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HINDU LAW

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I INTRODUCTION

IMPORTANT JUDICIAL pronouncements in the area of Hindu law relating to adoptions, marriage and matrimonial remedies, maintenance, custody, guardianship, Hindu joint family and succession reported during the year 2023, have been briefly analyzed here.

II HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

Adoption continues tohave both humane and religious connotations under Hindu law. With the dominant motives of providing the joy of parenthood to childless person/s, and a home to a child in need, it also facilitates the spiritual aspects of the life ofa Hindu with an assurance of performance of post death spiritual rites and ceremonies for attainment of salvation. Keeping the twin purposes in mind, the Act stipulates elaborate/ extensive provisions, as also conditions relating to validity of an adoption complementing this dominant objective. Right from specifying the maximum age and marital status of child to be adopted, to the qualifications of the adopted parents san a child of a specific gender, and participation of both sets of parents in the act of giving and taking of the child, the provisions display a purpose oriented clarity. Since adoption leads to a complete transportation of the adopted child from the biological to the adoptive family, a natural consequence is also conferment of full inheritance/property rights in favour of the adopted child from the property of the adoptive parents. It is this angle owing to which a large number of spurious and doubtful claims come/stem from unscrupulous persons claiming the status of adopted child of another, that in many cases are refuted by the very same person, whose child they claim to be often throwing shadows on a genuine adoption. In *Rukmini Devi* v. *Choudhary Mahto*,[1] A, a Hindu man claimed that B had taken him in adoption through an adoption deed. This adoption was challenged by B himself disputingits validity on the ground that at the time of the alleged adoption, he already had a Hindu son and had no intention to bring another in the family through adoption.

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1 AIR 2023 (NOC) 96 (JHA); AIROnLine 2022 JHA 90.

According to the Hindu Adoption and Maintanance Act, 1956 (HAMA), it is mandatory that the child adopted should be unmarried unless there is a custom to the contrary in the community to which the parties belong that permits such adoption. A was married at that time and B argued that no such custom existed in their community.The court ruled as against the claim of adoption as A failed to prove the performance of any ceremonies at the time when he was allegedly taken by B in adoption. Consequently, no giving and taking of the child as mandated by the Act was proved. The witnesses also rebutted the story of adoption.Since B already had a Hindu son living at the time when A was allegedly adopted, hence even if A was adopted with the performance of all the requisite ceremonies, B lacked the capacity to adopt him according to the HAMA. The court also noticed that B's conduct post his assertion of adoption stood in sharp contradiction to his claim. He was not able to satisfactorily explain why after the alleged adoption, neither his surname was changed to that of the adoptive father nor did his residence change, as he continued to live with his own parents and carried his biological father's surname. The court dismissed his petition.

III HINDU MARRIAGE ACT, 1955

Right to marry

Perhaps the highlight of the year 2023 was the issue of whether Indians have a fundamental right to marry or not? The term 'right' includes also a right to choose the life partner of a desired sex. Traditional outlook of marriages in India being only heterosexual in nature with the dominant purpose of procreation and continuation of family line have been seriously diluted by modern living. As present day entry into marital bond may be for companionship or togetherness, marriages solemnised in silver years of the parties or post child bearing age are also not uncommon. Criterion of age, health, religion, domicile, region, nationality etc are irrelevant for marriages in India as multiple options by way of secular and religious matrimonial laws facilitate its solemnisation. The only commonality in diverse matrimonial legislations in India, is specifying degrees of prohibited relations. In addition, religious based matrimonial laws also provide sameness of religion of parties as fundamental to validity of the marriage. Except for usage of terms like, bride and bridegroom, the usage of either party to the marriage show that a direct refence to the marriage evidently being heterosexual may be interpreted differently, yet heterosexuality is still considered mandatory. In a country where not so recently, homosexuality was visualised as a crime , being part of the penal code, the issue of whether same sex marriages are permissible under various matrimonial laws, is still an open question interpreted differently by different groups. Two gay couples,[2] challenged the validity of section 4(c) of the Special Marriages Act, 1954 and the Foreign Marriage Act, 1969, as violative of article 14,15,19, 21and 25, for enforcing their right to live a life of dignity, that includes a right to marry and choose one's life partner and prayed to the apex court for amongst others the following reliefs:

2 *Supriyo* v. *Union of India* AIR 2023 SC 5283; AIROnLine 2023 SC 855.

i) that a right to marry be declared a fundamental right;

ii) The Special Marriage Act, 1954, be suitably amended so as to include two persons regardless of their gender identity and sex orientation;

iii) The term Husband and wife in Special Marriage Act, 1954, be substituted by words "party" or "spouse";

iv) The term spouse under section 7 A (1) (d) of the Citizenship Act be read as gender neutral;

v) requirementof publishing a public notice under the Special Marriage Act, for the intended marriage along with domicile of the parties and inviting of objections be declared unconstitutional;

The parties argued that under article 21 of the Constitution of India, every person has a fundamental right to choose a partner and the FMA violates the right to dignity and decisional autonomy of LGBTQIA+ persons and is discriminatory. International conventions also enjoin a duty upon the state to not interfere with the right of a person to marry and have a family in terms of their own choice as well as to protect the familial rights of all persons without discrimination on the basis of inter alia sexuality, race or religion.

Their main emphasis therefore was to give section 4 (c) a modified /suitable interpretation, reading under the term 'parties', not necessarily a heterosexual couple but also a homosexual couple, altering the concept of bride and bridegroom being a woman and a man to either party being of any sex. It sought within the present regime of matrimonial laws, a scope for inclusive interpretation and validity of same sex marriage. The full bench of the apex court comprising of Chief justice, D Y Chandrachud, J S Ravindra Bhatt, J Sanjay Kishan Kaul, J P S Narasimhan, J Hima Kohli, in an elaborative, 365 page judgment, by a 3:2 ratio acknowledged the disadvantages/hardships that the marginalised community is facing not only from the society generally, the police but also many a times from their natal family.They noted that even though same sex marriages are a time honoured tradition in the Indian society, history is replete with instances of the state having used the provision,[3] of Victorian morality,[4] to rip off the dignity and autonomy of individuals who engaged in sexual activity with persons of same sex.[5] They further observed that, despite the decriminalisation of section 377, and the decision of *Navtej Singh Johar*,[6] the member of queer community continue to suffer violence, oppression, contempt and ridicule in many forms, subtle and not so subtle every single day.[7] They even called upon the state to ensure that they are not discriminated against or ridiculed in any manner, recognising their right to be left alonebut stopped short of providing the desired relief to them calling for maintaining an appropriate

3 S. 377, Indian Penal Code, 1860.

4 See *Queen Empress* v. *Khairati* ILR (1884) 6 All 204.

5 Para 4, quoting from *Meharban Nowshirwan Irani* v. *Empress* AIR 1934 Sind 206.

6 *Navtej Singh Johar* v. *Union of India* AIR 2018 SC 4321.

7 *Id.,* para 8.

balance between judicial role in protecting fundamental rights and legislative authority to enact laws.It is amazing how cutting across the religious lines, multiple organisations as also several individuals took upon themselves to intervene, contest and oppose the plea for recognition of same sex marriages. The predominant argument of virtually all opposing the plea was, natural versus unnatural, normal versus abnormal. It was labelled as a foreign and alien to the concept of an Indian marriage which is religious and holy, being against the order of nature and unnecessary, and that may prove destructive to the institution and sanctity of marriage .The custodians of religion in India, vehemently argued it as against the interests of children, anti-cultural in character, and against all that is essentially Indian in a heteronormative social order. The court observed that section 4(c), of the Special Marriage Act, cannot be read as permitting a homosexual marriage, as at the timeof its inception and also at the time of enactment of other matrimonial legislations, the conceptof marriage though not elaborated under any other enactment, was essentially heterosexual in nature.It is so deep-rooted, that a marriage is perceived as only between a woman and a man, and not even a transgender. An alliance between two persons of the same sex, was unimaginable. The court did acknowledge that the parties have a cause of action and that it has the jurisdiction to decide the constitutional validity of Special Marriage Act, yet lamented the fact that in view of the disparate multiple personal laws co-existing validly in the Indian regime, it is part of the legislative domain and not judicial domain to rewrite the legislation.

The case highlights and brings forth both the public as also the private domain of marriage inIndiawith statutory protection and benefits accompanying this cherished and sacrosanct institution.It is noteworthy that presently 34 out of 194 countries have given recognition to same sex relationship. 28 out of them have done it through an express legislation. On the other hand, same sex relationship though not recognized legally has been decriminalised in some countries but remains a criminal offence in some other countries.

In India, owing to section 377 of the Indian Penal Code, 1860, homosexuality was an offence even amongst consenting adults. Decriminalised first in *Naz Foundation* v. *government of NCT Delhi*,[8] the division bench of the Delhi high court ruled that treating consensual homosexual sex between two adults as a crime would be a violation of their fundamental right protected under the Indian Constitution. The ruling as against this piece of Victorian morality was overruled later by the apex court.[9] On September 6, 2018, in a historic judgement *NavtejSingh Johar* v. *Union of India*[10] a five judges benchthrough a unanimous decision decriminalised section 377.

Since thedecriminalisation of Section 377 of the Indian Penal Code and absence of a parallel section in the Bhartiya Nyaya Samhita, as also tolerance and

8 (2010) CrLJ 94.

9 *Suresh Kumar Koushal* v. *Naz Foundation* (2014) 1 SCC 1.

10 AIR 2018 SC 4321.

acknowledgment of live in relationship, it is now open to any two parties to live together in an intimate physical relationship whether heterosexual or even same sex couples, without fear of persecution legally. However, their insistence of legal recognition shows that a range of benefits that accompany a marriage remain elusive to them in a live in relationship. The benefits span not only across the private domain of the life of a couple but extend to their public domain as well. The joy of spousal companionship and togetherness cannot be taken away from them. Secondly, the argument that nothing prevents them from starting a family by adopting a child and securing its future needs a closer look. It is true that presently all Indians irrespective of their religion or sex including single persons of either sex, can avail the facility of adoption, guardianship , can execute a will of their property in favour of their ward/progeny thereby fulfilling their desire to have a family and children and therefore insistence on the formal validity of their union is unnecessary has a little catch. First of all, no facility including adoption and guardianship is unsupervised and the agencies scrutinise the family background of the intending parent very carefully. Though adoption is available to all Indians , including non-Hindus under the Juvenile Justice (Care and Protection) Act, 2000, the authorities ensure that the child is provided a conducive environment and often, the traditional patriarchal outlook dominates the intending honesty of same sex couple to their disadvantage. Heterosexual couples are in a considerable advantageous position in comparison to their same sex counterparts. The concept of two parents of same sex continues to boggle the members of committee supervising adoption of children due to intense perception of normalcy associated with only heterosexual couples. Ironically, it is not a slowness or hesitancy but awkwardness amongst the majority to even speak about sexuality that remains the major culprit in addressing the issue positively.

Thus practically they are denied the joy of parenthood legally. It sure contradicts article 21 , *i.e.*, a right to live a life of dignity . Many individuals resort to the option of surrogacy to have their own children, though even the Assisted Reproductive Technology (Regulation) Act, 2021 has no room for homosexuals.

With respect to the public domain, a range of benefits that are otherwise available to heterosexual couples, remain unavailable to homosexuals due to absence of legal recognition of their relationship by a formal marriage. The entire category of service benefits, like pension, gratuity, compassionate appointments, *ex-gratia* payments, medical benefits, joint taxation available to legally wedded spouse are completely denied to them.

The fact that legalisation of same sex marriages would usher in an equality in marriage as between the spouses, sharing of domestic and financial responsibilities, would correct the regressive patriarchy and social evils, leading to a balance of power in matrimony has been lost to the society and presently even judiciary. Custodians of religion and society in India lament possible destruction of the delicate fabric of Indian culture , should two person are allowed to legally demonstrate their love, faithfulness and commitment to each other.

Sameness of religion

The Act facilitates marriage between two Hindus only and postulates both conditions enlisting its solemnisation and validity. Religion of the parties is a dominant factor for deciding the validity of the marriage despite the fact that parties might have undergone all the requisite rites and ceremonies required for its solemnisation otherwise. In *Panditi Rathna Raju* v. *Galipothu Mercy Parimala*,[11]the main issue before the court was that where one of the parties to the marriage was not a Hindu, can a divorce petition be entertained and dissolution granted on a petition filed by one of such parties, who happens to be a Hindu. The husband was a Hindu belonging to the Scheduled caste community. The wife was also a Hindu to begin with but had embraced Christian faith along with her whole family. At the time of solemnisation of marriage, she was therefore a practising Christian. Marriage between the parties took place in a church in accordance with the customs of the Christian community. Due to matrimonial turmoil, the husband filed a petition under section 13 of the Hindu Marriage Act, praying for a decree of divorce on grounds of wife's cruelty. The wife contested his claim on the maintainability of the suit under the Hindu Marriage Act. Her contention was that since the marriage was performed in accordance with the Christian customs and rites and she was a Christian at the time of marriage and never reconverted to Hindu religion, Hindu Marriage Act cannot be availed of by the husband even if he was a Hindu at the time of marriage. The court accepted her contention and held that a marriage between a Hindu and a non-Hindu was impermissible under the Hindu marriage Act. Secondly, as the marriage was solemnised as per the Christian rites and ceremonies, a petition for a matrimonial relief could not be presented under the Hindu Marriage Act. The prayer of the husband was thus dismissed.

Here, the marriage was solemnised in a church and as one party was a practising Christian, the Indian Christian marriage Act, permits it. Though the marriage was solemnised validly, it was not solemnised under the Hindu Marriage Act, 1955, hence the issue of any of the parties resorting to availing the matrimonial reliefs under the Act did not arise. It is not only the religion of the parties that is the determining criteria of which Act would govern their matrimonial relationship but the Act or the law under which the parties got married. Even if both parties are Hindus, but if they marry under the Special Marriage Act, 1954, and being Hindus if they desire to file a matrimonial petition, they can do so under the law under which their marriage was solemnised, *i.e.*, the Special Marriage Act,1954 and not under the Hindu Marriage Act, 1955. The court thus rightly dismissed the prayer of the husband.

Restitution of conjugal rights

Parties trapped in matrimonial turbulence have multifarious options by way of obtaining reliefthat are both judicial and even extra judicial, for example, settling the disputes amicably through community elders, or through the medium of family

11 AIR 2023 AP 1; AIROnLine 2022 AP 337.

12 AIR 2023 Chh 38; AIROnLine 2023 CHH 8.

courts or through a contentious litigation running into several years. Seeking a matrimonial decree for a relief also provides multitude of options. If one of the parties is still desirous of continuation of married life, restitution of conjugal rights is a matrimonial relief intended in such direction of saving the marriage. However, the party claiming to be aggrieved must prove to the satisfaction of the court that the other has withdrawn from his society without a reasonable excuse. The party who leaves the matrimonial home has again to demonstrate that his/her withdrawal was due to a misconduct of the party who remained in the house. A failureto do so would tilt the case in favour of the aggrieved party. In *Kunti Chakradhari* v. *Gajendra*,[12] the wife withdrew from the society of the husband and he filed a petition praying for a decree of restitution of conjugal rights. The wife made unsubstantiated allegations that the husband and in-laws had demanded a motorcycle; that her father-in-law had molested her but had refused to tender an apology and that the husband had caused aspersions on her character forcing her to withdraw from his society. The husband refuted all allegations and submitted with proof that she would talk on phone incessantly for long hours with some other persons. The court held in his favour and said that since the wife made grave but false allegations against the husband, he cannot be accused of driving her out of the home by his conduct, when all along she was at fault. Holding the wife's withdrawal as without a reasonable excuse the court granted a decree of restitution of conjugal rights in favour of the husband. In *Abhishek Parashar* v. *Neha Parashar*,[13] the husband filed an application praying for a decree of restitution of conjugal rights. The wife had made no efforts to contact her husband and was residing in Australia. Her counsel had no instructions from her except for a period of one year. The court held the wife's withdrawal from his society as without any reasonable excuse and granted the decree in his favour. On the other hand if the withdrawal by the wife is due to the misconduct of the husband, she would be justified in leaving his society. In *Neha Thakur* v. *Durgesh Thakur*,[14] the.wife withdrew from the society of the husband citing his torture leading to her miscarriage and cruelty including dowry demands as a result of which she had filed a criminal case against the husband and his relatives. The husband applied for a decree of restitution of conjugal rights, while these cases werepending in the court. The court dismissed his petition and observed that till the criminal cases against him and his family members are adjudicated by the court, award of the decree of restitution and erasing the charges of cruelty would amount to pre-judging the case and the entire issue and compelling the wife to join the husband in view of the allegations of cruelty may have serious repercussions.

Nullity: impotency

One of the primary though not the sole objective of marriage remains sexual pleasure, its legalisation and procreation of children. Ability to perform the act of marital intercourse is therefore fundamental to the validity of a marriage with the

13 AIR 2023 MP 38; AIROnLine 2023 MP 33.

14 AIR 2023 CHH 29; AIROnLine 2022 CHH 554.

permissibility to the potent party to get it declared void at his/her option. Since the act of marital intercourse happens only within the privacy of home, a direct evidence of who is at fault remains difficult to obtain. The court therefore has a tedious job in ascertaining the truth of the matter, if both parties blame each other for non-consummation of marriage. In *A Radhakrishnan* v. *R Vanitha*,[15] the parties got married in 2001 followed by a nuptial ceremony held at the wife's home itself. The wife brought a petition under section 12 (1) (a) and 13 (1) (a) of the Act praying for a decree of nullity on the ground of impotency of the husband and a decree of divorce on grounds of his mental cruelty. She pleaded that the husband avoided cohabiting with her on her wedding night on the pretext of having high fever and thereafter left immediately to his place of work leaving her behind at her natal home. After great deal of persuasion, she was taken to the residence of herhusband's parents at Puducherry, but during the entire period the husband stayed away from her. She even got herself transferred to the place of residence of the husband *i.e.*, Puducherry to be with him, but he failed to set up a home and she was constrained to stay in a hostel. The marriage remained unconsummated and the parties separated. The husband contested her claim, denied the charge of impotency and claimed that the marriage was not consummated owing to a gynaecological problem that the wife suffered from, but it was negated by the doctor who examined the wife, because as per the medical report, she did not have any gynaecological problem. The husband did submit documents to refute the charges of impotency but his conduct in evading the wife and her company lead the court to draw adverse inferences as against him. The parties were living away from each other for a period of 11 years and the court held that the wife was entitled to a decree of annulment and a decree of divorce was passed in her favour.

Consent obtained by force

Entry into marriage has to be voluntary and if the consent of one of the parties is tainted by elements of force or fraud, the aggrieved party can pray for its annulment once the force has ceased to operate or the fraud has been discovered. The only condition remains that the petition praying a decree of nullity must be presented within a period of one year from the date the fraud came to light or the force ceased to operate and that the parties since such date have not voluntarily cohabited, or else the remedy would be refused. Proving that consent was obtained by force or fraud also has to be done to the satisfaction of the court and a bare unsubstantiated statement if the circumstances prove otherwise would result in dismissal of the case.In *Surabhi Singh Rajput* v. *Rupendra Singh Gautum*,[16] the petition was filed by the wife stating that one day after coming out of the examination hall, she was abducted by 4 to 5 men, was administered some intoxicant and was made to sign some papers. Since she was under pressure, her marriage was performed under a threat to her life at Arya Samaj temple. The husband negatived it and proved that the wife had on her own accord and voluntarily joined him, they

15 AIR 2023 KAR 26; AIROnLine 2022 KARN 279.

16 AIR 2023 Chh 65; AIROnLine CHH 100.

had together gone to the Arya Samaj temple and the marriage was performed there with free consent of both. All the requisite ceremonies were performed by the priest and the fact of solemnisation was entered into the register. The solemnisation of the marriage was proved, hence the court dismissed the application of the wife holding that it was done voluntarily and no use of force or fraud was evidenced. In *Sujatha* v. *Narsimhamurthy*,[17] the parties had an affair,resulting in the conception of a child whose paternity was confirmed according to the DNA test. Since the man refused to marry his partner, she filed a police complaint against him, following which, he was brought to the police station and was threatened with arrest if he refused to marry her. Three days after the birth of the baby, he married her to escape arrest, lived with her for three days and then filed a petition praying for a decree of nullity on the ground that his consent to the marriage was obtained by force and therefore the marriage was void. The court held the marriage to be a nullity as his consent was obtained by force and observed that the fact that he had in fact fathered the child born to the wife prior to the marriage, would have no reflection on the validity of the marriage. In *Stanis Laus Pratp* v. *A Subhashini*,[18] the husband filed a petition praying that his marriage be declared null and void as his consent to the same was obtained by fraud with respect to a material fact relating to the wife. The wife had deliberately concealed information about her health and her age from him. She according to the husband was suffering from an incurable disease affecting adversely her liver, blood etc and was 41 years of age while she was told to be in her mid-thirties. Age of the parties and their health, the court said are material facts and since the wife admitted concealment and furnished false information, the marriage was declared null and void.

Divorce

Cruelty and desertion remain by far the most commonly used matrimonial misconducts to seek a decree of divorce. Which conduct of the parties would amount to cruelty depends on multiple factors like, socio-cultural and financial status of the parties, their education and avocation as well and no hard and fast rule can be laid down. While it is very important to distinguish a cruel conduct of the spouse from a normal wear and tear of married life, the court does have to deal with not an ideal man and a woman but the parties in front of them. Nevertheless, some misconducts would probably in all cases would amount to cruelty, for example, torturing the wife under influence of liquor by the alcoholic husband would amount to cruelty.[19] In *Uday Padmakar Sirsat* v. *Rupali Uday Sirsat*,[20] the husband under the influence of liquor visited the work place of the wife, *i.e.*, the police training academy, used filthy language and created a scene so as to cause huge embarrassment to the wife. He even went on to file a police complaint against the mother of the wife, her friend, well-wishers, prosecutors and her advocate. He then

17 AIR 2023 KAR 146; AIROnLine 2023 KAR 375.

18 AIR 2023 KAR 136; AIROnLine 2023 KAR 114. A case under the Divorce Act, 1869.

19 *Anil Kumar Tripathy* v. *Biva Upadhyay* AIR 2023 (NOC) 149 (TRI); AIROnLine 2022 TRI 231.

20 AIR 2023 Bom 168; AIROnLine 2023 BOM 504.

published the allegations against the wife in the newspapers that had the effect of lowering her image in the eyes of public. He even mortgaged her gold ornaments to raise a loan and contended that some of them were given to her by his family members. The court held the conduct of the husband as amounting to cruelty and directed him to return the ornaments or its value to the wife observing that whether it is her own parents or the parents-in-laws , the gifts or ornaments given to the wife from either side belong to her only. The court granted divorce to the wife. Similarly, in *Siddharth SaojiUrkude* v. *Sheetal Siddarth Urkude*,[21] the husband filed an application seeking divorce from the wife. He alleged irritation or annoyance and differences and her separate residenceas the reason. Evidence on the other hand proved that he himself was in the habit of drinking and using abusive language against her. The court dismissed his plea holding that marriage cannot be dissolved on averments made by one of the parties as irretrievable breakdown of marriage was not yet a ground for divorce.

Filing of criminal cases even where after investigation husband was acquitted and refusal of the wife to resume cohabitation after living with husband for only a period of three months amounts to cruelty.[22] Similarly, where the wife threatened the in-laws to implicate them in false dowry cases,[23] or filing of false complaints by wife against the husband to higher authorities and unproved allegations of his indulgence in adultery damaging his reputation,[24] or lodging false complaints against husband and his family,[25] for demand of dowry; abusing the husband and his family members in filthy language, assassinating his character stating that he was planning to remarry his colleague,[26]or that he had illicit relations with cousin and office colleague,[27] or with his real sister or any other woman or where the wife does not allow the grandparents to see their grandchild so that they went back weeping it was held as cruelty by the wife and the husband was granted divorce.[28] Similarly, forcing the wife to terminate her pregnancy against her will by the husband leading to complications and gynaecological problems with the result that she could not conceive would amount to cruelty on his part.[29] In *Rakesh Raman* v. *Kavita*,[30] the court held that if the marital relationship was broken irretrievably,

21 AIR 2023 (NOC) 427 (BOM); AIROnLine 2022 BOM 396.

22 *Manish Nandlal Adatiya* v. *Chitra Manish Adatiy* AIR 2023 Bom 18; AIROnLine 2022 BOM 482.

23 *Duleshwari Sahu* v. *Ramesh Kumar Sahu* AIR 2023 Chh 95; AIROnLine 2023 CHH 189.

24 *Gayatri Mohapatra* v. *Ashit Kumar Panda* AIR 2023 (NOC) 428 (All); AIROnLine 2022 ALL 326.

25 *Vasudev Prajapati* v. *Sunita Kumari* AIR 2023 (NOC) 57 (CHH); AIROnLine 2022 CHH 911.

26 *V Sathyapriya* v. *P Venkatesh Prabhu* AIR 2023 (NOC) 222 (MAD); AIROnLine 2022 MAD 3632.

27 *Nalini Mishra* v. *Surendra Kumar Patel* AIR 2023 (NOC) 238 (CHH); AIROnLine 2022 CHH 32.

28 *Abhishek Parashar* v. *Neha Parashar* AIR 2023 MP 38; AIROnLine 2023 MP 33.

29 *Renuka* v. *Shelly Kumar* AIR 2023 P and H 38; AIROnLine 2022 PandH 434.

30 AIR 2023 SC 2144; AIROnLine 2023 SC 325.

then long separation, absence of cohabitation, and filing of multiple cases and their continuation in itself would amount to cruelty and therefore, the husband was held entitled to a decree of divorce. Here, the parties had married in 1994,soon separatedand the divorce was finalised in 2023. The husband had filed a petition praying for divorce on grounds of wife's cruelty that she contested. The trial court granted a decree of divorce to the husband in 2009, that the wife challenged and the high court overturned the decision of the trial court in 2013. By a special leave petition the husband approached the apex court. The apex court noted that the separation of the parties had extended to over 25 years and they had no child as between them. The matrimonial bond was completely broken down , all attempts of mediation had failed , multiple court cases were pending as between them, and the court said while dissolving the marriage that if such is the situation, keeping them tied to each other would prolong the marriage which is already dead.

Cruelty has to be distinguished with normal wear and tear of married life. In *Mahesh Kumar Pandey* v. *Uma Pandey*,[31] the husband filed a petition praying for divorce on grounds of wife's cruelty and desertion. He claimed that upon wife's insistence, he had to shift at a place that was around 14 to 17 kilometres away from his place of work and thus he is forced to commute daily for around 11 or 17 kms. The wife submitted that as the salary of the husband was not enough, she wanted to complete her education and augment the family income and the opportunities at such place could have helped her secure a job. The court dismissed the petition observing that insistence on living at a place with better civil amenities does not amount to refusal to live with the husband or forsake his company permanently and held that it does not amount to cruelty. On the other hand, long separation without a reasonable excuse may indicate death of a matrimonial bond. In *Amrish K Pandyajayantilal Patel* v. *Jayantibhai Sankabhai Patel*,[32] the petition for divorce was filed by the husband as against this wife on grounds of cruelty and desertion. The separation had lasted for over 45 years and he claimed that all his efforts to bring back the wife were futile. The court held that such a long time separation in itself would amount to cruelty on her part. The wife was a school teacher and had earlier filed for and secured a decree of judicial separation petition. Post thatsheresided separately all by herself, remained remarried and did not contest the present petition filed by the husband. However, the husband had already remarried. The court found her attitude as careless and callous clearly indicating , that she was not interested in living with the husband. The court granted to the wife a sum of Rs 250000/ to be paid by the husband as towards her medical expenses and a divorce decree was granted in his favour.

The case and the observations of the court are perplexing. The court described her attitude as callous or careless and observed that it appeared that she was not interested in living with the husband. The court failed to note that she was granted a decree of judicial separation, that the court grants only on the

31 AIR 2023 (NOC) 299 (CHH); AIROnLine 2022 CHH 828.

32 AIR 2023 (NOC) 290 (Guj); AIROnLine 2022 GUJ 2196.

proven misconduct of the other party, in this case, the husband. Secondly as the court itself noted the husband had already remarried. In such circumstances for the court to observe that it appears that she is not interested in living with the husband is mind boggling. Does the judiciary expect a legally wedded but judicially separated wife to be interested in living with the husband who had already remarried and is living with the new wife?

Unsoundness of mind

The party pleading unsoundness of mind of the spouse for a decree of divorce must demonstrate medica evidence to support his claim to the satisfaction of the court, otherwise his petition would be dismissed In *Ajay Marar* v. *Bivrai,*[33] the husband filed a petition praying for a decree of divorce on grounds of the wife's unsoundness of mind. The wife denied the charges and in her evidence stated that she was ready for any medical test, but the husband neither examined the expert doctor nor produced any documentary evidence to substantiate his claim. The court held that the grounds as alleged against the wife were not proved and he is not entitled to any decree on the basis of his claim. In *P Senthil* v. *K Karthikayini*,[34] the husband filed a petition praying for a decree of divorce on the ground that the wife was suffering from a psychopathic disorder. He supported his claim by contending that on the very first night of the marriage she behaved abnormally and attempted to strangulate herself after removing her clothes. She suffered from having fits but refused to co-operate with the husband for her medical treatment. Since the parties had already been living away from each other for a period of more than 15 years even after the passing of a decree of restitution of conjugal rights as sought by the wife, and she herself stated that there was no hope for a reunion, the court passed a decree of divorce in favour of the husband.

Divorce by mutual consent

Cases where divorce is sought by mutual consent are increasing. Courts on their own as also mediators advice the parties to settle their disputes amicably rather than wasting their youth and precious time in endless time consuming, expensive and physically and mentally exhausting contentious litigation. At the same time, two problematic areas where courts have failed to adopt a consistent approach providing relief to some while denying the same to others, creating an ambivalent zone, that continues to raise the hopes of many who are similarly situated are:

i) Unwillingness of parties to wait for a mandatory period of six months as between the two motions once they makeup their mind to go their separate ways;

ii) Withdrawal of consent by one of the parties in between the two motions and the absence of such spouse at the time of second motion , while one of them is still desirous of being free of the matrimonial bond.

33 AIR 2023 Kar 114; AIROnLine 2023 KAR 140.

34 AIR 2023 Mad 37; AIR 2022 MAD 334.

In *Biswajit Das* v. *Priyanka Das*,[35] the husband filed a petition praying for a decree of divorce on grounds of cruelty and desertion on part of the wife, but was unable to substantiate the same to the satisfaction of the court. Consequently, his petition was dismissed. He filed an appeal against the judgment of the lower court but during the intervening period, at the behest of family members and friends the parties came to an agreement and decided to seek divorce through mutual consent after reaching a settlement. The court recorded the terms and settlement conditions and treating the pending divorce petition as the one filed for mutual consent dissolved their marriage. In *Vishwa Prakash* v. *Nibha Shaligram Prasad*,[36] since the parties agreed to settled their disputes, reached a settlement and the sum was received by the wife as her matrimonial dues, the court granted a divorce to them.

In all four cases under survey this year, the courts entertained the plea of waiver of six months waiting time period bringing relief to the waring parties. In *Bhagwant Singh* v. *Manbir Kaur*,[37] the parties had no litigation pending in the court as between them despite living away from each other for a long time period. The six months period was waived off. In *Priyanka Rathore* v. *Nitin Rathore* ,[38] the parties had applied for divorce by mutual consent and also applied for a waiver to be granted from the wait of six month time period. The court ruled in their favour waiving off the wating time period observing that as the parties had amicably settled their dispute and decided to live separately there was no question of them settling together, cooling period be waived off and marriage be dissolved. In *Pooja Bharat Chandak* v. *Nil*,[39] the court noted that since inception of the marriage, the couple was unable to match with each other and it was difficult for them to live together. In order to have a dignified parting , they decided to separate and started living away from each other. They made an application for waiver of six months period after filing for divorce by mutual consent, and were firm on it even after four months had lapsed. The court felt that no useful purpose would be served by making the parties to wait further as there was no possibility of reconciliation and the cooling period was waived off by the court. In *Johny Sebastian* v. *Jossy*,[40] the parties were living away from each other for a period of more than 14 years and there was no scope of any reconciliation between the two. They filed a petition praying for a decree of divorce. During the pendency of the appeal, they decided to file a petition based on grounds of mutual consent after reaching a settlement. They then filed an application for waiver of the six months waiting time period. The issue before the court was whether the waiting time period is mandatory or directory. The court waived of the time period observing that it would only prolong their agony and no useful purpose would be served by making them wait.

35 AIR 2023 (NOC) 25 (TRI); AIROnLine 2022 TRI 60.

36 AIR 2023 (NOC) 293 (PAT); AIROnLine 2023 PAT 30.

37 AIR 2023 (NOC) 120 (P&H); AIROnLine 2022 P&H 475.

38 AIR 2023 (NOC) 382 (MP); AIROnLine 2023 MP 234.

39 AIR 2023 (NOC) 481 (BOM); AIROnLine 2022 BOM 897.

40 AIR 2023 Kerala 88; AIROnLine 2023 KER 44; a case under the Special Marriage Act, 1954.

In *Kanhaiya Kanaujiya* v. *Tara Devi*,[41] the parties filed a joint petition praying for a decree of divorce by mutual consent in 2021. However, even at the time of filing of the petition, the wife did not appear before the court. After six months the husband filed an application stating that he and his wife have entered into compromise/settlement for dissolution of marriage with consent. The true copy of the notary affidavit prepared by him was attached, but he alone filed a second motion without his wife. The court dismissed his application while holding that the second motion must be filed jointly and not by just one party and thus divorce was not granted to him.

Irretrievable breakdown of marriage

A marriage is solemnised with the consent of both the parties but its culmination may not be consensual. With one party trying desperately to get out of it while the other hangs onto it, a peculiar situation of neither live nor leave emerges. In Indian context, even though divorce is no longer a stigma, some keep clinging to a dead marriage without living with each other but fiercely contesting a petition of divorce filed by the other. This is also a fundamental rule in matrimonial litigation, that the party approaching the court for a remedy must do so with clean hands and should not be responsible for the state of affairs leading to the presentation of petition. In contentious litigation, the fault of the other party must be established to the satisfaction of the court. In this connection an interesting case was adjudicated by the apex court where the husband spend his lifetime in seeking a matrimonial relief in the court, when the separation spread over a period of more than 40 years, only to be disappointed at the age of 89 years. In *Nirmal Singh Panesar* v *Paramjit Kaur Panesar*,[42] the marriage was solemnised according to Sikh rites in 1963 and the parties were blessed with three children, a son and two daughters. The husband was serving as a doctor in army while the wife was a teacher in Amritsar and the parties were settled with children going to school in Amritsar. They lived together for a period of 21 years and thereafter the husband was posted in Madras and asked the wife to join him there which she refused to do. Thereupon the husband filed a divorce petition against her citing desertion and cruelty as her matrimonial misconduct. He allegedthat the wifewas maligning him and making complaintsto his senior officers/Air Force authorities. The wife contended that she had done her duties diligently, respected the relationship throughout , was ready to look after the husband even presently, and did not want to live with the stigma of a divorced woman. She had seen to the marriage and educationof all of her children single handedly without the husband contributing anything towards that. Further that the husband had sought the transfer to Madras without her consent unilaterally and expected to unsettle everything at Amritsar including the education and future of children and shift with him at his workplace. While the case travelled through the hierarchy of courts, the district court granting him divorce, the high court reversing it, and the apex court yet again refusing to

41 AIR 2023 All 10; AIROnLine 2022 ALL 403.

42 AIR 2023 SC 4920; AIROnLine 2023 SC 803.

grant divorce. At the timeof final hearing before the apex court the husband was already 89 years of age while the wife was 82 years old. The court noted that the parties had lived together for a period of 21 yearsand the wife had reared three children and even before their separation in 1984, one of the daughters had been married. Explaining the concept of cruelty under Hindu Marriage Act, the court said that cruelty has to be construed and interpreted considering the type of life the parties are accustomed to, their economic and social conditions , their culture and human values to which they attach importance and each case has to be decided on their own merits and observed that,[43]

> in our opinion, one should notbe oblivious of the fact that the institution of marriage occupies an important place and role in the society. Despite the increasing trend of filing the divorce proceedings in the court of law, the institution of marriage is still considered to be a pious, spiritual and invaluable emotional life net between the husband and wife in the Indian society. It is governed not only by the letters of law but by societal norms as well. So many other relationships stem from and thrive on the matrimonial relationship in the society and therefore it would not be desirable to accept the formula of irretrievable breakdown of marriage as a strait jacket formula for grant of relief of divorce under Art 142 of the constitution.

Thus his plea for divorce was rejected. The judgement is in sharp contrast to the court's usual stand that long separation in itself would amount to cruelty

In *Shilpa Shailesh* v. *Varun Sreenivasan*,[44] pursuant to matrimonial bickering the parties separated post which a number of litigations commenced as between them including the one under section 498A of Indian Penal Code, 1860, claim of maintenance under section 125 of the Criminal Procedure Code, 1973 and under the Domestic violence Act. Despite several attempts of mediation and conciliation, there was no positive result. Upon the lower court'sfailure to give them appropriate relief, the matter reached the apex court that was confronted with its powers under article 142 to dissolve the marriage without the grounds stipulated under the Act being satisfied.

The apex court deliberated on two issues namely, whether in absence of a legislation to this effect, the court can grant divorce on irretrievable breakdown of marriage , and waive of the mandatory six months waiting time period between two motions of divorce by mutual consent. Whether the power under article 142 of the constitution of India is inhibited in any manner in a scenario where there is an irretrievable breakdown of marriage in the opinion of the court but one of the partes is not consenting to the terms. It explored the issues along thefollowing lines:

i) The scope and ambit of the power and jurisdiction of the apex court under Article 142 (1);

43 *Id.*, para 18.

44 (2023) 5 SCR 165.

ii) Can the court exercise this power in view of settlement of the parties and grant a divorce by mutual consent dispensing with the period stipulated and the procedure prescribed under section 13-(B) and quash and dispose of other proceedings under the DVA and section 125 of the criminal Procedure Code.

The *amicus curiae* submitted that the waiting period enshrined under section 13-B(2) of the Act is directory and can be waived of by the court while the proceedings are pending in exceptional situations. This discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation an parties were already separated for a longer period or contesting proceedings for a period longer than mentioned in the Act. Thus the court should consider the following questions:

i) How long parties have been married?

ii) How long is litigation pending?

iii) How long they have been staying apart?

iv) Are there any other proceedings between the parties?

v) Have the parties attended mediation/conciliation?

vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or nay other pending issues between the parties?

The court then observed that if the court dealing with the matter is satisfied that a case is made out to waive the six months statutory period it can do so after considering the following:

i) the statutory period of six months specified under Section 13-B (2) in addition to the statutory period of one year under section 13-B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order 32-A Rule 3 CPC/Section 23 (2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issue between the parties;and

iv) the waiting period would only prolong their agony.

The waiver application can be filed one week after the first motion giving reason for the prayer for waiver. If the above conditions are satisfied the waiver of the waiting period for the second motion will be at the discretion of the court concerned . The time gap is meant to enable the parties to cogitate, analyse and take a deliberate decision. The object of the cooling period is notto stretch the already disintegrated marriage, or to prolong the agony or misery of the parties when there are no chances of the marriage working out. Therefore, every effort has been made to salvage the marriage there remains no possibility of reunion and cohabitation, the court is not powerless in enabling the parties to avail a better

option which is togrant divorce. The waiver is not to be given on mere asking , but on the court being satisfied beyond doubt that the marriage has shattered beyond repair. The court observed that exercise of jurisdiction under Art 142 (1) of the Constitution of India by the apex court is clearly permissible to do complete justice to a cause or matter.

In *Roopa Soni* v. *Kamalnarayan Soni*,[45] the apex court held that a decade and a half of separation, when the parties had moved ahead and settled in their life, would in itself further the agony that is not needed for a healthy society and therefore divorce was granted even though one of the parties was not consenting to it.

Remarriage during pendency of appeal against divorce decree

After securing a decree of divorce from the court, the parties intending to remarry have to wait till the time for filing an appeal as against this judgement is over. The hierarchy of the court and the possibility of the lower court's verdict being overturned by the higher court is not ruled out and in such cases, despite the lower court's order of putting the marriage to an end, the marriage bond continues if the higher court's pronouncementrules in its favour. In such a situation, if the marriage revives, it is not open to any of the party to remarry. But, often in a hurry to get married again, one party may solemnise the second marriage during the appeal time period or there may be circumstances where the appeal is presented to the higher court, is admitted as well, but one of the party does not wish to wait endlessly for the hearing at the higher court. In *Roshan Lal* v. *Veena Rani*,[46] the parties obtained divorce and the wife performed second marriage during the pendency of the appeal preferred by the husband in the higher court as against the grant of the divorce decree. The appeal though was admitted, but remained pending and undecided for a long time period. The court in the response to the claim of civil contempt filed by the husband as against her observed, that the wife cannot be made to wait indefinitely or for an endless period if the court is not able to decide the appeal, especially when the appeal was admitted. The wife had waited for ten years before she remarried. The court noted that there was no restraint order after the three months' time period expired under section 21 B (3), for disposal of the appeal and held, that if the wife decides to move on and secure her future, there was no wilful disobedience on her part. The verdict of the High Court of Punjab and Haryana appears to be surprising. Rather than putting their own house in order with a timely disposal of the matrimonial matters, giving a clean chit to the wife for having violated the legal provisions seems incorrect. It is a matter of an unfortunate practical reality that litigation has become extremely time consuming and with the current hierarchy of the courts, if one party unhappy with the decision rendered by the lower courts decides to take the matter right to the apex court, the time taken for a final verdict to come would be immense. However,

45 AIR 2023 SC 4186; AIROnLine 2023 SC 694.

46 AIR 2023 (NOC) 338 (P&H); AIROnLine 2023 P&H 252.

it does not give the parties a legal right to remarry as the verdict of the higher court may restore the original marital bond. It would in fact be an abuse of the process of hierarchy of the court mechanism, and for the court to acknowledge that a woman cannot be made to wait indefinitely for the verdict to come is like a direct acceptance of the fallacy of the whole court procedure.

The court should neither create nor encourage the prevalence or perpetuation of a system that encourages litigants to take potential steps and ignore the legal provisions. Law has a sanctity and should be respected by one and all, and not twisted or ignored to suit one's convenience. Instead of putting their own house in order , permitting the party to get away with flouting of legal provisions is uncalled for. Once married during the pendency of appeal, with the likelihood of having children from the second marriage, the woman knew clearly that the bar on remarriage would have no adverse repercussion as the courts would hesitate to declare such marriage as void, despite the fact it practically was a bigamous one. Courts should have called for a timely hearing and frowned upon or reprimanded her rather than tacitly accepting it, bordering to a judicial justification. Instead of merely stating a lacunae of excessive time consumption, judicial corrective measure to ensure efficiency was the need of the hour as this precedent may have a dangerous unwarranted future consequences.

***Ex-parte* divorce**

A fair representation and hearing on an equal platform is fundamental to dispensation of justice. Unless both the parties are able to present their case to the satisfaction of the court, an outcome would be lopsided and unfair. In this connection, serving of summons play an extremely important role. Effective information of commencement of litigation in accordance with law ensures that a party to the proceedings should not be caught unawares that a case has been filed and a verdict has been delivered as against her/him without any knowledge or an opportunity to present their side of the version. Thus, if the circumstances lead to grant of an *ex-parte* decree, and the absentee party brings it to the knowledge of the court effectively that her/his non- participation in the trial was not voluntary but due to non-service of summons, the court would set aside the decree and the matter would be heard afresh or else it would lead to travesty of justice. In *Kiran Devi* v. *Rajesh Kumar*,[47] The husband filed a petition in the court praying for a decree of divorce on the ground that the wife had deserted him and had taken their child with an intention never to come back. Accordingly after the admittance of the petition, notices were sent to the wife but she did not appear and an ex-parte divorce decree was granted to the husband as against her. She then preferred an application that notice was not served on her through the process of the court. The notices were served on her through other means, *i.e.*, through *Nazarat*, through registered post and thereafter it was also published in the newspaper but it was not served on her through the process of the court. There was also no evidence as to whether she had indeed received the notice or that she had ever refused to

47 AIR 2023 Jhar 81; AIROnLine 2023 JHAR 151.

accept the notice. The court ruled in her favour and held that since the family court failed in its duty to ensure the serving of the summons through the process of the court, the ex-parte decree granted to the husband was liable to be set aside. Again in *Abhijit Roy* v. *Swapna Sarkar*,[48] the wife had filed a petition seeking divorce from the husband . As required the summons needed to be sent to the husband and they were sent at his parental place despite the fact that the wife knew that the husband and his parents seldom lived there. The summons that were sent through registered post, came back with an endorsement "not claimed". Since the husband did not appear, an *ex-parte* divorce decree was given to the wife that was later challenged by him. The court held that 'not claimed' does not mean 'refused' and it was within the knowledge of the wife that the family seldom lived at the address that she had sent the summons to. In such a situation it cannot be said that the husband had refused to receive the summons deliberately, and his non-appearance was therefore bonafide and unintentional and the matter was reopened after setting aside the ex-parte divorce decree earlier granted to the wife.

Presentation of divorce petition within one year of marriage

The Act provides a minimum time period of one year calculated from the date of solemnisation of a marriage before a petition could be presented in the court praying for a decree of divorce unless the case is of exception hardship or exceptional depravity. The time bar provides an opportunity to the parties to take stock of the situation, rethink their decision and prevent hasty separation. For that it is the court that would decide the genuineness of the claim and that whether the petition should be heard or dismissed as filed prematurely. However, in many cases this preliminary adjudication takes a time longer than the stipulated period. In *V Sathyapriya* v. *P Venkatesh Prabhu*,[49] a petition praying for a decree of divorce was filed before the expiry of one year of solemnisation of the marriage but that prayer in itself took 13 years for coming to a conclusion. The high court said that the petition in such situation is maintainable and observed, that under section 14 the presentation of filing of a petition for divorce , the conditions specified there under mandating that petition should be filed after expiry of one year of solemnisation of marriage is directory and not mandatory for two reasons:

i) The Act did not contain any provision for consequences of non-compliance of time limit prescribed in section 14;

ii) As per the proviso to section 14, the court has power to permit the petitioner before expiry of one year on the application of the petitioner claiming exceptional hardship or exceptional depravity on the part of the respondent. The court has further power to dismiss the petition or pass decree which will come into force after expiry of one year if the court at the time of hearing the original petition comes to the conclusion that the petitioner has obtained permission of misrepresentation or concealment of the nature of the case.

48 AIR 2023 Chh 88; AIROnLine 2023 CHH 226.

49 AIR 2023 (NOC) 222 (MAD); AIROnLine 2022 MAD 3632.

IV MAINTENANCE

Applicability of HAMA to tribals and amendment of petition to under section 125 CrPC

The Hindu Adoptions and Maintenance Act, 1956, clearly specifies the applicability criteria in consonance with all religious based laws governing domestic relations. It applies only to Hindus and with a clear provision under section 2(2) is not available to even those Hindus who are members of scheduled tribe within the meaning of article 366 of the Constitution of India. At the same time these religious based laws co-exist with secular laws overlapping in the core arena of family law. For example, while the HAMA, enables a Hindu wife (not being a member of scheduled tribe) to proceed against the husband seeking maintenance, section 125 of Code of Criminal Procedure, 1973, has no religious based qualification for a woman to avail its beneficial provisions. Every Indian wife (including a divorced wife) can seek maintenance from her husband if she is in indigent circumstances and the husband having means to do so neglects or fails to maintain her. Her religion, tribe, sect or region from where she comes is immaterial and would not incapacitate her from applying formaintenance under criminal law. In *Munavath Jayaram Naik* v. *Munavatha Sri Usha*,[50] the wife filed an application seeking maintenance from her husband under section 18 of the HAMA. The husband opposed her application and contended that since the parties belong to scheduled tribe, the provisions of HAMA, by virtue of section 2(2) , are not available to them unless there is a notification from the Central Government published in the official gazette. In absence of such a notification, the petition under this Act cannot be sustained. The wife then moved another application for permission to convert her maintenance application filed initially under section 18 of the HAMA, to that under section 125 of the Cr PC.

Since this is a secular law it is applicable to every Indian irrespective of whether or not they are governed by the provisions of the religious based personal laws. The court permitted the change holding that the spirit behind both the provisions is same, *i.e.*, to prevent vagrancy and destitution. Though HAMA provides a civil remedy, Cr PC also provides a quasi civil remedy. Granting permission to amend the pleading it said

i) It is simply a case of converting one category of matter into another category for adjudicating on the same subject with the same or may be substantially same factual and legal matrix;

ii) Any court has the inherent jurisdiction to permit the parties to amend the pleadings, even in absence of express enabling provision.

iii) The amendment should be allowed to prevent multiplicity of proceedings and to completely decide the dispute between the parties when the amendment does not result in prejudice to the other party;

50 AIR 2023 AP 20: AIROnLine 2022 AP 410.

iv) As the entire factual matrix remained the same , there is no change in the case except altering the provisions of law under which the relief is sought, the same should be permitted by the court.

Claim of maintenance when the marriage is doubtful

Maintenance rights flow from a valid marriage and therefore a man cannot be saddled with a liability to maintain a woman who is not his lawfully wedded wife. Where the fact of solemnisation of a marriage is disputed, the validity of marriage is to be adjudged first to ensure that the claim of maintenance be sustained in law. In *Sarnam Singh Lekhpal Chakbandi* v. *Preetam Kumari*,[51] a prayer for restitution of conjugal rights was filed by a woman against a man stating that she was his lawfully wedded wife, he having married her according to the custom but had later deserted her. The man on the other hand claimed that though there were negotiations of marriage, the same could not be solemnised due to her fraudulent acts. He further pleaded that not only there was no marriage as between them, they never lived together as husband and wife. He thereupon filed for declaration of the alleged marriage as null and void. The court clubbed both the petitions and heard them together. While the prayer of the wife for restitution was dismissed, the marriage was declared a nullity. At the same time, the trial court passed an order putting the man under an obligation to pay maintenance to the woman, directing him to pay a sum of Rs two lakhs as permanent alimony and Rs 6500/ per month as monthly maintenance. He went in appeal. The high court observed that not only there was no prayer for grant of maintenance from the woman and since there was no application made by her in this regard there was no opportunity given to the man to present his side of the case before the court. In these circumstances, the high court held that the order of the trial court granting maintenance to the wife as improper and unsustainable. The order of the trial court was surprising and incorrect. Mere negotiation of marriages do not establish any relationship let alone giving rise to statutory protection and serious financial liabilities such as monthly maintenance. If after a trial the court itself declared the marriage a nullity on the petition filed by man, who claimed that he had never married, the trial court binds him with a maintenance burden it is anachronistic. The trial court had not made any observation that the marriage had in fact been solemnised, yet to award maintenance in such cases to a woman who came with a false claim of marriage before the court was akin to rewarding the guilty and the high court rightly overruled the order. In *Amit Suresh Pali* v. *Rita Ramavtar Pal*,[52] the husband dropped the wife at her natal place and refused to take her back despite her issuing a notice to him. She then filed a petition praying for restitution of conjugal rights but withdrew it after successful mediation, went back to her matrimonial home but cohabitation lasted a few days only, post which they separated again with the wife complaining of torture at his hands. The husband now filed a petition praying for a decree of

51 AIR 2023 All 115; AIROnLine 2023 ALL 385.
52 AIR 2023 Bom 74; AIROnLine 2023 BOM 28.

divorce on grounds of her cruelty and desertion, proved his allegations successfully and a decree was granted by the court in his favour. The parties also had a daughter from this marriage. The wife applied for maintenance. She had neither any independent source of income, nor any residence and was living with her daughter in the house of her father. The court ruled in her favour as far as the maintenance liability of the husband was concerned and directed him to pay Rs 7,000/ per month to her and the 10 year old daughter who was studying in school. The court also observed that even if divorce was granted on the matrimonial misconduct committed by the wife, the liability to pay maintenance to the wife remained.

Maintenance claim by the step mother as against the step son

As aforesaid, maintenance rights flow from a valid marriage not only as between the spouses but also their progeny. Children's entitlement to claim maintenance from their parents is undisputed. Similarly, parents in indigent circumstances are empowered to seek maintenance from their children. Parents having multiple children can also choose against which of their child they want to proceed and an argument from their children that they should claim maintenance from some other sibling who is better placed financially is not tenable. An issue of a step mother who was a party to a void marriage came before the Chhattisgarh High court wherein she having her own adult son/children , claimed maintenance not from them but from her step son. In *Basanti Bai* v. *Ajit Kumar Bhatt*,[53] a Hindu man, A was married to W1 and had a son,S from her. During the subsistence of this marriage, he remarried W2 and had a son and daughter from this marriage as well. He was in government employment and after his death, his son from the first marriage, S, applied and got an appointment in his place on compassionate grounds. Upon the death of A, his property was equally divided amongst his widow (the first wife), S and the two children he had fathered from his second marriage, while the second wife, being a party to the void marriage was ineligible to get anything. Thereafter, the second wife for her and on behalf of her two children filed a maintenance petition against S. She contended that the compassionate appointment was given on the condition that the son would maintain the dependents of his father. S refuted her claim and pleaded firstly, that the step mother actually had the status of a concubine, and had no legal status of the wife even during the life time of the father and therefore had no legitimate claim against him. Secondly, with respect to the children of the father from the second woman, he contended that both of them had attained majority, and therefore cannot seek maintenance from the step brother. Moreover, an employment even though obtained on compassionate grounds is not an estate within the meaning of section 21 of the HAMA, and therefore he is not under any obligation to maintain them. The court held in his favor and observed that compassionate employment is an attribute of public employment and is not an estate inherited from the deceased and therefore the dependents of the deceased are not eligible to claim maintenance from the step-brother.

53 AIR 2023 Chh 63; AIROnLine 2022 CHH 888.

V CUSTODY AND GUARDIANSHIP

One of the most important yet unfortunate casualty of matrimonial breakup is the issue of custody of minor children. Tender minds and bodies require the company, love, affection, finances and energies of both parents for their healthy development, yet they become objects of tug of war between the over possessive parents. Emotional blackmail, poisoning of sensitive young minds and even kidnapping of one's own child is not uncommon in such a scenario. In fiercely litigated and contested custody battles, the chief criteria that helps the court to adjudicate such matters is the welfare of the child. If the child is of an age, where he/she can demonstrate his wishes, the same are taken into consideration. Courts also ensure that the continuity of residence of the child is not disturbed as an uprooting of the child form his habitual surroundings may adversely affect his interests. Nevertheless, in a majority of cases under survey in custody matters mothers were preferred to fathers, while he had to be content with visitation rights. Fathers also lost the custody of their own child to maternal grandfather in case of demise of the mothers.

In *Imam Grigorios Karat* v. *Jasna Shayala K*,[54] during the proceedings for divorce, the family court allowed the mother to have the permanent custody of her six years old child, while the father could have interaction with the child on specific days of the week and time. He filed for seeking the child's permanent custody. The high court held in favor of the mother in the interests of the child. The child was about nine years old at the time of hearing of the appeal. The mother was a nurse in a governmental hospital in Jharkhand and later secured an employment in a government hospital in Kerela and resided with her parents. The husband was an advocate by profession and had taken the child to Ernakulum under the guise that he wanted the child to interact with the paternal grandparents pursuant to which, she had even filed a police complaint. The family court granted the custody of the child to the mother observing that the custody of the child below the age of 12 years should ordinarily be with the mother and the father filed an appeal. The high court maintained the continuity of custody with the mother and periodical custody with the father observing that the welfare of the child so demanded. Both the parties here had remarried pursuant to their divorce and the court felt that in these circumstances the mother would be in a better position to look after the welfare of the child. In *Devnath Ratre* v. *Malti Ratre*,[55] the father of a minor girl claimed that he being the natural guardian had a legal right to have the custody of the child. The girl was around 14 to 15 years in age. Evidence showed that the father did not have adequate income to maintain his daughter and since he spend most of his time on duty, there would be no one to look after the child. The court observed that the mother is competent to take special care and attention to the daughter during this age, due to biological changes in the body of a girl and her company and her advice would be important. Considering paramount interest of the child, the custody

54 AIR 2023 Ker 107; AIROnLine 2023 KER 99.

55 AIR 2023 CHH 33; AIROnLine 2022 CHH 744.

was allowed to be retained by the mother. The court observed, that in determining the question as to who should be given the custody of a minor child, the paramount consideration is the welfare of the child and not the right of the parents under a statute for the time being in force. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Therefore, the provisions of the special statute which govern the rights of the parents or guardians may be taken into consideration , but the court exercising its *parens patriae* jurisdiction can always decide what is best for a child. Therefore, averment of the husband that father is the natural guardian cannot be given preference and welfare of minor would be the paramount consideration. In *Priyanka Dahiya* v. *Manish Raj*,[56] the marriage was performed under the Special Marriage Act, 1954. Due to matrimonial bickering the parties went in for divorce by mutual consent. The wife agreed to divorce only on the condition that the child would be with her. She also ensured that the decree of divorce passed on the joint statement of the parties did contain the condition that the custody of the child would remain with her only. Despite this, the father approached the court for the custody of the child. The court dismissed his petition on the basis of the joint statement. In *Aneesh* v. *Aswathy*,[57] The father filed a petition praying for the custody of his child. He claimed that the mother left the matrimonial home and his company, took the child with her and was not permitting him to visit the child. The mother cited his extra-marital affair and special needs of the child to retain his custody. The child suffered from obesity and limitations to move freely, required the support of a wheelchair and thus had a need for constant care and supervision. The court held that the paramount consideration is the welfare of the child and overnight custody of the child cannot be given to the father as prayed by him. However, the visitation rights were granted in favor of the father with modification in timings as the court noted that the child needs the love and affection and the company of both the parents for its better growth. Again, in *Ferose Khan* v. *Hina Kauser*,[58] the custody of minor children was sought by the father who was working and posted in Saudi Arabia while the mother and children were in India. The court declared the mother as the guardian of the minor children till puberty while the father was granted visitation rights.

In *Reshma Sumedh Bawaskar* v. *Sumedh Sudhakar Bawaskar*,[59] amongst the matrimonial turmoil, the wife left the matrimonial home and refused to come back. The husband claimed that despite his filing of a restitution of conjugal rights petition she did not turn up for mediation and he withdrew the petition for the sake of the child who at the time of the case coming up for hearing was six years old. He had put the child in a good school, but since the wife took him with her, he was unable to attend the school as well. He also prayed that since the wife had applied and sought maintenance from him, it shows that she is financially not sound and

56 AIR 2023 (NOC) 377; AIROnLine 2022 P&H 780.

57 AIR 2023 Ker 81; AIROnLine 2023 KER 35.

58 AIR 2023 Mad 301; AIROnLine 2023 MAD 872.

59 AIR 2023 Bom 162; AIROnLine 2023 BOM 428.

would not be in a position to maintain the child as well. Thus, in the interests of the child, permanent custody be given to him so that the child can develop comfortably and attend the good school that he is put into. The father also claimed that since he is the natural guardian, he had a better right to his child's custody. The mother did not appear and the father was granted the custody of the child through an *ex-parte* order. The trial court observed that the father was the natural guardian and financially well off and in the interests of the child it would be better to eb with the father. The mother filed an appeal and contended unsuccessfully that she was not served any summons as the Bailiff's report showed clearly that summons was properly served on her. But in the appeal, the high court remanded the matter back to the trial court to decide it afresh taking into account the pleadings of the mother as well. They also observed that the sole determining criteria cannot be that the father alone if alive is the natural guardian of the child and it is the overall welfare of the child that has to be ascertained. However, where it was proved to the satisfaction of the court that the mother was leading an immoral life, the court held that she was disqualified and the custody of the child was given to the father.[60]

In *Ketaki Gokhale* v. *State of Goa*,[61] the parties were US nationals and custody petition for a four years old child was pending in the superior court of California, county of Sonoma. The court granted the interim custody to the father and the mother filed an appeal against the interim order. She did not dispute the jurisdiction of the foreign court and was given a fair hearing by them. With her son separated from her, the mother came to India and filed a writ under article 226 of the constitution of India seeking production and restoration of permanent custody of the minor, in her favour in terms of section 6 of the HMGA. She prayed that as per law, the custody of the child who is below the age of five years should ordinarily be with the mother. and in the best interests of the child, she be granted its custody. Father had also invoked the remedy available under the Indian laws, *i.e.*, Guardianship and Wards Act, (GWA) seeking the child's custody. With respect to maintainability of a *habeus corpus* petition, the court held that in child custody matters, writ of habeus corpus is maintainable, where it is proved that detention of minor child by a parent was illegal and without any authority of law. However, in the present case the court refused to grant such a remedy or writ as firstly, the custody with the father could not be said to be illegal as the parties had themselves mutually decided to pursue the matter in Indian courts. The court directed the family court to decide the matter of interim custody on merits of the case within a period of eight weeks. Visitation rights were provided to the mother including overnight access over weekends as an interim measure till the decision of the court. In *Venkatasubramanian Ravichandran* v. *A Nithya*,[62] the family lived in the United States. The father was in United States when the mother along with the child came to India . Upon adjudicating on the custody and guardianship prayer of

60 *Dhatshayani* v. *Pounraj* AIR 2023 Mad 248; AIROnLine 2023 MAD 494. Under ss. 7 and 8 of GWA.

61 AIR 2023 Bom 175; AIROnLine 2023 BOM 505.

62 AIR 2023 Mad 324; AIROnLine 2023 MAD 1189.

the father, the court opined that it was not in the interests of the child to move her to United States as in the adolescent age a girl requires the company and guidance of the mother more. The father was denied any interim relief as well.

Parents versus grandparents

With the untimely demise of one parent specially mother, the tussle for the custody of the child is often between the father on one hand and the maternal grandfather on the other, more so if the husband is held responsible directly or indirectly for his wife's death or even where woman dies of health-related complications or due to natural causes. If the father chooses to remain unmarried after the death of his wife, the fact that he is gainfully employed works against him as he would not in such cases be in a positionto look after the child. If he remarries, his involvement inthe new family and the presence of a step mother with possibility of ill-treatment is perceived as fatal to a conducive loving environment desirable for the healthy growth of a child. Thus, despite the father being the natural guardian, the supportive environment required for a child's development if provided by the maternal grandfather is visualized as sufficient to tilt the balance in his favor. In *Prabhat* v. *Minor Lomesh Sahu*,[63] after the death of the mother the minor son, was residing with his maternal grandparents. His father had remarried and was engrossed in his new family and had not spent even a single day in the company of his son. He never enquired about his welfare nor visited him even once on any singular occasion. The child was growing up at the maternal grand-parents family in an atmosphere that was conducive for its growth. He was being taken care of very well by the grandparents and was happy there. In comparison, the father had no love and affection for him and had not sought his company or welfare right since his birth. His contention that being the father, he was the natural guardian of the child and no one else if he is alive can be the guardian or seek has custody was dismissed by the court which held that it is the welfare of the child that is to be kept in mind and therefore the maternal grandparents were allowed to continue with the custody of the minor. The father was however given the visitation rights. In *Nagendra Kumar Joshi* v. *SukhlalBandhe*,[64] the child aged 10 years at the time of hearing of the case had been since his birth in the company of the grandfather where he was looked after by his aunt. The grandfather accused the father of his cruel conduct holding him responsible for the death of the mother. He had also adduced proof of his adequate income to look after his grandson. At the time of hearing the child had expressed his desire to continue with the maternal grandfather and was not ready to be with his own father. The court invoked the rule of welfare of the child and ruled in favour of the grandfather observing that it is the welfare of the child which is of paramount importance and there is no right of the parent to get the custody of the child. In *M Vijayakumar* v. *S Mani* ,[65] the mother died of health- related issues and the minor son of the couple was brought up by the

63 AIR 2023 CHH 17; AIROnLine 2022 CHH 750.

64 AIR 2023 Chh 54; AIROnLine 2022 CHH 802.

65 O.P No 31 of 2022, decided by the Madras High Court, on Aug 28, 2023.

maternal grandfather. He was going to school and doing well in his studies The father was living alone and applied for the child's custody being the natural guardian. The court denied and rejected his application and granting him visitation rights held that uprooting of the child at this stage would be against his interests and continuity of residence should not be disturbed. In *Anand Kumar* v. *Lakhan Jatav*,[66] the minor child was living with his maternal grandfather when the mother committed suicide. The father was framed for her death though later acquitted by the court and post-acquittal, he applied for regaining the custody of the child. While the father had sufficient income, the maternal grandfather was unable to demonstrate adequate finances to support the child. The court felt that the minor would get a better exposure in life and would have access to different regions and culture in life as the father was posted in ITBP, a paramilitary force and was earning a regular salary. The court awarded the custody of the child to the father as opposed to the maternal grandfather for proper growth of his personality under his guardianship.

VI HINDU JOINT FAMILY

Legal necessity

Karta is legally entrusted with the management of the joint family property but has qualified powers to sell the same as he is not itsexclusive owner. Joint family property usually has multiple owners and the possibility of minors may not be ruled out. Yet as he is responsibleforthe welfare of the entire family, the Karta has superior powers with respect to its alienation including the share of minors, if in his prudent judgment the sale would be necessary or beneficial for the family members. Such an action of Karta does not warrant a validation from other members of the joint family even including its other co-owners. The categorisations validating such alienation are covered under 'legal necessity' or as 'beneficial to estate' or for 'performance of certain indispensable religious or charitable duties'. Family debts including mortgage debts due to the family are covered in the term legal necessity as also money spend on family good and for pious purposes.[67] In *Mathivanan* v. *Deivanai*,[68] the father, mother and the grandmother of the minor sold the property including his share for antecedent debts that were duly established and proved to the satisfaction of the court. The sale was held as valid and binding on minor's share. Under Hindu Minority and Guardianship Act, 1956, a Guardian is enjoined to seek permission of the court to sell the share of the minor even for his benefit. However, if the guardian happens to be Karta, he is not under any obligation to obtain or seek permission from the court, and can sell the property of the minor for legal necessity that includes minor's well-being and education.[69] In *Jagrutiben Dharmeshbhai Suhagiya* v. *Nil*,[70] a Hindu man A had a share in the joint Hindu

66 AIR 2023 (NOC) 360 (MP); AIROnLine 2022 MP 711.

67 *G Murali* v. *Gurumurhty* AIR 2023 Mad 315; AIROnLine 2023 MAD 831.

68 AIR 2023 Mad 213; AIROnLine 2023 MAD 429.

69 *Jagrutiben Dharmeshbhai Suhagiya* v. *Nil* AIR 2023 Guj 86; AIROnLine 2023 GUJ 275.

70 AIR 2023 Guj 86; AIROnLine 2023 Guj 275.

family property. He died leaving behind his widow W, and two minor children, a son and a daughter. The widow had no source of income and she filed a petition praying for the guardianship of the minor children since they had a share in the joint family property belonging to their father and a permission to sell this property for their benefit, *i.e.*, for their well-being and education. The property was in the nature of a flat. The guardianship application was accepted by the trial court that ruled in her favour but the permission to sell the share in the joint family property was denied and she preferred an appeal in the high court. The high court re-iterated that permission for sale of minor's share in the joint family property need not be taken at all if the sale is to be effected by the karta of the Hindu joint family as the Karta is legally permitted to sell the joint family property including the share of the minor under some specified categories that include making provision for the education and well-being of the minor.

Doctrine of blending

Under Hindu law, that property that a Hindu may own is categoriesed in two: self-acquired or separate property or a share in the joint family property. A person is the exclusive owner of the separate property with full powers of alienation . With respect to his share in the joint family property he can demarcate it by asking for a partition. At the same time if he wants to relinquish his control over his own self acquired property and share it with all joint family members, he can throw this separate property of his into joint family pool by an express declaration or conduct under the doctrine of blending. While determining whether the property is the separate property of the Karta or the joint family property, the intention of the member who threw it in the joint family property or not is to be seen. Doctrine of blending applies when the Karta/coparcener with clarity announces the character of the property that he had purchased with his separate finances as the one belonging to the joint family. In, *D T Rajkapoor Sah* v. *Kamakshi Bai*,[71] the great grandfather of the propositous had purchased the property with his separate money but had declared the same to be joint family property belonging to the joint family in the partition deed. The court held that the doctrine of blending will apply and the character of that property would be ancestral or joint family property and not the separate property.

VII HINDU SUCESSION ACT, 1955

Right of children born of void and voidable marriages

Inheritance rights are directly related to validity of marriage conferring succession rights in favour of the lawful wedded spouse and the legitimate progeny. While children of live in relationship see a complete elimination becoming ineligible to succeed the property of their father, children of void and voidable marriage are under statutory protection, with conferment of limited succession rights in the property of their parents, despite the parent's marriage being contrary to law. They have limited succession rights in the property of their parents but are not

71 AIR 2023 (NOC) 78 (MAD); AIROnLine 2022 MAD 246.

deemed to be related to any of the relatives of their parents consequently a denial of inheritance from the latter's property is enjoined. The courts have also time and again clarified,[72] that the children of void or voidable marriages are entitled only to succeed to the separate property of their father/mother, but are neither coparceners in the joint family nor can acquire a right by birth in the coparcenary property. They would not become ipso facto members of Mitakshara coparcenary or Mitakshara joint family.

Releasing the succession rights and the rule of estopple

No Act can be read in isolation and both the Transfer of PropertyAct, 1882, and Hindu Succession Act,1956, have to be read together to decide on the claims of relinquishment of succession rights for consideration, something which is expressly prohibited under the TPA, and its impact on the rights of heirs of relinquisher under HSA. In *Elumalai* v. *M Kamala*,[73] a Hindu man A, had self-acquired property. He had a son S from his first marriage. He remarried and had five daughters and a son from the second marriage. With respect to his self-acquired property, that also included a house, A and his son from the first marriage entered into an agreement and S released his rights in this property that belonged to A and could have been succeeded by S in the event of his death for valuable consideration in 1975. The consideration was Rs 10,000/ as also jewellery worth Rs 5,000/. At the time of such relinquishment, S had a three year old son and his other son was born post such relinquishment. In this relinquishment deed S claimed that from that time onwards he would have no relation with his father and all the accounts of the property that was also subject to a mortgage would be settled by the father. S died soon thereafter leaving behind sons. Ten years post the death of S, A died, and children of S claimed the property of their grandfather as class-I heirs of the intestate. Children from the second wife intervened , contested their claim and pleaded that children of S were bound by the release deed executed by their father for valuable consideration and a rule of estopple would apply and prevent them from claiming this inheritance as it had already been released in favour of the intestate. Neither S, if he was alive , nor his children who would be bound by such release can claim any share. The children contended that what their father had released was a mere spes successionis and as per section 6 (a) of the TPA, the same was void and neither he nor his heirs would be bound by it.

The trial court upheld their claim, ignored the release deed as spessuccessionisand therefore void, confirmed their rights of inheritance but the high court reversed this judgement and relying on *Ghulam Abbas* case[74], applied the rule of estopple. They held thatas the son had received valuable consideration and since this was the self- acquired property of the father, the children would also be bound by the estopple. The apex court also held as against them and observed that since he had released his probable share in favour of his father for valuable

72 *Revanasiddappa* v. *Mallikarjuna* AIR 2023 SC 4707; AIROnLine 2023 SC 686.

73 AIR 2023 SC 659; AIROnLine 2023 SC 65.

74 *Ghulam Abbas* v. *Haji Kayyum Ali* AIR 1973 SC 554.

consideration, he would be bound by it and because he had no interest left in his father's property, his children also cannot claim any share in it. Dismissing the contention of the release being spes successionis, the court held that the rule of estopple would apply as against them and dismissed their petition.

The apex court verdict unfortunately is incorrect and directly contravenes and wrongly interprets the substance and effect of a rule of substantive law. Section 6 (a) of the Transfer of Property Act, clearly and in no uncertain terms provides;

> "The chance of an heir apparent to succeed to the property of an intestate cannot be transferred;"

The term 'transfer' includes a 'relinquishment' for consideration. Here, at the time of relinquishment, S was only an heir apparent to the property of his father, 'heir apparent' and not 'heir', as living person do not have heirs and since this was the self-acquired property of his father, and he was the exclusive ownerof the property. The fact that S was merely an heir apparent and had no substantive right in his father's property was due to the possibility of the father alienating it during his life time or even disposing it through will excluding S notwithstanding the relinquishment. Secondly, mortality is certain but its time is not, there may be a possibility that S might die during the life timeof his father. This is the reason why it is called a chance of an heir apparent and not a certainty. Transfers based on chances, with or without consideration are expressly prohibited under the Transfer of Property Act, and Hindu Succession Act cannot override the provisions , in absence of an express mention of it. The fact that such relinquishment was for consideration is irrelevant as his lack of capacity to enter into any kind of transfer like this, was within the knowledge of both, the transferor, *i.e.*, S and his father, *i.e.*, the owner of the property, from whom he expected to inherit, if the later died before him leaving the property intact. In layman's terms what did he transfer and for what did he receive a consideration. On the day of relinquishment, he had no right in the property so he could not have relinquished any. There was a possibility that should he survive his father and the father leaves the property for him to inherit without making a Will or a disposal otherwise, he might inherit the interest in property as his class-I heir. This is expressly prohibited under law. He received a consideration based on a future possibility and hence in light of an express rule of law under a void transaction. As even after such relinquishment, the father could have alienated the entire property for whatso ever may be the reason, being a full owner of it and such relinquishment would have been meaningless. Moreover, the consideration in a void contract cannot validate a statutorily prohibited transfer. Estopple under section 43 of the same Act can be applied if there had been a fraudulent or erroneous representation by the transferor about his competency to transfer an interest in immovable property that he professes to do for consideration, the transferee acts on this representation and furnishes consideration, in such cases, estopple applies against the transferor when he acquires the interest in the same immovable property , so long as the contract subsist. The present situation was totally at variance with the rule contained in section 43 of the Transfer of

Property Act, and should not be twisted and extended to cover cases like that. Since the transfer/relinquishment even for a consideration was void, it would have no adverse impact on the succession rights of S, or his legal heirs at the timeof his father's death. His sons, would inherit the property of their grandfather, as the class-I heirs of the intestate as (sons of his predeceased son) and would be entitled to claim their rightful share in the property along with other class-I heirs. Not only the claimant after prolonged litigation were deprived of their rightful shares in the property, this deprivation coming from the apex court is unfortunate with no future correctional eventuality.

Notional partition

The Hindu Succession Act, brought in the daughter of an intestate as his class-I heir bringing her share on par with that of the son and apparently ended the then prevailing gender inequity with severe impediments over her rights to ask for partition of a dwelling house and her inability to take a share in the coparcenary property remained even on paper as also in practice. As a *via* media therefore for the first time a small though indirect participation of a daughter in the ancestral property was conceptualised through the medium of a fictional partition, upon the death of a coparcener.

Upon the death of the father after 1956, but before 2005, as per section 6 of the Hindu Succession Act, a notional partition would be affected, and it would be presumed that the father had effected a partition before his death. Thus where father died and was survived by two sons and a daughter, the presence of female heirs, *i.e.*, daughters would result in the application of the notional partition. The property would be partitioned between the son and the father each taking half share and from the half that devolves on the father each child including daughters would take a third share. Thus, the son would take half +one sixth , while the daughter would take one sixth each.[75]

Right of daughter

Presently, a daughter is one of the primary heirs to the property of the father on the same footing as a son, including her entitlement.Thus where a Hindu man died leaving behind two son and four daughters , with his wife predeceasing him, each of the child would be entitled to one sixth share in his property and the claim of the sons to the complete property to the exclusion of daughters would be dismissed.[76] In *S N Papa Reddy* v. *Narayan Reddy*,[77] a Hindu joint family comprised of two brothers, Br1 and Br2 initially and their respective dependants. The brother effected a partition as between them dividing the property. While the brothers took one half each, Br2 divided the property further between him and his son. He had a wife, and five other children who were not given anything. The suit was filed by his daughter, wife and the other four children. The court accepted the contention

75 *Derha* v .*Vishal* AIR 2023 SC 4180; AIROnLine 2023 SC 672.

76 *K Chakrapani* v. *N Brindha* AIR 2023 Mad 306; AIROnLine 2023 MAD 1099.

77 AIR 2023 Kar 101; AIROnLine 2022 KAR 488.

of the daughter and held that even though the trial court had determined the shares by way of a preliminary decree, in light of *Vineeta Sharma's*,[78] case it has to be reworked because after the enactment of the 2005 Amendment Act, the daughters are also entitled to a share out of the coparcenary property. The family as depicted by the facts now consisted of A, his wife W, his son S and five daughters. The court held that each of them except the wife, in the first instance along with Br2 would be entitled to 1/7th of the property. After the death of Br2, his share would again be taken by the seven heirs including the wife of Br2 from 1/7th of the share of Br2. Thus each of the child would take 8/49th share while the wife of Br2 would get 1/49th share in the property.

However, the daughters do have an onus to prove the character of the property if they claim their share contending that the property in question was coparcenary property. In *H Vasanthi* v. *A Santha*,[79] an unmarried daughter filed a suit for partition and claiming a share in the property that she contended were ancestral in character under section 29A of the Tamil Nadu Hindu Succession (Amendment) Act, 1989. Their claim relating to nature of property was contested by the other party negating its separate character. They contended that the property was already partitioned. The court held that the burden of proof was on the daughter to show that the nature of property was coparcenary property. The court called upon the unmarried daughter to furnish proof that the partition that had already been affected in the family was a partial one and that it did not affect her share in the property.

Absolute ownership to Hindu females

Almost seven decades post enactment of the Hindu succession Act, 1956, with conferment of full ownership rights to a Hindu female, litigation keeps emerging disputing her title. Male collaterals sense of entitlement is enough to ensure filing a litigation claiming property belonging to a widow even in view of an express provision securing and reaffirming her ownership. In *Kanhaiyalal Shyola* v. *Ram Shyola*,[80] the property left behind was the ancestral joint family property. The issue was whether the widow of the intestate would have a transferable right over the share that she inherits. She had transferred the property after she inherited it from her husband and the claimant sought to nullify it. The court held that upon the death of the Hindu man, firstly a notional partition would take place in terms of section 6 of the Hindu Succession Act, as the death was prior to 2005. Here, the widow would succeed to the share along with other heirs, *i.e.*, sons and daughters and would become by virtue of section 14 an absolute owner of the property. Even otherwise, she was in constructive possession of the property throughout. The court held that her transferable rights in the property that vested in her by virtue of such succession would not be fettered by incidents of coparcenary property as claimed by the other heirs.With respect to the plea of the collaterals/petitioners

78 *Vineeta Sharma* v. *Rakesh Sharma* (2020)10 SCR 135.

79 AIR 2023 SC 3873; AIROnLine 2023 SC 632.

80 AIR 2023 (NOC) 69 (RAJ); AIROnLine 2022 RAJ 108.

that she transferred her share before a partition took place by metes and bounds, the court further observed that when the preliminary decree of partition fixes the sharers of the members of the family, actual partition by metes and bounds was not necessary to operate as an embargo on right of female heir who got absolute ownership by force of law, to transfer her right , title and interest in the said property. Consequently their petition was dismissed by the court.

VIII CONCLUSION

The year 2023 saw some important adjudications from the courts. While the courts successfully thwarted the attempt of spurious claims of adoption, it dismissed the claim of a right to marry being a fundamental right thereby giving a blow to the sexual minorities to legalise theirrelationship. Sameness of religion was considered essential for validity of marriage and availing the matrimonial relief under Hindu Marriage Act.

The court explained in detail under what circumstances the apex court may culminate a marriage by divorce on grounds of irretrievable breakdown of marriage exercising their powers under article 142. At the same time considerable ambivalence was noticed as in many cases, the marriage was dissolved yet in other despite the separation of parties extending over four decades, relief was denied to the husband in his super silver years only because the wife who was not living with him for all these 43 years did not want to live with the stigma of a divorced woman. The court eulogized the institution of marriage, specified the benefits that go with it and refused the relief. Maintenance claim of step mother (who was a party to a void marriage) from a step son were dismissed, while the mother and maternal grandfather were preferred in custody battles to the father.