share out of his property, the daughters born of the first marriage being perfectly legitimate while the third would be statutory legitimate taking the benefit of section 16, but as far as W_2, was concerned, her marriage to H was void, as she had married him but without obtaining divorce from her first husband. As a party to a bigamous marriage, succession rights could not be conferred in her favour. All the daughters were held entitled to the succession certificates along with the retiral benefits.

Attempted denial of daughter's Rights under customary law of tribals

Hindu Succession Act, excludes from its application, the members of scheduled tribes despite the fact that they might be professing Hindu faith. Yet very often, there is no clarity as to whether daughters would or would not be entitled to succeed to their father's property in the event of his demise. Often the male members corner the total property and deny to the females any share in the property by way of intestacy citing the customary laws, that are neither written nor authenticated/substantiated. Time and again, the issue has come before the courts, where daughters claim their father's property but the male members contend firstly, the non application of the Hindu Succession Act over them due to special exemption given under the law and secondly plead total exclusion of females from participating in the succession process under the garb, that the customary laws prevailing in their community so exclude them. The burden of proof is then on the daughters to demonstrate that there is no such exclusion. Pleading such a custom leading to a total exclusion of daughters from inheritance was the focal issue this year in a couple of cases. In *Jhuli* v. *Patru*.[102] A Hindu man A, was the owner of the property and had four sons, S_1, S_2, S_3 and S_4. S_1, S_2, S_3 had sons while S_4 had only daughters D_1 and D_2. D_1 was kept in the house of her father and her husband was the ghar jamai of her father's house as was the custom in the community that they came from. The parties were governed by the Uraon tribal customs. D_1 also claimed that after the death of her father, his property was mutated in her and her husband's name, but the sons of her paternal uncles in connivance with the authorities got the mutation done in their name. Her claim to her father's property

101 AIR 2021 (NOC) 502 (Utr): AIROnLine 2021 Utr 27.

102 AIR 2021 Chh 60: AIROnLine 2021 Chh 73.

was vehemently refuted by the sons of her paternal uncles contending that all the parties belonged to *Uraon* Tribe which is a Scheduled Tribe, within the meaning of Art 366 of the constitution. By the special exemption under the Hindu Succession Act, the Act does not apply to the members of the Uraon tribals, and as per the customs of their community, daughters as a rule do not inherit the property of their father as the succession is through male descent only.

Accepting the first part of their contention, the court held that the provision of the Hindu Succession Act, cannot be applied to the tribals due to section 2(2), but on the total exclusion of daughters under their customary law, they observed that the same has to be proved through cogent evidence and a mere statement of theirs to that effect or a simple testimony of the witness would not be sufficient. It held that the burden of proof was on the sons that daughters are specifically deprived of the right of inheritance from their father's property. There cannot be a general presumption that customary laws governing the tribe exclude daughters/females from inheriting the property and therefore the court upheld the entitlement of daughters to the extent of 1/4th of the property. Similarly, in *Bhagwati Chandan Singh* v. *Cheduram*,[103] a Hindu woman filed a suit for declaration of title to the property. Her contention was that the suit property originally belonged to her uncle and after his death it was inherited by her father and she inherited the property after her father's death. On the other hand the opposite party claimed that they belonged to the *Gond* community and by way of section 2(2) of the Hindu Succession Act, and article 366 (25) of the Constitution of India, the Hindu Succession Act, is not applicable to them. Further, in the *Gond* community there is a customary rule that females cannot inherit the property of their father and the succession is through the male line only. The court held that it was upon the defendants to prove the existence of such a custom and there was nothing that showed that daughters cannot inherit the property of the father. The court granted the title to the daughter.

Succession rights of wife during pendency of appeal against divorce.

A legally wedded wife is the primary heir to the property of her husband. Where a decree of dissolution of marriage is granted by the court of competent jurisdiction, she would take the label of an ex-wife and in the event of the husband dying thereafter, her inheritance rights would come to an end. However, if after the decree of divorce is so granted, one of the party challenges it in the higher court, not only the matrimonial ties but mutual rights of inheritance are also revived. In *C N Sathyanarayana* v. *K Kavitha*,[104] the family court had granted divorce on a petition praying for dissolution of marriage filed by the wife as against the husband and the husband went in appeal against this decision to the high court. While pronouncing the divorce decree the Family court had also ruled that one fourth of the retiral benefits of the husband

103 AIR 2021 (NOC) 3513 (Chh); AIROnline 2019 Chh 1814.
104 AIR 2021 (NOC) 226 (Karn); AIROnline 2020 Karn 2319.

would go to the wife as her permanent alimony. During the pendency of the appeal, the husband died and the wife claimed both the retiral benefits and inheritance. The court held that since the appeal stood abated, the judgment and decree of family court attained finality. The wife in pursuance of the divorce decree became an ex-wife and would not be entitled to inheritance but to one fourth of the retirement benefits as her alimony and the children would be entitled to their respective shares in his property by way of succession.

Daughters share in coparcenary property

The Hindu Succession Act, enacted in 1956 conferred the right of intestacy in favour of the daughters, around 66 years back. The amendment of 2005, further enlarged her share putting her on the same pedestal as her brother. Thus, both from the separate property and ancestral joint family property a daughter presently takes a share equal to her brother. In addition, the restrictions to partition the dwelling house in presence of male heirs existing prior to 2005, as far as all class-I female heirs are concerned, stands deleted. This legal entitlement is still sought to be violated by the brothers under the social garb of sons being the rightful owners of the entire family property. In *Kalavathi v Shanthavva Basappa Nagaral*,[105] the daughter sought partition and possession of her share in the dwelling house as against her brother who was in its possession. The court held that post 2005, a daughter's rights in the parental property are equal to that of the son irrespective of whether her father died before or after the date of amendment of section 6, and held her entitled to 1/3rd share in the property including the dwelling house. Similarly, in *Valsan* v. *Sivadas*,[106] a Hindu woman D, filed a suit for partition of the property as against her brother. The brother pleaded ownership through adverse possession and claimed that he had already divided the property including the share of the sister without her consent amongst him and his children through a partition deed. The court dismissed his contention, ruled in favour of the sister and held that since the sister was not a party of such partition deed, she would not be bound by it to the extent of her share in it. She was not given her due at any point of time and a title of adverse passion cannot be set up by merely paying taxes of property that belonged to the sister. They held that the sister is entitled to have her share demarcated and possess it and directed the brother to hand it over to her while dismissing his plea of ownership by adverse possession .

Notional partition

The concept of notional partition was coined by the legislature at a time when daughters were totally excluded from the participation or ownership of the coparcenary property held by their father, while the sons had a right by birth in it. The legislature in 1956, sought to take some half hearted remedial measures and introduced the concept of notional partition by way of section 6 in the Act, that had the effect of

105 AIR 2021 Karnataka 132: AIROnLine 2021 KAR 1098.
106 AIR 2021 (NOC) 820 (Ker); AIROnLine 2021 Ker 788.

conversion of the undivided share of the deceased in the Mitakshara coparcenary into his separate share by means of a presumptive partition in presence of his class-I heirs or an heir claiming through a female. Later apex court judgments inculcating a gender friendly approach held that daughters have to be given a share, when a notional partition takes place as the effects of a notional partition are equivalent to a real partition. Absolute parity was achieved only in 2005, by introducing daughters as coparceners in a Mitakshara coparcenary. In *Ashwani Kumar* v. *Horo Bai*,[107] the father died prior to 2005, leaving behind his two sons and a daughter and his undivided share in Mitakshara coparcenary. The property was taken by his sons while the daughter was not given anything. She filed a suit claiming her share. The lower court ruled against her pronouncing that she would not get any share and the matter went in appeal to the high court. The High Court of Chhattisgarh, termed the trial court's verdict as erroneous and held that due to the application of the concept of notional partition, the share of the daughter would be well protected and be handed over to her. While effecting a division of the property the court held that in the first place, the property would be divided in three shares one third going to each of the coparceners, i.e., the father's share would also be calculated under the presumptive partition. This share of the father would then be divided amongst his two sons and a daughter, each of them taking 1/3rd of the share of the father, i.e., 1/9th each. As one of the sons died issueless, his share would be taken by the surviving sister and brother, both being class-II heirs equally by virtue of section 8 and section 11. The brother would be entitled to 1/3 + 1/9+ ½ of the share of the brother and the sister would-be entitled to 1/9 and ½ share of the brother .

Absolute ownership to Hindu females

The conferment of absolute ownership to Hindu females was first major legislative step towards gender empowerment. Overnight from a dependant she became a legal owner of the property that she held for her maintenance or survival. Absolute ownership conferred in her favor the complete rights to alienate the property in any manner that she thought fit and also to have her own line of heirs. In *Puranjai Pandey* v. *Gopi Ram*,[108] after the death of the husband, his widow acquired a limited interest in the joint family property to the extent of the husband's share. Upon the promulgation of the Hindu succession Act, this limited ownership converted into absolute ownership. She executed a sale deed of the property that was challenged by the reversioners. The court held that since the widow became an absolute owner of the property, a sale deed executed by her of the same would be valid and the vendee would get a title to the property. Similarly, a gift deed executed of the property by the widow of erstwhile owner of the property as an absolute owner of the property after the 1956 Act, in favour of the alienee would be valid and he would be entitled to exercise all the rights

107 AIR 2021 (NOC) 344 (Chh); AIROnLine 2020 Chh 1315.
108 AIR 2021 (NOC) 474 (Chh): AIROnLine 2020 Chh 773.

over the property including seeking a declaration and permanent injunction.[109] Again in *Bela Bai* v. *Adhinram*,[110] a Hindu man was the owner of the landed property and he was cultivating this land with his wife, W. He died and left behind W and three children, a minor son aged 10 years and two minor daughters. W stood as a step mother to these minor children in relationship. The property was recorded in the name of the minor step son and W. After the coming into force of the 1956 Act, the limited estate in favour of the W matured into an absolute estate and it was held that the share of the step mother, W and the son would be equal.

Succession to the property of a female intestate

Not only Hindu Succession Act provides two separate and diverse schemes of succession depending upon the sex of the intestate, it further diversifies the schemes of succession in case of a female intestate depending upon the source from where the deceased had acquired the property. Thus, three different schemes and different categories of heirs are provided for Hindu female intestates. One noticeable observation while looking at the entire scheme of succession designed for female intestates is the heavy inclination and preference to her husband and his heirs over her natal relations. This legislative perception of nearness and superiority of husband's relation over her own parents and brothers and sisters is a patriarchal dictate and an assumption of a complete transformation and absorbtion of her persona in the matrimonial family. Her relations by marriage take a priority over her biological family. It leads to in some cases inequitable results warranting legislative corrections. Presently, the category i) heirs to the property of a female Hindu are her husband and her children to her separate property and her mother is not included in category i) and so long as a single heir in category i) is present the property cannot pass to the heirs specified in the next category. In *Gireesh Kumar C K* v. *State of Kerala,*[111] a married woman died leaving behind her husband and her mother. Both her husband and her mother were issued certificates for her property to which the husband objected as he claimed that he alone was the heir in category (i). The court accepted his plea and held that the mother cannot get the legal heir certificate to her married daughter's property in presence of her husband who has a better standing as far as heirship is concerned. Similarly, in *Amola Saikia v Pankajit Narayan Konwar*,[112] a Hindu married woman died intestate and issueless. An application for grant of succession certificates was filed by her husband H on one hand and by her mother, brother and sisters on the other hand. The court held that as the husband of the deceased, would be the heir in category (i) and therefore he would be preferred to her sisters, brothers and mother.

109 *Chintakunta Venkata Subba Reddy* v. *Alluri Tholasi Eswara Reddy* AIR 2021 (NOC) 652 (AP); AIRONline 2020 AP 84.

110 AIR 2021 (NOC) 157 (Chh); AIROnLine 2019 Chh 1905.

111 AIR 2021 Ker 227: AIROnLine 2021 Ker 1320.

112 AIR 2021 Gau 50: AIROnLine 2020 Gau 511.

VIII CONCLUSION

The year 2021, saw some important judicial pronouncements in the area of domestic relations. The court reiterated the importance of procuring the consent of the wife for validity of adoption and also explained yet again, the harmonious construction of the JJA and the HAMA. It clarified that an adoption under the HAMA, stands on a different platform and does not require the formal procedural requirements of JJA. It came to the rescue of a tribal female trapped in an unhappy marriage and granted her a matrimonial relief of divorce by holding that HMAwould apply to her even though she came from a scheduled tribe as her husband was a non tribal. Insistence on formal solemnization of marriage was re-emphasized upon in relation to the inheritance rights of children begotten out of live in relationship. The court upheld the non application of section 16, in such cases resulting in a compete denial of sharing the putative father's property in absence of a marriage between the parents. Judicial ambivalence continued while deviating from the statutory requirement of one year mandatory separation of couples desirous of getting a decree of divorce by mutual consent by waiving the one year's separation requirement in some cases while denying the same in others. The same continued in cases of irretrievable breakdown of marriage as the ground for divorce as the plea was accepted in some while rejected in some others. The Madras High court in complete contrast to the legal provisions and their spirit, incorrectly remanded the case back to the family court for trial afresh to decide the fault or guilt of the wife on an interim maintenance application. Welfare of the child concept was applied by the courts in deciding the custody battles between parents and sometimes between one parent and a set of grandparents. In matters of applicability of Hindu Succession Act to the daughters, who are members of scheduled tribe and their resultant pleaded exclusion from inheritance of their father's property by the brothers, the court placed the burden of proving such custom that leads to compete exclusion of the females from inheritance on male members pleading such custom and held that under the Constitution, a daughter cannot be excluded from inheriting the property of their fathers. In matters of succession to the property of female intestates, husband and his heirs continued to enjoy their superiority of status in comparison to the natal family members of the intestate.