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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 2022, have been briefly analyzed here.

II THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

Adoption of the child by the stepfather at the behest of biological mother

The legal provisions have appropriately stalled the deep patriarchal notions in adoption laws making woman a decision making party in her own right. Not only an adoption effected without the consent of the biological mother is ineffective,[1] a widowed mother singlehandedly has acquired a right to give a child in adoption without seeking the consent from anyone. The present law does not mandate the requirement of procuring anyone's consent, not even of deceased husband's parents as conditional for a valid adoption. However, since the blood relationship and the affection of the grandparents is absolutely natural, they may seek and be conferred visitation rights or access to their grandchild. However, the pertinent question remains, in the patriarchal society, since the name of the father is appended to the child, can the surname of the child be altered by the mother who decides to remarry and substitute the biological father's surname with that of her new husband and taking a step further give this child in adoption to the new husband who in actuality is the step father of the child erasing him completely from the biological family of the deceased father. In *Akella Lalitha* v. *Sri Konda Hanumantha Rao*,[2] a couple H and W married in 2003 and a son was born to them in 2006. When the child was two and a half months old, the father, H died. The mother remarried after a year to H1 and the couple had a child from this union as well. The mother first altered the surname of the first born child from that of the biological father's surname and substituted it with the second husband's surname and secondly, she gave the child in adoption to the new husband. The paternal grandparents of the child filed an application praying to the court that they be appointed as guardian

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1 *Gurupada Das* v. *State of West Bengal* AIR 2022 (NOC) 701 (Cal); AIR Online 2022 CAL 1085.

2 AIR 2022 SC 3544; AIR Online 2022 SC 1149.

of the child in view of the mother's remarriage and be granted visiting rights to the child pending disposal of the guardianship application. The court had to adjudicate two issues here, first that in the best interests of the child, who should have its custody and be appointed as its guardian and secondly, can the mother exercising her sole rights over the child give the child in adoption to the second husband and following this, does she also have a right to wipe off the surname of the first husband, removing the child totally from his entire paternal family and replace it with that of the second husband. The trial court dismissed the petition of the grandparents holding that it would not be advisable to separate the child of such tender age from the mother as the child was only two years old at that time but did grant in their favor visitation rights, directing the mother to proceed accordingly. She took the matter in appeal to the High court of Karnataka.

The High Court of Karnataka directed the mother to restore the surname of the child to that of the biological father and directed that wherever the record permits, the name of the natural father shall be shown and if it is otherwise permissible, the name of the present husband shall be mentioned as the step father but she took the matter in appeal to the supreme court. The apex court allowed the appeal filed by her and observed that:

> there was nothing unusual in mother upon remarriage having given the child the surname of her husband or even giving the child in adoption to her husband. The direction by the high court they said to include the name of the present husband as step father in documents is almost cruel and mindless of how it would impact the mental health and self esteem of the child. The mother being the only natural guardian of the child has the right to decide the surname of the child. She also has a right to give the child in adoption.

There are couple of questions that the apex court verdict leaves unanswered and would result in the opening of a Pandora's box. Where a single mother has been permitted to take or give a child in adoption all by herself, once an adoption is validly effected, she ceases to be the mother from the date of adoption as all the ties with the biological mother get suspended except for matrimonial purposes. The adopted child's mother now is the adoptive mother.

section 12 of the HAMA reads as under:

> Effects of adoption: An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family: Provided that-
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> a) The child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;
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> b) Any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any,

attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

c) The adopted child shall not divest any person of any estate which vested in him or her before the adoption.

Can the person giving the child in adoption and taking the child in adoption be the same person? If the biological mother decided to give her child in adoption to the step father, i.e., her new husband who is the mother of the child now as according to the law, all the ties of the child in the biological family are severed from the date of adoption? Can there be an exception that the mother remains the mother even after giving the child in adoption? Does a woman have a right to erase the paternal biological connections of the child while keeping alive her and her own family connections? Can section 12 of the HAMA have different consequences if the mother gives the child in adoption and if the father does it or the couple does it? The role of the apex court is to clarify and correctly apply the law as it exists in the statute book and not deviate from it without any reason and create complexities. It is an extremely unfortunate, incorrect and confusing pronouncement of the year by the apex court.

Dissolution of adoption

Adoption is an irrevocable act and once the process is complete either under the HAMA or the JJAct, the child cannot be returned to the biological family or the authorities in the later case.[3] In *Mangli Bai Miri* v. *Specialised Adoption Agency, Mahasamund*,[4] A, a child was given in adoption to M and her husband H, under the JJ Act, 2015, on September 30, 2019. The child was now declared as the child of M and H and custody of the child was taken by them. On November 9, 2020, H died. M now filed an application that the child was unable to mix up and adjust in the new family and as he is not interested in staying in this family, wanted to hand it over back to the authorities or surrender him. As a result of this application filed by M , a counseling session took place and then she filed an application seeking annulment of the adoption stating that the adoptive child was not able to adjust in the adoptive family after the death of the adoptive father. The family court dismissed her application holding that the child becomes a part and parcel of the adoptive family like a biological child and adoption cannot be cancelled at all at a later point of time. In addition, the court noted that in the present case the adopted child had categorically stated that he wanted to live in the adoptive family and with his mother. Considering the welfare of the child the court held that dissolution of adoption cannot be allowed as it is impermissible in law.

This case raises some very important issues. A vulnerable child of tender age is now thrown at the mercy of a hostile parent and the same is bound to have a heavy impact on its welfare and upbringing. The fact that the adoptive parent wanted to hand it over to the authorities would make him virtually an unwanted child and make him more vulnerable than an orphaned or abandoned child. The

3 See Ss. 68, 63 adoption Regulations , 2017 Regulation 13 (7) JJAct.

4 AIR 2022 CHH 187; AIROnline 2022 CHH 148.

child was in the adoptive family for only a month and nine days and his coming into the family and departing of the adoptive father would not improve things for him .A tragic set of facts, but a return of the adoptive child is neither desirable nor permissible under the Act and with good reason as well. Adopting a baby is a very serious act and should be taken carefully after a thorough discussion between the intending parents with no scope for a re-thinking. The adoptive parents have no right to play with the life of a vulnerable little being by taking him and when it becomes inconvenient to take care of him to return him treating it like goods bought and return when found unsatisfactory or otherwise. Section 63 of the JJ Act, reads as under:

Effects of adoption: a child in respect of whom an adoption order is issued by the court, shall become the child of the adoptive parents and the adoptive parents shall become the parents of the child as if the child had been born to the adoptive parents, for all purposes, including intestacy, with effect from the date on which the adoption order takes effect. It further purports that on and from such date all the ties of the child in the family of his or her birth shall stand severed and replaced by those created by the adoption order in the adoptive family.

Thus the court rightly dismissed the application of the adoptive mother for a reconsideration/ revocation of the adoption.

III THE HINDU MARRIAGE ACT, 1955

Marriage between a Hindu and a non- Hindu

The religious based personal laws place strong emphasis on the religion of the parties and do not permit an inter-religious marriage under its domain. Both the parties must be Hindus at the time of solemnisation of marriage is the basic requirement for the validity of marriage under the The Hindu Marriage Act, 1955 (HMA), without possibility or permissibility of any exception or any deviation. Failure to demonstrate sameness of religion at the time of solemnisation of marriage would prove fatal to the validity of the marriage with no rights and obligations arising from this union under the Act. In *Devika Shetty* v. *NIL*,[5] a man, who was born into Christian faith married a Hindu girl under the HMA . Later both applied and sought divorce by mutual consent owing to matrimonial differences. The family court dismissed the application holding that since the conversion of the husband to Hindu faith was not established, a marriage between the two people coming from different faiths was not valid under Hindu law, consequently, no matrimonial relief can be availed by them. On appeal, the man produced a copy of the affidavit containing a declaration that he had before marriage adopted Hindu religion and had only then performed the marriage at the Arya Samaj temple. He had undertook to follow all Hindu customs and traditions and supported his claim by producing a copy of the application made to the secretary of the Arya Samaj. Since these documents were not produced before the family court, the high court directed the family court to take them into cognizance and ascertain if the

5 AIR 2022 (NOC) 598 (KAR); AIROnline 2022 Kar 1608.

conversion of the man to Hindu faith could be established from them. The dismissal of the application was set aside and the family court was directed to examine the case afresh in light of the new evidence of the conversion, if at all leading to the validity of their marriage.

Bigamy and a decree of nullity

Absolute monogamy continues to be the rule for the validity of a Hindu marriage and a marriage of a married person even with the consent of the first spouse would be void. In *Manti Sahu* v. *Mahesh Ganjeer*,[6] a married man entered into an agreement of marriage with an unmarried woman, W1 but later sought the court's help to annul it on the ground that since he was already married, he cannot enter into such an agreement with anyone. He contended that W1 had threatened to file a false case of rape against him and he executed such an agreement under compulsion to save himself from such charges. The woman countered his plea and claimed that he had assured her of his bachelor status. The court held the agreement as also the second marriage as void and despite the fact that as alleged by the parties, the first wife had consented to it, or whether or not the status of the parties was known to the second wife, the marriage being in contravention of section 5 would be void. Similarly, in *Saket Nishad* v. *Pooja Nishad*,[7] the court held that the status of a bigamous marriage would not change irrespective of the knowledge and consent on part of the second woman or the village community. Here, a Hindu man H was married to W and had a child from her. It was his statement that he got married to W_1, in 2014 while his first marriage was subsisting and the marital status was known to the second woman whom he married. The marriage was performed in presence of villagers in accordance with the rites and ceremonies. W_1 after sometimes left him and he approached the court praying for a decree of nullity with respect to the second marriage on account of it contravening the requirements of section 5 (i). The family court dismissed his prayer holding that he had done it in connivance with the woman and he cannot be allowed to take advantage of his own wrong or misconduct. The matter was taken in appeal by him. The High Court of Chhattisgarh pronounced a decree of nullity on account of its contravention with the primary conditions stipulated in the HMA and observed that the parties themselves had admitted the fact of bigamy at the cost of their reputation. There was no collusion by the mere fact that the woman was also aware of his marital status at the time of her marriage to him.

Factual reality and legal requirements would prevail over even a genuine belief that the child marriage being void, a person can enter into a second marriage validly again and would meet the same fate. In *Nirmala Devi* v. *Anil Kumar Tiwari*,[8] H married W who was only ten years old. She filed for dissolution of her child marriage under section 13 B and the divorce decree was passed in her favour in the year 2015. Meanwhile in 2014, while the first marriage was subsisting awaiting the

6 AIR 2022 CHH 150; AIROnline 2022 CHH 1521.

7 AIR 2022 Chh 19; AIROnline 2022 Chh 5.

8 AIR 2022 MP 27; AIROnline 2021 MP 2880.

court's decree, she remarried H1,. The second husband, H1 filed a petition praying for a decree of nullity on the ground that at the time of his marriage to W , she had a subsisting marriage and thus the marriage being a bigamous one was void under section 5 (i) of the Act. The wife took the defence that her first marriage being a child marriage was no marriage in eyes of law and thus the second marriage would be a valid one. Dismissing her contention and granting a decree of nullity in favour of H1, the husband, the court held that even though at the time of her first marriage, W was not of marriageable age, it cannot be presumed that such marriage was a nullity.

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

Existence of a valid marriage is a pre-requisite for availing any matrimonial relief under the Hindu law. Three cases under survey inculcated the issue of existence of a valid marriage before a petition for restitution of conjugal rights could be adjudicated. In *Arindam Saha* v. *Dipanwita Thakur* ,[9] H, a Hindu man filed a petition praying for a decree of restitution of conjugal rights as against W, claiming that she was his wife and had withdrawn from his society without a reasonable excuse. It is noteworthy that this was a second petition of restitution of conjugal rights filed by him as against W, as the first similar petition had resulted in a compromise, and withdrawn following their joint statement, that they had decided to stay together. The second petition of H against W was contested by W stating that she was never married to H. She was his friend and had become acquainted with him through social media at a time when she was already married, but had stayed with him as a tenant in his house at Delhi. She produced to the satisfaction of the court the documents and registered evidence of her marriage to H1. H failed to counter her facts and prove his marriage to her. The court held that the first condition for accepting a plea of restitution of conjugal rights is the factum of a valid marriage but since the marriage could not be proved, mere living together even for a while would not entitle the man to approach the court for a remedy. Secondly, even if he had married W, while she had a subsisting marriage with H1, the second marriage would be void, and in a void marriage the parties cannot avail any matrimonial relief. His petition was accordingly dismissed. Similarly, in *Sunita Suresh Pantawane* v. *Suresh Keshavrao Pantawane*,[10] a Hindu woman W filed a petition praying for a decree of restitution of conjugal rights as against a Hindu man H, whom she claimed had married her and then had thrown her out. H was already married to W1 and was living with her. He denied having ever marrying W. On being asked to establish the marital relationship between her and H, W was unable to recall the name of the Bhante (Priest) who had married her, was unable to produce any marriage certificate or even provide any explanation as to why she had not produced the marriage certificate as well as the marriage register, and not even any evidence at all of their living together. The court held that the marital relationship between H and W was not proved as the witnesses

9 AIR 2022 Delhi 139; AIROnline 2022 DEL 1686.

10 AIR 2022 (NOC) 274 (Bom); AIROnline 2021 Bom 4149.

brought by her were unreliable. Secondly by her own admission she knew the marital status of H for around 8 to 10 years even before her alleged relationship with him had started. The court observed that even if a marriage between H and W was proved, since he was already married, the second marriage if at all proved would be null and void and the application of W both for restitution of conjugal rights as also for maintenance was dismissed. On the other hand in *Pooja Dubey* v. *Manish Kumar*,[11] the husband was successful in proving the solemnisation and existence of a valid marriage between him and his wife, that she later denied. He stated that he and W, his wife had a clandestine marriage in the Arya Samaj Temple, and proved it with the help of marriage certificate, photographs and the testimony of the priest who married them. Since both the parties had not informed their parents about it, after performance of marriage, they went back to their respective homes and agreed that the parents would be taken into confidence as they feared objections to their match from them. The boy eventually told his parents but the girl started denying the marriage he contended probably under pressure from her parents. He filed a petition for restitution of conjugal rights and the girl denied being married to him. She admitted all the documentary evidence but stated that though she took part in the ceremonies she never did it voluntarily and willingly but was forced by the husband to do it. The court noted that she had never challenged the validity of the solemnisation of marriage, and that the husband was able to prove the marriage to the satisfaction of the court. The court held in favour of the husband and directed the wife to give conjugal company to the husband.

Decree of nullity

Consent obtained by fraud relating to a material fact

Marriage as an institution requires trust, love, compassion and mutual understanding for its successful innings. A deceitful entry into it is fatal to its existence. Matrimonial remedy of a decree of nullity comes into foray when one party conceals certain material facts, that in normal course should have been disclosed to the other party, as the foundation of a happy marriage cannot be laid on falsified facts and concealment of material information. Mental health is a material fact relating to the respondent. In *Sandeep Aggarwal* v. *Priyanka Aggarwal*,[12] the husband approached the court with a prayer for grant of a decree of nullity on the ground that his consent to the marriage was obtained by fraud and concealment of a material fact relating to his wife. He claimed that the wife was suffering from acute schizophrenia prior to marriage and depicted abnormal behaviour post marriage. The fact of her mental illness was concealed from the bridegroom at the time of marriage negotiations and the same could be revealed post marriage from her behaviour. Even then , her family attempted to pass it off as headaches. The marriage lasted for only nine weeks after which they separated with the husband approaching the court with a prayer for a decree of nullity.

11 AIR 2022 Delhi 264; AIROnline 2022 DEL 105.

12 AIR 2022 Delhi 30; AIROnline 2021 Del 2672.

Before the Family court, the husband filed an application, that the wife be examined by a medical Board but the same was resisted by the wife and refused by the court as well even when the husband had successfully raised a preponderance of probabilities as the wife had vehemently refused to submit herself to medical examinations but the medicines that she was taking were the one prescribed for this very mental ailment. The matter went to the high court. The high court termed as erroneous the refusal of the family court to entertain the application of the husband to get his wife examined by a medical board as only after medical examination could it be established whether she indeed suffered from such ailment or not. The court held that the husband was able to prove due to probabilities that the wife was suffering from acute schizophrenia, was unfit for procreation of children and granted a decree of nullity in his favour.

Cruelty

Normal wear and tear of married life,[13] would not entitle a party to a decree of divorce on grounds of cruelty committed by the other spouse. Thus, visiting parents even without informing husband,[14] or that the wife is not good or does not behave well with members calling them beggars without specifying any single instance of misbehaviour[15] or a mere bald statement of husband that the wife is guilty of cruelty[16] without any substantive evidence would not amount to cruelty, but refusal to prepare food, not co-operating with husband in performance of marital obligations and giving comfort of physical relationship, making scandalous allegations against character of husband and extra marital affair without evidence,[17] making unsubstantiated charges of cruelty,[18] or fidelity,[19] against the wife, would amount to cruelty.

Similarly, mere filing of criminal cases against the matrimonial family does not amount to cruelty and mere acquittal or dismissal of complaint per se would not be sufficient to reach a conclusion that complaint was false or fictitious,[20] as every person has a right to take recourse to law for redressal of his grievance, but false allegations of cruelty and dowry demand and lodging of false cases with a view to harass husband and in-laws,[21] or making allegations in public about the

13 *Parag Pandit* v. *Sadhna Parag Pandit* AIR 2022 MP 113; AIROnline 2022 MP 1270.

14 *Mohit Preet Kapoor* v. *Sumit Kapoor* AIR 2022 All 81; AIROnline 2022 All 979.

15 *Prabhat Kumar Verma* v. *Anita Verma* AIR 2022 Jhar 49; AIROnline 2022 Jha 246; *Abha Ghatge* v. *Chandrashekar Ghatge* AIR 2022 (NOC) 454 (MP); AIROnline 2022 MP 759.

16 *Nakul Saxena* v. *Shivani Saxena* AIR 2022 P&H 88; AIROnline 2021 P&H 2010.

17 *Parubai Raghavendra Rathod* v. *Ragavendra Tukaram Rathod* AIR 2022 Karn 5; AIROnline 2021 Kar 3227; *Kishan Chandra Modak* v. *Ava Bhadra Modak* AIR 2022 Cal 219; AIROnline 2022 CAL 890.

18 *A Suresh v Revathi* AIR 2022 (NOC) 830 (MAD); AIROnline 2022 MAD 3787.

19 *M Subramaniyan* v. *S Latha* AIR 2022 Madras 314; AIROnline 2022 MAD 4270.

20 *Vasant Punju Chavan* v. *Sarala Vasant Chavan* AIR 2022 Bom 166; AIROnline 2022 BOM 2001.

character of the husband, filing of cases under s. 498A , and when the parties were acquitted not filing an appeal as the cases were false,[22] or filing a criminal complaint even after agreeing to a compromise,[23] or making unfounded allegations against spouse or his or her relatives in pleadings or making complaints with a view to affect the job of the spouse amounts to causing mental cruelty to said spouse.[24]

Cruelty under section 498A and cruelty under matrimonial laws as a ground for divorce

Matrimonial cruelty under the Hindu Marriage Act, enables an aggrieved party to obtain a civil remedy and its concept is distinct from that under the Penal Code that attracts punitive action against the accused. Under the Penal Code, the term cruelty has a limited meaning, but is defined/explained in section 498A. On the other hand, the HMA does not define the term cruelty and therefore, as such, any act or conduct which may not amount to cruelty under the Penal code may still constitute cruelty as envisaged under the section 13 (1) (ia) of the HMA. Under the HMA, cruelty postulates a treatment to the petitioner with such conduct as to cause a reasonable apprehension in the petitioner's mind that it will be harmful or injurious for the petitioner to live with the other spouse. This act may not constitute cruelty under the Penal Code but might be sufficient for granting a matrimonial remedy. In *Amit Singh* v. *State of UP*,[25] the parties were married in 2014 and then went to London where the husband worked. Matrimonial problems saw the wife filing a domestic violence case against the husband in London following which he was taken into custody and while coming back to India she also filed for divorce. The husband said that the cases against him filed by the wife under criminal law were pending and while they were pending the proceedings for divorce should be stayed as one of the case was also filed by her under section 498A. She had simultaneously filed for divorce on grounds of his cruelty. The husband's contention that till the time the case filed by her under Penal Code is decided, the divorce proceedings should be stayed was not accepted by the court as they said that the concept of cruelty under Penal Code and under matrimonial laws for the purposes of grant of a decree of divorce are entirely different.

21 *Nitu* v. *Gajendra* AIR 2022 (NOC) 391 (MP); AIROnline 2022 MP 420; *Premdeep Nishikant Matlane v Bhavana Pradeep Matlane* AIR 2022 Bom 125; AIROnline 2021 Bom 3082; *Pritam Lal Sahu* v. *Kalpana Sahu* AIR 2022 Chh 99; AIROnline 2022 Chh 998; *Deepak Kumar Dewangan* v. *Gunja Dewangan* AIR 2022 CHH 184; AIROnline 2022 CHH 179; *Manish Nandlal Adatiya* v. *Chitra Manish Adatiy* AIR 2023 Bom 18; AIROnline 2022 BOM 482; *Anmol Verma* v. *Radhika Sareen* AIR 2022 P&H 188; AIROnline 2022 P&H 69.

22 *Mohit Preet Kapoor* v. *Sumit Kapoor* AIR 2022 All 81; AIROnline 2022 All 979; *Santosh Shetty* v. *Ameeta Shetty* MANU /MH/0462/2020, in the high court of Bombay. Family court Appeal no 113/2014 dt 18.03.2020

23 *Harpinder Kaur* v. *Gurpreet Singh* AIR 2022 P&H 62; AIROnline 2022 P &H 172.

24 *Thalraj* v. *Jyoti Thalraj* AIR 2022 (NOC) 54 (Bom); AIROnline 2021 Bom 1127.

25 AIR 2022 ALL 225; AIROnline All 4251.

Denting traditional stereotypes

It is perhaps the first time that a case took seriously the career advancement of a wife in comparison to the husband's insistence on consummation of marriage. The Karnataka High court in an unprecedented step not only upheld the right of a woman to prefer her career over matrimony but also helped her to get out of the shackled matrimonial chains. In *Swapna* v. *Bhatla Penumarthi Venkata Bala Phanindra Kumar*,[26] the parties had an arranged marriage. At the time of the negotiations of marriage, the wife was pursuing her PhD from Indian Institute of Science, a very prestigious institute in India,that also has a reflection on her intelligence and dedication towards her studies and research. She made it very clear to the husband prior to the marriage that her first priority was to complete her PhD and therefore she was not contemplating marriage at this moment. She was assured by the husband that he would not insist on performance of matrimonial duties and would let her concentrate on finishing her research. They got married, stayed together for some time, but their marriage was not consummated. The wife came back to Bengaluru to complete her research and the husband also came to the city but used to visit her at her campus. However, subsequently he started pressurising her to join him at his residence and perform the matrimonial obligations. Her refusal led to abuses and harassment and the husband threatened to commit suicide and then send her a legal notice to join him and filed a petition praying for a decree of restitution of conjugal rights in the family court. The wife who was yet to complete her PhD filed for divorce on grounds of mental cruelty. Her main concern was that despite assuring her prior to marriage about letting her complete her research, the husband later insisted on consummating the marriage, threatened suicide, insisted on joining him at the matrimonial home and threatened her father who with a weak heart died of a heart attack as a result of it. The family court dismissed the petition filed by the wife praying for a decree of divorce on grounds of husband's cruelty, and the matter went in appeal.

The high court noted that the family court has appreciated the evidence placed on record in the perspective of a traditional case of matrimonial dispute between the couples rather than appreciating the intellectual aspect of the case of the wife and had held that she had failed to prove the case of cruelty and thereby erred in rejecting her application.

The court held that the conduct of the husband amounted to cruelty, the parties were living away from each other since 2008 and no purpose would be served by dismissing her petition and divorce was granted to her. In another case,[27] with huge traditional stereotyping of roles connotation, the High Court of Delhi observed that where the husband puts the entire responsibility /burden on the wife to manage the house, her job and to look after her two daughters, while he would not take any responsibility but continuously abused the wife insulted her

26 AIR 2022 KAR 193; AIROnline 2022 KAR 4489.

27 *Sunil Kumar Sharma* v. *Preeti Sharma* AIR 2022 Delhi 116; AIROnline 2022 DEL 1143.

and her family members, the conduct of the husband would amount to cruelty as the bond between them was irretrievably broken due to the husband subjecting her to repeated harassment and the wife would be entitled to a decree of divorce. Similarly, the High Court of Tripura dismissed the petition of the husband,[28] for divorce on the ground that the wife was guilty of neglecting her matrimonial duties and was not taking care of the home and the child as she was expected to do while observing that the wife who was working with Central Industrial Security Force, cannot be expected to take care of the child as is expected of a housewife, and that it would not amount to cruelty. The fact that in none of the cases, that came from south, north east and the centre, the courts viewed the matrimonial responsibilities from a traditional patriarchal perspective is heartening and says a lot about the changing perception of the importance and right of a woman to take decision about her career in Indian society.

Desertion

Desertion as a ground for divorce must be for a minimum period of two years immediately preceding the presentation of the petition.[29] Additionally, the party has to prove that he/she was not responsible for driving the other out of the house and was always ready and willing to receive him/her back and give him/her conjugal company. Desertion is permanent forsaking of the other spouse or leaving with an intention never to join back in conjugal relationship. Thus, non resumption of cohabitation even after the husband secures a decree of restitution of conjugal rights[30] and made all attempts to bring the wife back, it would amount to desertion on her part. The court held that since the separation spread over a period of 12 years and the wife did not show any sensitivity towards the emotional and general feelings of the husband leaving him with a clear intention to bringing cohabitation permanently to an end, the matrimonial offence of desertion was proved and he was entitled to a decree of divorce on grounds of her desertion.[31] In *Debananda Tamuli* v. *Smti Kakumoni Kataky*,[32] the parties married in 2009 at Assam. Merely thirteen days later the wife took all her belongings and left the husband. All attempts of mediation failed even at the behest of the court. Six months later when the mother of the husband died, the wife came back for a day and then again left. In 2011, the husband filed a petition praying for a decree of divorce on grounds of wife's cruelty and desertion as according to his submissions she refused to even consummate the marriage and left him with an intention to completely forsaking his company. On the other hand the wife's contention was that it was the duty of the husband to demonstrate to the satisfaction of the court the he had made sincere attempts to résumé cohabitation. He had neither filed for restitution of conjugal right nor had shown any other attempt to bring her back that shows his

28 *Parthajit Majumder* v. *Anita Rani Barman* AIR 2022 (NOC) 882 (TRI); AIROnline 2021 TRI 685.

29 *Sushma* v. *Sunil Kumar* AIR 2022 P&H 79; AIROnline 2022 P&H 298.

30 *Sanjeev Kumar Sahu* v. *Priyanka Sahu* AIR 2022 CHH 162.

31 *Ritesh Babbar* v. *Kiran Babbar* AIR 2022 Del 72; AIROnline 2022 Delhi 583.

32 AIR 2022 SC 1099; AIROnline 2022 SC 163.

lack of will to resume marital ties. Further since the wife had rejoined him, even for a day when his mother died, it shows that she did not intend to desert him or bring the marital relationship to an end.

The apex court noted that the marriage had failed miserably, and merely because the wife had joined the husband for a day on the occasion of death of his mother, it cannot mean an intention on her part to resume cohabitation. The court held the wife in desertion and directing the husband to pay a sum of Rs 15 lakhs as full and final settlement of alimony and permanent maintenance dissolved the marriage.

The withdrawal by the spouse must be without a reasonable excuse.[33] If the husband because of his conduct or cruelty,[34] makes it impossible for the wife to live with him, he cannot be successful in securing a decree of divorce on grounds of her desertion. In *Uttamaram Ledu Singh* v. *Kayaso Bai*,[35] the husband brought a petition praying for a decree of divorce on grounds of wife's desertion. The court held that if during the subsistence of the marriage, the husband brings home a concubine; gives shelter to her and proceeds to have a child with her and if the first wife has to leave the matrimonial home because of physical and mental torture meted out to her on this account, the matrimonial offence of desertion cannot be presumed on part of the wife.

Divorce by mutual consent

Harbouring doubts with respect to motives

Though existence of a valid marriage is essential for filing a petition praying for a decree of divorce by mutual consent, mere omission to recollect the exact date of marriage may not be sufficient to arouse suspicions about its solemnisation and to reject the mutual consent based petition, especially in light of the fact that the parties had produced the photographs of marriage as supporting their claim of matrimony. In *Rekha Kumari* v. *Heendra Choudhary*,[36] a couple, H and W, filed a mutual consent based divorce petition claiming that they were married and were unable to live together and prayed that their marriage be dissolved. On questioning, they were unable to tell the exact date of their marriage. The family court judge rejected/dismissed their application and observed that it appeared that the lady in question wanted to take the benefit of a scheme floated by the government which provided specific kind of job to divorced women and thereby said that there was a strong suspicion that the parties were not married but had approached the court so that they can benefit themselves from such scheme. The matter went to the high court and at the direction of the high court, even an investigation was carried by the police to find out whether the woman had indeed applied for the job under such scheme. The answer to that investigation was in the negative. The high court

33 *K Latika* v. *P R Ganesh,* AIR 2022 Mad 112; AIROnline 2022 Mad 279.

34 *Shekharanand Pandey* v. *Manju Pandey* AIR 2022 Utr 12; AIROnline 2021 Utr 786.

35 AIR 2022 Chh 66; AIROnline 2022 Chh 292.

36 AIR 2022 Raj 165; AIROnline 2022 RAJ 4048.

held that the family court cannot refuse to entertain the application on such suspicion and the order dismissing divorce by mutual consent was set aside.

Waiver of cooling time period

Despite clear statutory provisions, a haste for an immediate exit prompts the unhappy parties to approach no less than the apex court to waive off the cooling time period of six months between the two motions/petitions. It has virtually become a routine exercise as year after year, the time period is waived off by the apex court in several cases, making the situation more ambiguous leaving one wondering as to what is a hard case and what is not. To compound the confusion, this power of the apex court is now also exercised by the high courts in several cases. This year the benefit of waiver of six months was given by amongst others, Rajasthan,[37] Allahabad,[38] Uttrakhand[39] and Karnataka,[40] high courts as well. In *Amit Kumar* v. *Suman Beniwal*,[41] the apex court noted that both the parties were very well placed and educated, the husband was an IPS officer and the wife was an IFS officer. They were married in 2020 but due to irreconcilable differences separated three days later and after one year of their separation filed a mutual consent based petition praying for a decree of divorce. They also filed an application for waiver of the six months cooling time period as between the first joint petition and the second motion. The apex court granted the waiver noting that this marriage was a non starter as they lived together for only three days on account of irreconcilable differences. All the efforts of reconciliation had failed and they still wanted to go ahead with divorce after 14 months of separation. They were of the opinion that no useful purpose would be served by making the parties wait, except to prolong their agony and statutory period of six months was waived. Both the family court and the high court had dismissed their plea.

Continuation of consent of both parties on the date of second motion.

Legal provisions require continuation of the consent of both parties at the second motion in a mutual consent based petition. It is in consonance with the idea that the cooling time period would enable the warring parties to rethink about their decision and explore the possibility of continuation of the marriage bond. If both have clarity with respect to futility of continuation of the marital ties, they would together approach the court for a final culmination of the marriage after six months from the first petition but if in the meanwhile a party has a change of mind and feels that his/her interests would be better served if the marriage continues then the other cannot unilaterally proceed for its culmination as it is divorce by

37 *Kamal Dwarkadas Tewani* v. *Varsha Kamal Tewani* AIR 2022 Raj 64; AIROnline 2021 Raj 1836; *Sheela Dhobi* v. *Satish* AIR 2022 Raj 80; AIROnline 2022 Raj 167; *Ajeesh Anand* v. *Nil* AIR 2022 Raj 39; AIROnline 2021 Raj 1920..

38 *Anamika Srivastava* v. *Anoop Srivastava* AIR 2022 (NOC) 679 (ALL); AIROnline 2022 ALL 3175.

39 *Naresh Chander Sati* v. *Tina Sati* AIR 2022 Utr 48; AIROnline 2021 Utr 1365.

40 *Jagannath Puttaswamy* v. *Rashmi Rani* AIR 2022 (NOC) 530 (KAR); AIROnline 2021 KAR 992.

41 AIR 2022 SC 570; AIROnline 2021 SC 1321.

mutual consent. In such cases the courts do have the discretion to view the whole scenario and take a concrete decision as to whether they should in the circumstances as are presented before them dissolve the marriage or not. In two cases under the survey, the courts took diametrically opposite stand in one permitting the marriage to be dissolved while in other refusing to do so. In *Sneha Dahire* v. *Tarun Dahire*,[42] the parties had a child but went their separate ways due to matrimonial bickering . The joint petition for grant of divorce by mutual consent was filed by them and the consent of both the parties was recorded before the court. Six months later the parties re-appeared and the consent of both parties was re-recorded, but three days later, the case was reopened and while the husband re-iterated his unwillingness to continue with the marriage, the wife did not appear, nor was her consent recorded. Based on her presence three days earlier, the family court granted divorce on mutual consent, but the wife filed an appeal and said that the case was reopened on the date of the second motion and her consent was not recorded due to her withdrawal of the same. The issue was whether an appeal is maintainable at all under section 19 (2) , 9 of the Family Courts Act. The court allowed her appeal to be heard. However in *Ajay Bhikulal Gujar* v. *Shyamali Ajay Gujar*,[43] the Bombay High court took an opposite approach. Here, the husband filed a petition against wife seeking divorce. After mediation proceedings both agreed to file a petition for divorce by mutual consent. This led to dismissal of the contentious litigation filed by the husband. As per the agreement, the husband deposited the agreed amount in the Bank that was withdrawn by the wife, but after initially agreeing to file the divorce petition by mutual consent, the wife withdrew her consent at the second stage. The parties were residing separately since 21 years. The court held that after having agreed to go ahead with the mutual consent based petition and withdrawing the amount deposited by the husband she cannot withdraw her consent subsequently and divorce by mutual consent was granted.

***Ex- Parte* divorce**

Justice cannot be done unless the court hears both the parties on an equal platform. Not only the court examines the facts but also the evidence in detail to conclude whether the party who had approached the court, should or should not be granted a remedy. In case one party fails to appear before the court even with the service of summons effectively done in accordance with the court procedure, the court may conclude that the other party is not desirous of contesting the litigation and it may hear the petition ex-parte and come to suitable conclusion including grant of a decree so desired by the petitioner. However, if the failure of the party to appear before the court is due to the fact of non service of summons or ineffective service , or in some cases where service of summons were shown to the court but in fact the signatures of the recipient were forged, the court may set aside the ex-parte decree, order for re-opening of the case so as to enable the absentee party a fair chance to present her version of the case. Five cases under

42 AIR 2022 CHH 157; AIROnline 2022 CHH 1194.

43 AIR 2022 Bom 94; AIROnline 2022 Bom 932.

survey showed the ex-parte grant of divorce decree by the court to the husband as against the wife. While in four cases, the decree of divorce granted initially by the court was set aside, in one the court refused to do so. In *Rohit Kumar* v. *Ambika Kishan*,[44] the husband had filed an application praying for a decree of divorce, that was allowed ex-parte. The wife filed an appeal and the higher court set aside the divorce decree, remanded the matter back to the trial court for permitting the wife to file a written statement and the husband challenged this order of the appellate court in the high court contending that when the trial court had send the notice to the wife and she failed to appear the ex-parte divorce decree should be confirmed as she willfully had denied the service of notice. The wife was a working woman and the trial court judgment did reveal that the wife refused the service of notice served on her through the process server but did not mention whether a simultaneous notice was also sent to her through registered post s is procedurally mandated. The court held in favour of the wife noting that she had nothing to gain as she had challenged the ex-parte divorce decree without any delay and thus she must be given an opportunity to contest her case afresh. In *Leena* v. *Manish Purushottam Upadhayay*,[45] the petition was presented in the court by the husband praying for a decree of divorce on grounds of wife's cruelty citing several instances of her matrimonial misconduct. The summons were served, he claimed but since the wife failed to appear on any of the dates, an ex-parte divorce decree was pronounced by the family court in his favour. The wife on coming to know of it filed an appeal and deposed that she was never served any notice or summons and her signatures shown to the court on the service of summons letter were forged. The court noted that her signatures appearing on the summons service were in a different language than the one she had signed in all her other documents produced before the court and concluded that the husband had obtained the decree after forging her signatures. The ex-parte divorce decree so obtained through fraudulent means was set aside and the court also asked the family court to examine the statement of the husband that after the time for filing an appeal was over he has remarried. In the event of its verification and conclusion in the affirmative or even in the negative, the court held that he would be also liable to adverse consequences. Again in *Payal Sen Datta* v. *Dipjyoti Datta*,[46] in the petition filed by the husband for a grant of divorce the wife did not participate in any proceeding as she later revealed that she was given to understand no less than by her husband that he would settle the matter and therefore her participation in the proceedings was not required. The court accepted her contention, and held that in matrimonial matters, a highly technical approach cannot rule the roost and opportunity must be provided to wife to contest suit for substantive ends of justice, and the ex-parte divorce decree was set aside.

44 AIR 2022 Orissa 1; AIROnline 2021 Ori 550.

45 AIR 2022 MP 84; AIROnline 2022 MP 808.

46 AIR 2022 (NOC) 458 (TRI); AIROnline 2022 TRI 119.

Mahendra Prasad Dwivedi v. *Lajji Devi*,[47] presented extra-ordinary facts. Here the parties married in 1996 and were living together in the matrimonial home. They had three sons from this marriage. While so living together under the same roof, the husband filed a petition in the court praying for a decree of divorce on grounds of wife's cruelty, when his youngest son was ten years old. In the proceedings the wife was treated as served with the summons on the basis of the Process Server's report, which showed acknowledgement of the service of summons by her. As she did not appear on the dates of hearing, ex-parte divorce decree was passed by the court as against her, granting divorce to the husband. Even during the course of the proceedings the husband did not inform the court that he and the wife were living together under the same roof. Apparently the wife was neither informed nor did she come to know about the *ex-parte* divorce decree passed by the court at the behest of her husband due to continued cohabitation. Subsequently she moved two applications before the court, one for condoning the delay in filing and second for setting aside the *ex-parte* divorce decree. She was able to convince the court that she had no knowledge that the husband had obtained any such decree and it was only when his behaviour with other women was objected to by her that he told her much later after obtaining this decree that he had obtained divorce and was now a free man. The court held that the husband at no point of time disclosed that the parties were continuously living together under the same roof along with their children as husband and wife and part of a family and were actually cohabiting. The court concluded that the husband had obtained the decree by practicing fraud by obtaining her signatures on the summons and set aside the ex-parte decree obtained by him.

The approach of the court was otherwise in *Lee Anne Elton* v. *Arunoday Singh*.[48]

The facts demonstrated that the wife wrote emails to the husband that clearly indicated that she was not interested in marriage nor in her husband and intended its dissolution. The husband filed a petition praying for a decree of divorce. The wife though well aware of the nature of litigation filed against her chose not to file her written statement, nor to participate in the proceedings. She did not even participate in the supreme court Mediation centre despite the fact that the said mediation was directed in the petition filed by the wife herself . The court was satisfied with the pleadings and evidence filed by the husband that the wife was guilty of cruelty. The court granted an ex-parte order of divorce in favour of the husband and the wife challenged it, but the court dismissed her challenge holding that her knowledge of the proceedings was well evidenced.

Alternate relief in divorce proceedings

The primary difference between the matrimonial relief of judicial separation and that of a decree of divorce is that in the former, the marriage is kept alive while

47 AIR 2022 UTR 204; AIROnline 2022 UTR 20.

48 AIR 2022 MP 179; AIROnline 2022 MP 185. A case under the Special Marriage Act, 1954.

the later culminates it. The courts have been given the power to assess the complete situation and if they in their wisdom feel that the parties have the potential of coming back together as there is life still in their marriage, they may grant them a decree of judicial separation instead of the one they asked for, i.e., divorce. In such cases, the parties would remain married to each other but are prevented to cohabit or have access to each other. Inheritance rights are intact but if there is no resumption of cohabitation for a period of more than a year, either party can approach the court afresh for a decree of divorce. The court has the discretion to award a decree of judicial separation instead of that of divorce asked for /prayed for by the aggrieved party if the situation and the facts so necessitate . Two cases under survey this year saw the courts exercising this discretion but in one the family court's verdict was overruled by the high court. In *Tapas Goswami* v. *Nanda Saha*,[49] married in 2002, a son was born to the couple soon thereafter. The wife taking into account the financial weakness of the husband forced him to live with her parents that he did for a considerable period. The court said forcing the husband to live with her parents would amount to mental cruelty but since the husband had condoned it by living with her parents for a long time period , he would not be entitled to claim divorce on this ground. He was later driven out by her and was living with his widowed mother. He further claimed that since he was unemployed he was unable to meet the demands of money of his wife. The parties lived separately for six years before the husband filed a petition claiming divorce from her. After appreciating the evidence the court held that it was not a fit case where divorce should be granted and it instead granted a decree of judicial separation and held that none of them would interfere in the life of the other till they start living with each other with the leave of the court. The son was major by this time. However in *Vinay Khurana* v. *Shweta Khurana*,[50] the parties had lived with each other for a period of three years but then separated and their separation extended to more than 12 years. The wife refused to cohabit with the husband and the marriage had broken down completely. The husband filed a petition praying for a decree of divorce on grounds of cruelty that he was able to prove to the satisfaction of the court. However, the family court granted a decree of judicial separation instead of divorce even though the husband had never prayed for it. The matter went to the high court. The high observed that when mental cruelty was established on part of the wife, grant of a decree of judicial separation was erroneous as the power on part of the family court to decide for the petitioner and change the nature of relief sought for by the petitioner is absent. If the petitioner is able to establish the ground for seeking the relief, he/she should be granted the same. Since in the present case, the husband never prayed to the court to amend his prayer of grant of divorce to the one seeking judicial separation and was able to establish the offence of cruelty on part of his wife, grant of judicial separation instead of divorce was erroneous and divorce was granted to the husband by the high court.

49 AIR 2022 Tri 24; AIROnline 2022 TRI 295.

50 AIR 2022 (NOC) 804 (DEL); AIROnline 2022 DEL 452.

Section 13B and section 14 (1) proviso: Exceptional hardship

Section 14 mandates that no petition praying for a decree of divorce be filed within one year of the solemnization of the marriage, unless the case is of exceptional hardship or depravity. Since the adverse circumstances of one appear unduly harsh to them, rushing to the court for a quick respite is not unusual. The balancing approach of the court, *i.e.,* protection of institution of marriage if there is life left in it and to grant reprieve to the suffering parties in an unhappy alliance is a delicate one and has to be exercised with extreme caution and neither hasty separations nor perpetual misery in a dead marriage is desirable for the welfare of the society. In *Rishu Aggarwal* v. *Mohit Goyal*,[51] the marriage of the parties was solemnized on April 4, 2021 at Uttarakhand and the parties lived thereafter at Haryana in the matrimonial home. After ten days they started living away from each other separately albeit in the same house due to temperamental differences and three months later the wife left the matrimonial home and went back to her parents place at Rohini, Delhi. They then executed an MOU on September 16, 2021, settling their disputes , agreed to co-operate with each other, returned and exchanged the articles given to each one of them at the time of marriage and filed a mutual consent based divorce petition pursuant to this MOU. This mutual consent based petition under section 13 1B was accompanied with a prayer under section 14 of the Act for leave to present the petition before the expiry of one year from the date of marriage. The justification for hardship under section 14 was explained by them as denial of sexual relationship from both sides that led to not only exceptional hardship but also exceptional depravity making it a fit case to be dealt with under section 14.

The Family court dismissed their petition as premature in light of section 14 and also opined that it was not a case of exceptional hardship as except for their own statement that they lived together for around four months, which is a substantive period, whether with each other or away in the same house, it does not make out a case under section 14. They also said that the language of section 14 is clear that the rule of one year is a rule and not an exception, therefore the circumstances must be grave enough to justify deviance from the rule and covering it under the exception.

The High Court of Delhi held that denial of sex may amount to a matrimonial misconduct but cannot by itself without there being any other situation to show amount to a case of exceptional depravity or hardship. The intent behind section 13B, and section 14 was to protect both, the individuals, as also the marriage. Section 14 serves a societal purpose, namely, preserving sanctity of marriage as an institution and to prevent impulsive rush to the court by one or both parties to end their relationship, without due consideration of the consequences. What the legislature has sought to address by way of divorce on the ground of cruelty cannot be categorized as exceptional hardship or depravity so as to bypass the well established procedure. While explaining the distinction between cohabitation

51 AIR 2022 Delhi 96; AIROnline 2022 DEL 981.

and consummation of marriage, the court said that the two expressions are inherently different and must not be treated as same and observed:

> Sexual relationship is an integral, but not the beginning and end of cohabitation. Consummation is simply one instance to make a marriage complete, whereas a conjugal relationship would mean the continuous sexual relationship between a husband and wife over their course of marriage. Cohabitation is the complete marital status of a married couple where sexual relationship is a natural concomitant of that relationship. There can be consummation without cohabitation and vice versa. The term cohabitate simply means two individuals living together. These terms are inherently different and must not be treated as same. The fact of the matter is that these terms are used in different contexts under different provisions to show the difference in intent by the legislature. In the present case denial of cohabitation and denial of sex co-exist.

With respect to the term exceptional hardship the court said that the word hardship simply means severe suffering or unpleasantness. The proviso to section 14 (1) qualifies the word hardship by pre-fixing the same with the word "exceptional". The denial of sex by one spouse to the other, or by both of them to each other may certainly constitute hardship, but it cannot be said to be "exceptional hardship". 'Depravity' and 'hardship' are essentially the effects of certain actions/inactions on the aggrieved partner or both. It is not that, as a matter of generality, deprivation of sex for a period of time is known to cause any physical or mental problems bordering on extreme hardships or exceptional depravity.

The court dismissed their prayer as not being covered under the term "exceptional hardship."

Dissolution of marriage by custom

Extra-judicial divorce though permissible under the Act has to pass the test of community and customary sanction and also legal validity. On being challenged it has to be proved through cogent evidence as several adverse consequences may follow if parties remarry under a genuine belief of their being free to do so, while law perceives the situation otherwise. Marriage and divorce are not merely private affairs but also have a strong bearing on the governmental benefits available in the public domain. The shadow of these private actions on service benefits, succession and inheritance and also on the charges of bigamy in the event of a remarriage of such a party are very important and therefore the community approved separation must have legal backing as well. In *Krishna Veni* v. *Union of India*,[52] the issue related to the freedom fighters pension scheme *i.e., Swatantra Sainik Samman Pension Scheme* of 1980. The pension was claimed by W, as the widow of a person H. Later W1, filed an application that she be given the pension as H had divorced his first wife, W as per the customary laws that were applicable in their

52 AIR 2022 (NOC) 233 (Cal); AIROnline 2021 Cal 62.

community and had re-married her (W1). She claimed to be his legally wedded wife at the time of his death; i.e., his second wife. As per her claim, W therefore was an ex-wife and not eligible to claim the pension. On the other hand she being the legally wedded wife of H was eligible to claim his pension. The parties came from the Jat Sikh community and she prayed that such a customary divorce is validly permissible in their community. The court asked for a proof of its validation as she was not able to place any evidence on record of its validity except a bare statement. The court held that marriage between the husband and the first wife, W, can be dissolved only by a decree issued by a competent court and in absence of any evidence of prevalence of such custom, exception envisaged in section 29 (2) cannot be attracted. Parties have to revert to section 13 in order to seek a divorce. Since the second wife failed to prove the dissolution of the marriage of H with the first wife, W, by any custom, the first wife, it was held would continue to receive the pension which was sanctioned by the authorities. On the other hand , the parties were successful in proving a valid customary divorce in *Nirmala* v. *Mamta*.[53] Here, A, a Hindu man was married to W. W left him and performed a chudi marriage with a different male without putting an end to this marriage under the Hindu Marriage Act, but there was a custom of dissolution of marriage in the Satnami community to which the parties belonged. Evidence, pleadings and custom showed that since ancient times chudi custom of marriage and customary divorce,*i.e.,* Chod Chhuti was existing in the Satnami community to which the parties belonged and there was well established practice of such unbroken rituals which were not negated by any of the parties. A remarried W1, and then died. However, W now applied for succession certificates claiming inheritance in his property as his legally wedded widow. The second wife countered her claim and claimed the succession certificates herself contending that the marriage of A with W was dissolved as per the well established custom and hence the dissolution was valid under section 29 (2) of the Act. Since she was not only legally divorced but married another person as well, she was no longer entitled to claim any share in the property of A, her divorced husband. The court accepted her contention, held that the marriage of A with W had been brought to an end under the customary laws and therefore W1 was entitled to succession certificates.

IV MAINTENANCE

Ownership of material assets and economically secure position of a man is an evident truth in the Indian Patriarchal society. The wife's rights of maintenance in and after the culmination of marriage are well secured through several legislations and even if she chooses voluntarily, conditionally or even unconditionally to relinquish her claim of maintenance at the time of settlement or separation, she cannot be prevented from bringing in a claim of maintenance subsequently if she is in dire circumstances and is unable to maintain herself. No rule of estopple can be applied as against her. In *G Kavitha* v. *G Madhusudan*,[54] the husband claimed

53 AIR 2022 (NOC) 843 (CHH); AIROnline 2022 CHH 79.

54 AIR 2022 (NOC) 790 (TEL); AIROnline 2022 TEL 148.

that he and his wife executed a maintenance settlement as per which the wife relinquished her claim of maintenance and Rs 4000/ per month was awarded to the daughter from this marriage. She then filed for maintenance and he contended that she would be bound by the agreement and hence cannot claim any maintenance. The court observed that even if the wife executes an agreement relinquishing her right to receive maintenance in future, that would be contrary to public policy and unenforceable if she is unable to maintain herself. Since the husband failed to prove both the alleged settlement and also whether she has any independent source of income the court held in favour of the wife and directed him to pay Rs.10,000/ per month to her.

The primary condition however remains that the wife should be unable to maintain herself. If she has sufficient resources, she cannot claim any maintenance from the husband. In *Chinmayee Mohapatra* v. *Chinmaya Chetan Mishra*,[55] the wife was earning twice as much as that of the husband. She was working as a court manager in the District Court at Boudh and was earning a monthly salary of around Rs 55,000/ that was almost double to the earning of the husband, who was working in a private firm. In this situation, the court held that even for maintaining standards of life, the husband cannot be directed to pay her any alimony.

Interim maintenance: able bodied rule: Claim by the husband

The settled position visualises husband's economically active status putting him under a legal obligation to provide for the wife and for the children born of the wedlock. This is a general rule and the husband if able bodied should work for providing for the family and thus for a man it is extremely difficult to evade his maintenance responsibilities. Though the law places both the spouses on an equal platform taking into account the economically active provider rule, the courts do take very seriously a prayer of maintenance coming from the husband as against his gainfully employed wife. It actually results in re-enforcement of patriarchal stereotyping of respective gender roles in matrimony. In *Bhagyashri Jagdish Jaiswal* v. *Jagdish Sajjanlala Jaiswal*,[56] a claim for grant of interim maintenance was brought in by the husband as against his earning wife. The parties also had a daughter from this marriage. The wife had filed a petition praying for a decree of divorce on grounds of his cruelty and desertion, that was decreed in her favour and the marriage was brought to an end. The husband claimed that his health was failing , he had no job, and he would help in the business of his father-in-law staying with them . The wife on the other hand had a job and was earning Rs 30000/ per month. However, what was more important was the claim of the husband that in order to facilitate the wife to acquire education of MA, he had undertaken the domestic responsibilities including the one of bringing up their daughter so that the wife can study further and advance in her job. He therefore sought interim maintenance to the tune of Rs 15000/ from her. The wife resisted his claim on the ground that he should be asked to get a job and as a man, he cannot

55 AIR 2022 Orissa 188; AIROnline 2022 ORI 24.

56 AIR 2022 Bom 116; AIROnline 2022 Bom 1886.

be seen as being financially dependant on his wife. The trial court granted him Rs 3000/ as interim maintenance that was also upheld by the high court. After the grant of the decree of divorce the husband claimed permanent alimony and maintenance from the ex-wife.

The wife's second objection was that pursuant to a decree of divorce the relationship between her and her husband has come to an end and therefore she is under no obligation to provide maintenance to him. The court held that the language of section 25 is that "at anytime after the passing of the decree" indicate that the requirement of section 25 is that the matrimonial petition should not have been dismissed but should have culminated in the award of decree which was done in this case. That being the situation, if the husband was unable to maintain himself , he was entitled to get permanent alimony and maintenance from his gainfully employed wife.

V CUSTODY AND GUARDIANSHIP

Filing writ of habeas corpus when child is with mother

A small innocent child in broken families is a victim of excessive possessiveness under the garb of "mine only" by the custodian parent, while the other procreator desperately tries all possible legal recourses to catch even a glimpse of the little baby. It may include filing a writ of habeas corpus to gain the custody without any success. In *Priyanshu* v. *State of UP*,[57] soon after the birth of child, the mother left the matrimonial home along with the baby boy, and did not return. The father filed a writ of *habeas corpus* but the court held that this writ can be issued only if he is able to prove that the present custody is unlawful. Since the mother ordinarily retains the custody of the child below the age of five years, the court declined to issue such a writ and advised the parties to invoke the jurisdiction of the family court under section 26 of the HMA, with respect to custody orders ending the disposal of the matrimonial proceedings. The court said that a writ of habeas corpus is a prerogative writ and not an extra ordinary remedy. It is a writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown. Exercise of the extra-ordinary jurisdiction for issuance of a writ of habeas corpus would, therefore be seen to be dependent on jurisdictional fact where the applicant establishes a prima-facie case that the detention is unlawful. It is only where such jurisdictional fact is established that the applicant becomes entitled to the writ as of right. In an application seeking a writ of *habeas corpus* for custody of minor child the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether the welfare of the child requires that the present custody should be changed and the child be handed over in the care and custody of somebody else other than in whose custody the child presently is. Proceedings in the nature of habeas corpus may not be used to examine the question of the custody of a child. The prerogative writ of *habeas corpus* , is in the nature of extra-ordinary remedy and the writ is issued where in the circumstances of a particular case, the ordinary

57 AIR 2022 (NOC) 223 (All); AIROnline 2022 All 2136.

remedy provided under the law is either not available or its ineffective. The power of the high court, in granting a writ , in child custody matters , may be invoked only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody. Custody of a Minor who has not completed the age of five years is to be ordinarily with the mother and in view thereof the custody of the minor son with the mother cannot prima-facie be said to be illegal. The court dismissed the prayer of the father.

Permission sought by mother for relocation of child for a temporary period

The father is the natural guardian of the child and the mother in theory comes after him. It is another matter that often in the matter of taking decision with respect to the custody of the small child the mother is preferred to the father if in the interests of the baby the court thinks so. However, even if the mother gets the custody of the child, she cannot unilaterally take any decision with respect to relocating the child to another place more so, to a foreign land without the consent of the father and if he decides to withhold the consent and the interest of the child so demand the mother can move the court for seeking such permission. In *Anuradha Sharma* v. *Anuj Sharma*,[58] the parties had a daughter and the mother sought her custody and exclusive guardianship on the ground that she had brought her up single handedly right from birth with the father having actually a negligible role in her upbringing. The wife was an engineer by profession and shifted from the matrimonial home at Bombay to Pune where her parents lived to be with them. She had also changed the school of her daughter to the one in Pune. She now filed a prayer before the court to shift and relocate her daughter so that she could take her to Poland, as an opening in her company facilitated the same and it appeared beneficial to her in her career advancement. Since this relocation was for a period of two years, she wanted to take her daughter with her so that she could get the best opportunity to have education at some of the good schools. She was also taking her mother with her so that the child would have a constant company and would not feel isolated. The father contested her prayer and contended that the child would be uprooted from her culture and most of all would have a total disconnect with the father. The court rejected his contention, ruled in favor of the mother, and permitted her to take the daughter with her to the foreign land, observing that it was only for a period of two years and since she would be in the company of her mother and grandmother there would be no question of her uprooting from her culture, It would be in the best interests of the child to be with the mother. The rule of welfare of the minor continued in *Ravindra Prakash Kharat* v. *Kalpana Ravindra Kharat*,[59] with the High Court of Bombay observing that any decision that should be taken with respect to the custody of minor children should be done keeping in view their welfare. Here the parties had two small children and separated. The elder son was two and a half years old and the younger an infant. The younger child was with the mother while the elder was with the father who was looking after

58 AIR 2022 Bom 237: AIROnline 2022 BOM 5482.

59 AIR 2022 Bom 271; AIROnline 2022 BOM 4893.

him with the help of his old parents. The father was a teacher and during the time he was on his employment related work his parents looked after the child. The father also claimed that the mother had herself left the elder child with the father and had not bothered to even enquire about its welfare for a full year. Now when the bond between the father and the child had strengthened she wanted to break it by taking away the child. The mother on the other hand was a home maker, had no job and was devoting herself to bringing up the children. She was living with her parents and two brothers. The lower court in response to her application seeking permanent custody of the elder child held that a child of such tender age requires his mother , he would also have a number of persons to give him company including his younger brother, so they ruled in favour of the mother and awarded her the permanent custody of the elder son. The matter was taken in appeal to the high court which differed with the decision of the lower court and held that giving permanent custody was not appropriate on part of the lower court. Taking into account the vulnerability of the age of the child the high court thought it proper that the custody be awarded to the mother till the child attains the age of five years. The father was advised to file for appropriate proceedings once the child attained the age of five years.

Husband and wife are both under a legal duty jointly as well as severally to co-operate with each other for welfare of children even if they fail to re-unite.[60] If the interests of the child would be better served as was evidenced from the report of the child Welfare Committee, rehabilitation Psychologist and the District Child Protection Officer, who were unanimous in filing of the report based on the SIR home study report that the home environment of the father was conducive to the child's growth as his family members were very keen to have him as part of the family and the minor also had developed good relations with her extended family, the court directed the superintendent to hand over the custody of the child to the biological father.[61] However, if in the interests of the child, mother would be a better person, it is the mother who would be preferred to the father in relation to the child's custody.[62] The father's claim to custody may even be defeated and the maternal grandfather be given the custody of the child if the circumstances and the interests of the child so demand.[63]

Guardianship of a senior citizen

Guardianship issues primarily revolve around young innocent children but life is a full circle and often elderly due to mental issues and physical vulnerability require similar kind of attention and care from the courts, more so if the senior citizens own huge property that makes them additionally vulnerable from their

60 *Sanjay Kumar* v**.** *Suman Kumari* AIR 2022 Jhar 90; AIROnline 2022 JHA 500.

61 *Tushar Kanti Das* v. *Kajal Saha* AIR 2022 (NOC) 581 (CAL); AIROnline 2022 CAL 1101.

62 *Master Advait Sharma* v. *State of UP* AIR 2022 (NOC) 372 (All); AIROnline 2021 All 195; *Rajat Agarwal v Sonal Agarwal* AIR 2022 (NOC) 361 (P&H); AIROnline 2021 P&H 196.

63 *G Rajendran* v. *P Lakshmanan* AIR 2022 (NOC) 339 (Mad); AIROnline 2021 Mad 705.

own greedy relatives. *Satula Devi* v. *Government of NCT of Delhi*,[64] related to an eminent senior citizen, A, a member of Parliament, who was diagnosed with the "fronto-temporal dementia" and who possessed properties worth several thousand crores of rupees. His wife sought his guardianship but the same was vehemently opposed by some of his family members except her two sons and their families. Ultimately the court appointed a guardianship committee to look after his financial affairs and a supervising guardian as a retired Delhi High court judge Justice R S Endlaw. A died and the same tussle between the family members arose and there were apprehensions with respect to unjust possession or claims of his movable and immovable assets. The court now dissolved the guardianship committee but appointed Justice R S Endlaw as the sole guardian for the estate and all assets of the deceased, as there was a need to safeguard and secure the assets so that the same, which ran into thousands of crores are not frittered away or misused in any manner. The court also issued directions to the guardian to place the report before it within a period of two months about the status of movable and immovable assets of A, including his Bank account, fixed deposits , shares and any other investment. Till the final disposal of the case no one was permitted to withdraw any amount from his assets.

Cross border conflicts

Matrimonial conflicts many a times see conflict of jurisdiction and cross border issues due to relocating of the non Indian citizen child to India by the Indian parent, and insisting of holding the child here against the wishes of the other parent in clear violation of the order passed by a foreign court of competent jurisdiction. In *Vasudha Sethi* v. *Kiran V Bhasker*,[65] the parties were married in USA and the child was born there. Thus, he was a US citizen by birth. The child, a boy suffered from a disease and was advised to undergo surgery. Unable to secure an appointment in US, the parents decided to have him operated in India and since he was a US citizen, they took permission to remove him from the country of birth and authorised the mother to take him to India for medical reasons. He was successfully operated and recovered but the mother failed to bring him back to US and decided to stay in India, with her parents. The father filed a petition in the US court of competent jurisdiction and secured a favourable order. The order directed the wife to bring back the child to US, but the wife failed to obey it despite the order being served on her. The husband then filed a writ in the Indian court directing the wife to either come with the child or hand over the child to him to be taken to his country of birth. The high court directed the wife to either go to US with the child and hand him over to the father or hand over the child along with his passport to the father here in India. Failure to comply with these direction led the matter to the apex court which held as follows:

i) Rights of parents are irrelevant when the court decides the custody issues and it is only the welfare of the child that is to be taken into consideration;

64 AIR 2022 Delhi 208; AIROnline 2022 DEL 1945.

65 AIR 2022 SC 476; AIROnline 2022 SC 32.

ii) Welfare of the child always takes precedence over individual or personal rights of parents; in such proceedings the court cannot direct the wife to go to US as it would affect her right to privacy but an option to go to US can be given to them;

iii) The court held that it was in the interests of the child to go to US and that mother can travel to US with the child at the expense to be provided by the father.

The court further observed,[66] that the issue of custody of minor , whether in a petition seeking habeas corpus or in a custody petition, has to be decided on the touchstone of the principle that the welfare of a minor is of paramount consideration. The courts in such proceedings, cannot decide where the parents should reside as it will affect their rights of privacy. A writ court while dealing with the issue of habeas corpus cannot direct a parent to leave India and to go abroad with the child. If such orders are passed against the wishes of a parent, it will offend her/his right to privacy. A parent has to be given an option to go abroad with the child. It ultimately depends on the parent concerned to decide and opt for giving the company to the minor child for the sake of the welfare of the child. It will all depend on the priorities of the concerned parent.

The court thus directed the wife to hand over the child to the father and if she wanted to accompany the child to US the husband was directed to finance her travel and stay in USA.

VI HINDU LAW

Ancestral property

A Hindu man (and presently a Hindu woman as well) can own two kinds of interests in the property, *i.e.,* his self acquired property of which he is the exclusive owner and an interest in the ancestral or coparcenary property that he owns along with his lineal descendants with equal ownership rights over it So, to find the character of the property in the hands of the coparcener becomes important to ascertain the extent of enjoyment one has over the property and the rights of other coparceners over it that includes a right to demand partition and ascertainment of their respective shares. In *Chokhelal* v. *Ashwani Kumar*,[67] the property originally was acquired by a person A prior to 1938. He had three sons (B, C and D) two of whom (B and C) predeceased him leaving behind a son D, a grandson, F, (son of his predeceased son C), and a son of F, (great grandson, GGS) who was born in 1954. The third son, D, who survived A, became the Karta of the property being the eldest surviving male in the family and held the possession of the property. His son was S, who became the next Karta after the demise of his father. He along with the family of his undivided uncle, that now comprised of F and his son GGS, lived together in the family house. S claiming to be the sole owner of the property sold the same to X for a consideration and X claiming to be the *bona fide* purchaser

66 Para33.

67 AIR 2022 MP 157; AIROnline 2022 MP 2356.

filed for dispossession of GGS from the premise so as to have the exclusive possession of the property. GGS claiming a right by birth in this property that he contended was the ancestral property filed a suit as against S for partition and claimed half of the property as his share in the coparcenary property. The issue before the court was with respect to the character of the property. While S claimed that his father, D had constructed this house in 1938-39 and he had permitted the father of GGS along with his family to live in it, GGS claimed that since this property was acquired by his great grandfather, upon his death, it was inherited in equal shares by the father of GGS and father of S who stood in the relation of uncle to the father of GGS.

The court held that since the property once inherited by the sons of A, took the character of ancestral property in the hands of the sons, under the rule of survivorship as it existed prior to 1956, (as the property inherited from any of the male ancestors in the three generations was coparecenary property in the hands of the sons), all the sons of A (only one had remained as the other two had predeceased him) would take a share by survivorship. However, even though B had died issueless, C had left behind him a son F, (grandson in relation to A), the share of C would pass to his generation. Secondly as the son, grandson and great-grandson have a right by birth in the coparcenary property the moment GGS was born, he acquired an interest in this property, since his birth was also prior to the coming into force of the 1956 Act. Under the Mitakshara rules, the coparceners have a right by birth in the coparcenary property and thus after application of these rules the court concluded that GGS would be entitled to half of the share in the coparcenary property left by his great grandfather, the other half going to the branch of his granduncle whose son S had illegally sold the entire property. The purchaser would not get the title to the whole property as half of it fell to the share of GGS.

Gift of joint family property: validity

The Karta as the head of the Hindu joint family has a right to alienate the joint family property even without the consent of the other coparceners in certain specific permitted situations. These situations are oriented towards benefits, and protection to the family or the family property and do not however empower the Karta to gift a portion of the joint family property and the same if done can be challenged and declared invalid by the court. In *Kehri Devi* v. *Kamla Devi*,[68] A, was the Karta of the Hindu joint family. He died as a member of Hindu joint family leaving behind his three daughters , two sons, S1 and S2 and a widow, W . His one son S1 died leaving behind his family members as his mother, W and three daughters. Meanwhile the other son of A, S2 claimed that A during his life time had executed a gift and a Will of the joint family property in his favor excluding S1 and his family members. The suit was filed by the legal representatives of S1 challenging the validity of the Will and the gift allegedly executed of the entire property in favor of the other son S2. The court held that the Will was not proved and the gift would

68 AIR 2022 HP 106; AIROnline 2022 HP 810.

not be valid to the extent of the share of S2. It was held that after the death of A the entire property would be divided into six equal parts and the family/legal representatives of S1 would be entitled to 1/6th of the property. The gift would not be valid to the extent of 1/6th share of them However the total gift would not be invalid as other affected members had not challenged it.

VII THE HINDU SUCCESSION ACT, 1956

Effect of deletion of section 4(2)

The impact of deletion of section 4(2) from the Hindu Succession Act, 1956, in 2005, was adjudicated by the apex court in an important case this year.[69] Since its deletion in the year 2005 by the Hindu Succession (Amendment) Act, 2005, there was a confusion as to whether the Act's application is extended to the agricultural land as well even where the provisions of the law that hitherto governed the agricultural land dealt with the prevention of fragmentation of land holdings or for fixation of ceilings. Majority of the laws that govern agricultural land are state enacted laws, and are applicable uniformly irrespective of the religion of the holder of the land. Secondly, most of these laws are gender unjust but because they have been placed in schedule IX of the Constitution, they are outside the scope of judicial review even if they contradict the gender equality norm of the constitution itself. An issue arises here, since land is a state subject and the state acquires the power to enact laws relating to devolution of agricultural land from List II, and succession is placed in list III, and both state and the union are empowered to legislate on it, is there a contradiction between the agricultural laws and the general law enacted by the union *i.e.,* Hindu succession Act. The issue focused on the Delhi Land Reform Act,[70] and the Hindu Succession[71], the later granting to the daughter equal rights in the property of her father along with the son , while the former placing her at an inferior placement in presence of the son. Here the property belonged to a person A, who died leaving behind three sons who partitioned the property amongst themselves. One of the sons, S_3 had a wife, a daughter and two sons. Upon his death as per the Delhi Land Reforms Act, his two sons took possession of the property while the widow and the daughter were not given anything.

The widow and the daughter filed a petition in the court claiming half of the share in the property contending that since the deletion of section 4(2) of the Hindu Succession Act by the amendment of 2005, it is the Hindu Succession Act, which would govern succession to the agricultural property as well and therefore the son and daughter would have equal rights along with the widow of the deceased intestate. The sons on the other hand contended, that 1954 Act is a special law governing agricultural property, and would prevail over the Act of 1956. Further even if for argument sake it is accepted that by deletion of section 4 (2) the Hindu Succession Act, would govern succession to agricultural property as well, the

69 *Har Naraini Devi* v. *Union of India* AIR 2022 SC 4632; AIROnline 2022 SC 255.

70 Act 8 of 1954.

71 Act 30 of 1956.

application cannot be retrospective. As the succession here had opened in 1985, much prior to 2005, the amendment consequences can by no stretch of imagination be applied to the present case. Further as the 1954 Act is already placed in the ninth schedule of the constitution therefore despite its conflict with the general mandate of gender justice it is not open to judicial review and cannot be said to be *ultra vires* the provisions of the constitution. While under the Hindu Succession Act, the share of all class-I heirs , that include the widow, daughter and sons of a male intestate is equal and they inherit together, the rules under the Delhi Land Reform Act, 1954 are different and prefer sons over daughters. The petitioners also challenged the validity of these provisions as gender discriminatory.

The apex court held as follows:

i) There is no repugnancy between the two laws, namely the Delhi Land Reforms Act, 1954 and the Hindu Succession Act, 1956. The former has been enacted by the state deriving its powers under list II, of the constitution while the later has been enacted by the union as the subject is specified in the concurrent list.

ii) The rights of inheritance in the present case accrued in 1985 with the death of the bhumidar, while section 4 (2) was deleted for the Hindu Succession Act, in 2005. The exception that was clarifying in nature got omitted but its omission would have no impact on the facts of the present case as no amendment can have a retrospective effect.

iii) The constitutional validity of section 50 cannot be challenged as the Act has been placed in the ninth schedule of the constitution.

iv) The existence of section 4 (2) in the 1956 Act and its deletion will not have any impact in the present case and on the application of the Delhi Land Reform Act, 1954. The reason is that the Act of 1954 is a special law, dealing with fragmentation, ceiling and devolution of tenancy rights over agricultural holdings only whereas the 1956 Act is a general law, providing for succession to a Hindu by religion as stated in section 2 thereof. The existence or absence of section 4 (2) in the 1956 Act would be immaterial.

The court dismissed the appeal filed by the widow and the daughter of the deceased with respect to their claim over the property.

Right of adopted son to the deceased father's property

As was traditionally understood, a son adopted in the family by the widow, would also be deemed to be the son of her deceased husband and a member of the deceased father's coparcenary due to application of doctrine of relation back. This did give rise to some incongruous situations as the widow would adopt a child after some years of the death of the deceased husband while his share in the coparcenary property would have been taken by the surviving coparceners/heirs at the time of his death, and the adopted child invoking the doctrine of relation back would seek a reopening of the partition so as to claim the share of the father who was dead long back. This year also a similar issue of attempted application of

doctrine of relation back arose in *Rajesh Panditrao Pawar* v. *Parwatibai Bhimrao Bende*.[72] Here, a Hindu man died in 1965 and was survived by his widow W and a daughter D. His widow adopted a baby boy, S in the year 1973, eight years after his death. This son S in 1995, sold the entire property belonging originally to A. D filed a suit for recovery of her share in the property and the son claimed the benefit of doctrine of relation back. He claimed that since his valid adoption, in light of section 12 of the HAMA, the date of adoption would relate back to the date of death of the father and he would therefore be entitled to inherit the property as if he was in existence on the day the father died. The court dismissed his claim and held that the succession opened for the first time the moment A died in 1965. At the time of his death the survivors were his widow and his daughter and each of them as his class-I heirs would be entitled to one half of his property. Later when the widow adopted him, and the widow died, her half share would now be divided between the daughter and the adopted son. Thus the daughter would be entitled to ½+1/4 =3/4th of the total property while the son would be entitled to only 1/4th out of the total property and thus a sale deed executed by him of the entire property would not be binding on the share of the daughter at all and she can rightfully recover its possession and have a declaration of the sale to the extent of her share as a nullity.

With respect to the factum of adoption, the court held that since the child was not in existence at the time when the putative father died, doctrine of relation back would not apply and he would not become a coparcener in the coparcenary of which the father might have been a member. He cannot claim a share by stepping into the shoes of the deceased adoptive father who died long before he was adopted.

With respect to the validity of adoption the court noticed that section 8 of the HAMA empowers a single woman to take a child in adoption without seeking the consent from anyone, In case of a widow she can take a child in adoption all by herself as her husband is dead. As far as the effects of adoption are concerned, section 12 provides that the adopted child would be deemed to be the child of the adoptive father or mother for all purposes with effect from the date of adoption and from such date all ties in the biological /natural family would cease to exist except for marriage purposes, vesting and divesting of property. The court noted that the date of induction of the child in the adoptive family is of importance as adoption takes effect from the date of adoption and not prior to adoption. The court specifically pointed out that the aspect of doctrine of relation back is taken away by section 12, as though under the former law the adopted child was deemed to be in existence from the date of death of the father, this fiction has been taken away presently. The date of adoption is the crucial date as the same also rules out the incorrect and unwarranted consequences. The doctrine of relation back was specifically taken away in *Banabai v Wasudeo.*[73]

72 AIR 2022 Bom 172; AIROnline 2022 BOM 1973.

73 AIR 1979 Bom 181.

Determination of character of property and the rights of daughters in coparcenary property

Post 2005, daughters also are coparceners,[74] and entitled to file a suit for partition of ancestral property in the hands of their father. Prior to 2005, they could receive a share in the coparcenary property by applying the concept of notional partition but in separate property of the father, they had the same share as the sons. In *Gitabai Maruti Raut* v. *Pandurang Maruti Raut*,[75] the facts showed that B was the last holder of the property and had four sons namely, N,R, M and S. A partition was affected of the property by the father B and all the four brothers in 1961 and as per a family settlement, mutation was affected in 1971. All the four brothers took their respective share of the property as joint family property and enjoyed it along with their family members. One of the sons/brother, M became the Karta of his family. He died in 1966 and was survived by nine children from two of his wives, namely five sons and four daughters. His first wife had died in 1948. He had three sons and one daughter from his first wife and two sons and three daughters from his second wife who survived him. After his death in 1966, his eldest son S1 took the possession of property as the Karta of this family that remained joint as no partition ever took place in it. As against the claim of S1 as the owner of the property, W2, the second wife filed a suit for partition and her and her children's share in it. She died during litigation and was represented by her children, two sons and three daughters who also claimed a share in the property contending that since it was ancestral property, they also had a share in it. S1 tried unsuccessfully to prove that his uncle P, had gifted the property to him and he held the same as not the *Karta* of the joint family but as it separate owner. The court held that since the property was received by M by way of partition as amongst his four brothers, the character of the property was ancestral and he held it during his lifetime as the *Karta* of this family along with his second wife and all his children. Upon his death since no partition had ever taken place amongst the members of this family, the eldest child, S1 stepped into the shoes of his father and became the Karta of the family of which his step mother and her children were also members. Now at the time of demand of partition by the step mother and her children who stood in relation to the Karta as the step brothers and sisters, the court held that each one of them had an equal share in the property. Sons and daughters are coparceners, and all of them would take an equal share in it. Similarly, in *Somakka* v. *K P Basavaraj*,[76] the apex court held that the occupancy rights of the tenanted property held by the father would constitute his property and since they were heritable in nature, both the son as also the daughter would be entitled to it in equal shares. Here, a Hindu man A had some ancestral property and another self acquired property in which he had occupancy rights. He had under the relevant rules applied to the authorities to be declared as lawful occupant of the property but he died while the

74 *Sevak Ram* v. *Dwij Bai* AIR 2022 (NOC) 569 (CHH); AIROnline 2022 CHH 1086.

75 AIR 2022 SC 3888: AIROnline 2022 SC 1251.

76 AIR 2022 SC 2853: AIROnline 2022 SC 843.

matter could be finally settled. He was survived by a son and a daughter. His daughter filed a petition in the court for claiming 1/4th of the share out of the ancestral property that he held and ½ share in the separate property for which occupancy rights were granted in favor of his father. For ancestral property by applying the notional partition concept, the property would be first partitioned between the father and the son each taking one half share in it. The half share of the father would then be distributed applying the law of inheritance and out of it, the son and daughter would share equally. Thus the share of daughter in the ancestral property would be one fourth and the son would take three fourth of the property. From the separate property the court held that since it would go by the rules of inheritance laws, the daughter and son would share equally each taking half of the property. The daughter's prayer for seeking a partition was accepted.

Application of notional partition

The Madras High court unfortunately came up with an incorrect pronouncement and applied incorrectly section 8 and not section 6 as should have been applied to the case under survey. They actually overturned a correct pronouncement of the trial court and supplemented it with their incorrect decision. In *Nagarathinam* v. *K R Srinivasan*,[77] the three brothers were the holders of ancestral properties and effected a partition in 1982 amongst themselves of this property each of them taking 1/3rd of their share to be enjoyed by themselves independent of the erstwhile joint status of the brothers. The property was ancestral and more property was purchased out of the surplus of the ancestral property. One of the brothers F, had a wife W two daughters D1 and D2 and a son S. F died in 1989. The property that he held , he held as the Karta of the family that he headed. Upon his death as a matter of convenient arrangement, S took one item of property while the mother took another. Tension arose between the son and the mother and she filed a suit and secured a favourable order dispossessing the son from the possession of the property. The son approached the court seeking partition and demarcation of his 5/28 share in the property. Since the death occurred in 1989, and F had left surviving him a class-I heirs in the shape of his widow and two daughters, the trial court as per section 6 applied the concept of notional partition envisaged in section 6, whereby in the first instance the property would be divided it in two parts, one the presumptive share of the father, F and the other going to the male heir S. The ½ share of F would be divided amongst his all class-I heirs including the wife and daughter and each of them would be entitled to 1/8th share in the property. Thus the trial court held the son entitled to ½ + 1/8th, i.e., a total of 5/8th share in the property and the matter was taken in appeal by the mother to the High Court of Madras. Justice G Jayachandran J held that after the partition effected between the three brother in 1982 the character of the property that was ancestral got changed automatically to separate in the hands of each brother. That being the case, upon the death of F in 1989, it would be section 8 and not section 6 that would be applied and the property would be distributed treating it as the separate

77 AIR 2022 Mad 100; AIROnline 2022 Mad 627.

property of the deceased. Out of it, each of his heirs would get 1/4th share and S would get an additional share even if he was the sole male heir. The decision is incorrect as there is no automatic conversion of ancestral property in to separate property after partition amongst the brothers. While they hold the property as separate property *vis-à-vis* each other for their descendants the property continues to bear the joint family character.

Share of the class-I heirs: grandson versus son

Class-I heirs to the property of a male intestate for his separate property are his sons, son of a predeceased son, but the sons of a living class-I heirs are not heirs in presence of the parent through whom they were related to the intestate. In *Ashim Gujral* v. *Kuvam Gujral*,[78] F was the owner of the property "Moti Mahal", a restaurant that he opened in 1920 in Punjab now part of Pakistan. In 1947 he migrated to India and opened another restaurant under the same name in Delhi. He applied for a trademark for his franchise that was granted in his favour. His only son, S predeceased him leaving behind his widow SW, and two sons SS_1 and SS_2. F died in 1997. His estate along with the restaurant and the trademark was inherited by the two sons of his predeceased son and the widow of his predeceased son as his class-I heirs. SS_1 married and got a son SSS. SSS who was a minor at the time of death of F, the original owner, now started a restaurant with the name of Moti Mahal, in direct infringement of his father's trademark without informing them and without seeking their consent. SS_1, SS_2 and SW went to the court restraining him from using the trademark. SSS claimed that as the son of the class-I heir he also inherited the trademark as the same was a heritable property and he was entitled to use the same as a male descendant of the original owner. It was in evidence that the restaurant and the trademark constituted the self acquired property of F and were not in the nature of either the coparcenary or the joint family property. The court held in favour of SS_1, SS_2 and SW and ruled as against SSS holding that since SS_1 was himself a class-I heir, he would take the property as an exclusive owner, and his son would not have a right by birth in it. In presence of a parent through whom the person was related to the intestate, inheritance rights do not accrue in his favour. No right of representation occurs when a person is living. It is only when he dies that children can represent him and take the property. The expression used for class-I heir is not great grandson but son of a predeceased son of a predeceased son. The suit was adjudicated as against SSS.

Succession to the property of a female intestate: consequences of a disclaimer

Succession rights open at the time of the death of an intestate. Can a statement made by one of the heirs that he has nothing to do with the estate of the intestate in the court, operate as a disclaimer and an estoppel may be applied when he later as the rightful heir seeks to claim his share in the property of the intestate? In, *Surajit Majumder* v. *Manojit Majummder*,[79] a Hindu woman, W died leaving behind property and two sons S1 and S2. She possessed and was the owner of the

78 AIR 2022 (NOC) 743 (DEL); AIROnline 2022 DEL 528.

79 AIR 2022 Tripura 28; AIROnline 2022 TRI 190.

land and the house. After her death, her paternal uncle, brother of her late father brought a suit in a court of law claiming that even though the property stood in the name of W, she was only a benamidar and he was the real owner of the property. During cross examination in the said suit, S2 was also examined and he made a statement that he has nothing to do with this property. The suit brought by P was dismissed and the title of W was declared. Now the other siblings of S2 filed for succession certificates, claiming the total property to the exclusion of S2 on the ground that since he had already relinquished his share in his mother's property by way of his statement made during cross examination, in an earlier suit that related to the title dispute of the same property, it amounts to relinquishment on his part and he no longer would be entitled to claim any share. S2 contested their claim and claimed an equal share in the property of his mother by virtue of being her son. The main issue was whether his earlier statement in an earlier suit that he had no claim over the property of his mother amounts to disclaimer conferring title upon other co-owners. Would it results in his forfeiting his rights of inheritance from his mother's property? In other words: whether the right of inheritance can be relinquished be making an admission in the cross examination? The court held in the negative and observed, that a disclaimer means any writing which disclaims, refuses, renounces, or disclaims any interest that would otherwise be taken by a beneficiary. Therefore, the statements made in the previous suit or any sort of statements or admission in the present suit as well , by no stretch of imagination be said to be a waiver /relinquishment of the defendant's right of inheritance or his co-ownership over the suit property left behind by his late mother. Deciding the case in favour of S2, the court held that no estopple would be applicable as against him and a mere statement/disclaimer even though before the court in an earlier suit would not result in forfeiture of his rights of inheritance.

Property inherited from parents

Property that a female intestate leaves and which was inherited by her from her parents would revert back to the heirs of her father upon her issueless demise as per section 15 (2) (a). In *Maniyamma K P* v. *Harikumar*,[80] a Hindu female had no income of her own . She had inherited gold ornaments and Rs 2 lakhs as her share in her parental property which was also not denied by her husband . The court held that the jewellery and the amount would be treated as the one inherited by the deceased female from her parents and the husband cannot inherit the same. In addition, an amount of Rs two lakhs was advanced as loan by her parents to the son-in-law for construction of a house that took place during coverture. The mother of the deceased had produced the bank receipts for the same. It was held that the mother was entitled to recover this amount from the husband of her late daughter.

VIII CONCLUSION

The year 2022 saw some interesting cases under survey. Revocation of adoption was rightly denied to the adoptive mother who wanted to return the

80 AIR 2022 (NOC) 431 (KER; AIROnline 2021 Ker 655.

child, after the death of the adoptive father. While the concept of cruelty both under matrimonial laws as distinct from penal laws was effectively explained, the court also came up with a progressive attitude towards the cause of career advancement of a married woman, freeing her from an unhappy marriage as coming in the way of competing her research and refusing to hold her conduct as amounting to cruelty when she was posted in the services (CISF). The court explained the impact of deletion of section 4 (2) from the Hindu Succession Act in 2005 as inconsequential and clarified the co-existence of the application of agricultural laws and the Hindu succession Act. Unfortunately two cases were decided incorrectly. While the apex court held that a widowed mother who remarries has a unilateral right to supplement the name of the biological father's surname with that of the step father's surname, she also has a right to give the child in adoption to the new husband, i.e., the step father of the child. It had the result of erasing completely the child from his biological paternal family, but this verdict permitted her to retain completely her and her natal family connections with the child as intact. It is perhaps the first of its kind verdict, though not a happy one where only one side of the child's ancestral line vanishes due to a strange act of the mother but the one that meets the judicial approval despite the fact that it stood totally in conflict with the written provisions of the law, making it her illegal act. The High Court of Madras erred in applying section 8 instead of section 6 to the property of a person leading to incorrect distribution of the property. In both the cases what is noteworthy is that the higher courts while being in the wrong themselves overruled the correct pronouncements of the lower courts. A very careful analysis and understanding of the law is desired at the highest level as the pronouncements of the apex court may not have any future correctional eventuality.