22

HINDU LAW

*Poonam Pradhan Saxena**

I INTRODUCTION

IMPORTANT JUDICIAL pronouncements in the area of Hindu law relating to marriage, adoptions, maintenance, custody, guardianship, Hindu joint family and succession reported during the year 2014, have been briefly analyzed here.

II HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

Validity of adoption

Adherence to age requirements for validity of adoption is a mandatory feature of the Act. The maximum age for the child to be adopted is 15 but it co-exists with legislative permission for concessional deviation/relaxation if existence of a contrary custom in the community to which the parties belong is amply demonstrated. In absence of a contrary custom sanctioning adoption of an over-age person, adoption remains invalid. This year in a case from Karnataka,[1] the court adjudicated upon the validity of adoption of a child above the age of 15 years. Here, upon the death of a Hindu man, his widow filed an application seeking a declaration to negate the claim of adoption put forward by a person A (who was the biological son of her sister). A had claimed inheritance rights from the property of deceased as his adopted son on the strength of a registered adoption deed. A, stated that his adoptive parents were devastated after losing their only biological son and in order to overcome their grief had adopted him and at the time of adoption he was around 21 years old. He raised two pleas, first the existence of a custom in his community permitting adoption of a child above the age of 15 years, and second that both the existence of such custom and the validity of the adoption should automatically stand proved without any further corroboration due to a written recital in the adoption deed and its subsequent registration.

The issues before the trial court were, whether there is a presumptive validity of an adoption owing to a registered deed, and should the person discharge actively the burden of proof of existence of a contrary custom permitting adoption of a child above the statutory age. The trial court held the adoption deed as invalid, adoption as fraudulent and invalid both due to claimant's age being above the permissible statutory stipulated age on the date of alleged adoption and also on account of his failure to prove the existence of any custom or usage prevalent in

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* Vice Chancellor, National Law University, Jodhpur, Rajasthan.

1 *Parvathamma* v. *Shivkumar,* AIR 2014 Kar 104.

his community that sanctioned adoption of a child above the age of 15 years. The claimant took the matter before the Karnataka High Court.

The present court said that judicial presumption in the first instance would lean in favour of not only the validity of an adoption that is shown to be effected with a registered document, though signed both by the adoptive as well as biological parents, but the law would also presume that for this adoption all necessary formalities and legal requirements have been complied with. This presumption of validity of adoption and the fact of it being in accordance with law is nevertheless a rebuttable presumption and would not b applicable in the present case due to two main reasons, *firstly* because the age of the adopted child was more than the permissible statutory limit and as the existence of a custom or usage cannot be proved merely on the basis of the recitals in the adoption deed, the same has to be established by the party asserting the same because in absence of such a custom the adoption is invalid. *Secondly,* as while assessing the validity of this registered adoption deed, it was found that the deed neither bore the signatures/thumb impression of the parents of the adopted child nor that of any guardian, it strongly indicated that none of them was present at the time of the registration of the deed leading to a conclusion of invalidity of adoption.[2] Stressing additionally on the importance of observance of ceremonies in the process of adoption, the court said that for a valid adoption the transfer of the child from the biological family to the adoptive family necessitates performance of some ceremonies in order to get due publicity. As the law mandates that the child should be actually given and taken, it is imperative that some ceremonies must be performed, at the same time cautioning that no particular form of ceremony is warranted by the law. The court insisted: [3]

> The nature of ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be and giving and taking shall be a part of it.

That an adoption deed is not required by law to be compulsorily registered, the court reiterated, while noticing a strange but crucial fact, that the certified copy of the adoption deed carried the signatures of neither the biological father nor of any guardian of the child which indicated, its execution in their absence, and consequently, its mere registration leading to a presumption of the validity of adoption was negated by the court. Court's suspicion as against its validity was further compounded by the fact that though the natural mother of the child was alive her testimony was not taken as a witness, the adoption was held as invalid.

In another case from Patna,[4] raised the issue of indispensability of procuring consent of the wife when adoption was effected by her Hindu husband. Here, a suit was filed by a person for a declaration that he was the legally adopted son of

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2 *Ram Chandra* v. *Banwari Lal*, AIR 2014 Raj 144.

3 *Id.* at 15.

4 *Mohan Murari Tiwari* v. *Deoki Nandani Devi,* AIR 2014 Pat 132.

a Hindu man 'A', adopted by him with the consent of his two wives. Facts showed that despite marrying twice, A remained childless and resorted to adoption upon observance of due ceremonies in 1963, that included physical handing over of the child by the biological father to the adoptive father. The child was the son of his half sister. This adoption deed was later registered. Post A's death in 1971, the adopted son performed the last rites and other ceremonies and then applied for mutation of his name as his heir in the municipal records. It was at this juncture that the first wife of A challenged his application and claim of adoption on the grounds of her lack of consent and non performance of ceremonies.

The trial court ruled against the adoption strangely enough on the ground that as per the prevalent practice in India, under the classical law, no one could take that child in adoption, whose mother in the maiden stage he could not have lawfully married owing to them being in degrees of prohibited relationship and therefore adoption of the son of a sister including a half sister was impermissible and void. Thus for an adoption that took place after the coming into force of this Act, the trial court applied the law in vogue prior to its enactment. It is noteworthy that section 4 of the Hindu Adoptions and Maintenance Act, 1956, expressly overrules any custom or practice contrary to what has been provided under the Act and the rule of inability of a person to take his sister's child in adoption on account of rule of reverse relationship[5] prior to 1956 stands abrogated. The present Act does not lays down any disability of such a nature.

On appeal, the court ruled in favour of validity of this adoption on account of express abrogation of contrary customs under the classical law and present permissibility of adopting a child from not only within and outside of the family but also of those close female relations who otherwise stand in degrees of prohibited relationship. On the second issue of lack of the consent of the first wife of the adopted father, the petitioner failed to prove the same on her part at the time of adoption. On the other hand, as per the established facts, it was proved to the satisfaction of the court that the first wife had indeed given the consent for the adoption. The adoption thus was held to be valid.

Effects of adoption

A valid adoption creates ties equivalent to birth in the new family and an absolute severance with biological family except in the area of application of the degrees of prohibited relationship and non divesting of the property that had already vested in the child. In other words the prohibition of marrying the blood relations or of affinity in the natal family and the permission to carry the vested property to the new family notwithstanding, the child is deemed to be dead for every purpose for the biological family and is deemed to be reborn in the adoptive family from

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5 Under the classical law of adoption, a man could not take a child in adoption whose mother in maiden stage he could not have married. Since a man cannot marry his sister or half sister, due to the bar of degrees of prohibited relationship the plaintiff pleaded he is prevented from taking the son of his half sister in adoption.

the date of adoption.[6]

In a case from Hyderabad,[7] this year, the issue revolved around the entitlement of an adopted child to the coparcenary property of his biological family, post his adoption. Here a couple having four sons gave one of the sons, S_1 in adoption to his maternal grandfather, through a registered adoption deed in 1940. Initially moving with the maternal grandfather, post his death, the adopted child resumed habitation with the biological family and with his natural brothers. S_1 had inherited the complete property of his adopted father in the capacity of his class-I heir. His biological father and mother died in 1956 and 1982 respectively.

On the basis of evidence that was produced before the trial court it was found that the joint family property of the biological family as also the property of the adopted son were clearly identified and were separately and independently maintained. S_1 was looking after the property of the adoptive father independently while the other brothers were looking after the joint family properties, without any record of a family arrangement. One of the brothers S_2, filed a suit for partition and claim of separate possession of his share in the joint family property. He claimed 1/3rd share on the ground that since S_1 had already been given in adoption he would be deemed dead for the purposes of distribution of the coparcenary property. However, while submitting the details of the total property available for partition, he also included the separate property of S_1; *viz*., the one which he had inherited from his adoptive father and projected a false claim in the court that the complete properties were intermingled and were therefore the family properties.

The trial court reprimanded him for not approaching the court with clean hands and proceeded to examine the main issue for adjudication, *i.e.*, can the child after adoption retain rights in the coparcenary property of his biological family as on that depended the extent of his share; 1/3rd or 1/4th. As the adoption had taken place prior to the coming into force of the 1956 Act, the need was to examine the

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6 Hindu Adoptions and Maintenance Act, 1956, s. 12 reads as under:

Effects of adoption

An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that-

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property including the obligation to maintain relatives in the family of his or her birth;

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

7 *Madala Yathirajulu* v. *Madala China Ananthaiah*, AIR 2014 Hyd 32.

classical law, *i.e*., as it was prevalent in 1940. Although the court observed that by adoption the filial relationship is extinguished in one family and is created in another family and therefore and thereafter the person adopted cannot claim or take any property in his natural family by virtue of the extinguished filial relationship therein, it nevertheless held:[8]

> It has to be held that even though 3rd defendant went in adoption in 1940, he did not lose his right in the coparcenary property in the natural family which had vested in him on the day he was born. Therefore the 3rd defendant would also be entitled to a share in .....

Where the court went wrong was in misinterpreting that the coparcenary property vests in a person from the time of the birth. The term coparcenary or its primary incidents are nowhere statutorily defined and one has to necessarily fall back upon the classical concept of coparcenary to understand the full implication of the character of property, its acquisition and devolution as also its partition. The character of coparcenary property and separate property is distinct and therefore the concepts of property ownership and incidents applicable in a separate property cannot be applied to coparcenary property. Acquisition of an interest by birth in the coparcenary property and vesting of property in an owner are two different concepts with differential consequences and are easily distinguishable. Under the classical law of Hindu joint family and coparcenary, the coparceners acquire an interest by birth in the coparcenary property but on his death the interest is not taken by his heirs as in case of separate property but devolves on the other coparceners by survivorship as if he has died without any property to be transmitted to his heirs. An interest in coparcenary property never goes under the classical law to heirs but goes to surviving coparceners under the doctrine of survivorship, which is considered an essential feature or component of coparcenary property ownership. It is not heritable generally as would be a property that vests in a person and goes to his heirs under laws of intestacy on his demise. Thus the distinction is clear, coparcenary property goes by survivorship to surviving coparceners and separate property goes by inheritance to heirs. The coparcenary property does not vest in a person, it is more in the nature of an interest that is fluctuating and therefore does not vest in a coparcener till a partition takes place and the fluctuating shares become specific, and therefore upon the adoption of a child, his coparcenary rights in the joint family property of the natal family come to an end and devolve on the surviving coparceners as if the adopted child, a coparcener has died, and if he is taken in adoption by a couple, who are members of a Hindu joint family, he would become a coparcener with his father and other coparceners in the new family and would acquire an interest in the coparcenary property of the adoptive family as if he is born from that date. There is a plethora of judicial precedents[9] wherein the conferment of coparcenary rights in the family of adoption have been judicially

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8 *Id*. at 37.

9 See, for example, a ruling of the Andhra Pradesh High Court, *Rayaprolu Narayana Murthy* v. *Rayaprolu Ramakrishna Sarma*, AIR 2003 AP (NOC) 50 wherein it was

upheld. It is because adoption is a fictional process of death and birth in that order from biological to adoptive family. The moment the child is given in adoption to the other family he ceases to a coparcener in the natal family, and if he is not a coparcener, resumption of habitation subsequently if at all happens would not make him a coparcener. Vesting of the property has a different connotation. It refers to the property that is owned by a person and is heritable by his heirs post his death. For example, a child is born in the family and the father makes a gift of a portion of his property to the child. The property so gifted to the child vests in the child and even if such a child is given in adoption to a family, the child would carry the property to the new family. This child would not be divested of the property despite his adoption. But if the family is the joint family and the child by virtue of him being a coparcener acquires an interest in the property, post adoption the child cannot carry the property to the new family. Hence the decision of the court appears to be erroneous.

III HINDU MARRIAGE ACT, 1955

Competency to initiate action for a matrimonial relief

Parental interference in marriage related matters of their children in India is a well established reality. Notwithstanding the age and economical status of their children, social reality check confirms a fact that even presently parental duty includes a responsibility to arrange marriage of the children. Grownup and economically independent young men and women look upon their parents to find a suitable match for them with full social approval that treats it as a laudable step on their part. It is also projected as a part of our glorious Indian social culture that persons desirous of getting married should first seek the approval and blessings of their parents and trust them to act in their best interests. It is precisely for this reason that independent decisions of youngsters in matrimonial matters is strictly frowned upon. Where the children, more specifically the sons, choose their life partner either without informing their parents or against their wishes, their actions are condemned by the society with strong disapproval. The parents also generally not willing to give up adopt preventing and punitive measures often sabotaging their union sometimes with horrendous consequences. In a case from Rajasthan,[10] a boy and a girl, both adults but coming from different castes married, without or rather against the wishes of their parents. The marriage was then registered with the registrar of marriage in complete conformity with law and established procedure. This marriage was severely resisted by the boy's parents. His infuriated father approached the court seeking a declaration that the marriage is not valid on two main grounds, first that the marriage was not solemnized as per the Hindu customs and rites including saptapadi and as such it has no sanctity and should be de-recognized as such, and second that the rumours about this defective marriage has

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clearly held that, an adopted son is not entitled to a share in the coparcenary property of his natural family post adoption.

10 *Dilip* v. *Ravi*, AIR 2014 Raj 89.

denigrated his social reputation and status in the society and thus he was well within his right to seek its legal determination. The allegations were countered by the children authenticating the ceremonial validity and legal completion of the marriage. They pleaded that the suit was infact a result of the intolerance and un-acceptance of this marriage on part of the parents and the frivolous litigation was an act of frustration founded on their stubborn and orthodox notion and emotional aversion. They reiterated that they were major, had married owing to their free and voluntary will to do so, and thus no one else had a right to question the validity of this marriage, let alone seek its annulment.

These contentions were accepted by the court which while dismissing the petition of the father also came down heavily against his action and admonishing him of wasting the precious time of the court for re-enforcing the orthodox notions, the primitive concept of castesim and so called family traditions. This blatant attempt to nurture and reinforce wholly obsolete and redundant perceptions against inter-caste marriages that are contrary to our social fabric, the court cautioned must be hatched.

On the issue of *locus* to present a case, the court held that in matrimonial relationship, *locus standi* to challenge the factum of marriage or a relief for its annulment can only be claimed by one of the spouses and no other person can ever seek the relief of annulment of somebody else's matrimonial relationship including that of his children. Thus, no cause of action had accrued to the parents to file a suit and they have no locus to lay a suit of such a nature. On the other hand by filing such a suit the parents were held guilty of abusing the process of the court. Incidentally the lower court while adopting the same line of disapproval had imposed a fine of Rs 5,000 on the parents. The present court also upheld both the decision of the court as also the fine imposed by the trial court.

The line of approach taken by the Rajasthan High Court is extremely positive and in tune with present times. At a time when the country is plagued with the ills of honour killings and the social evils of dowry, gender subjugation of patriarchy, casteism, religionism, the divisive forces escalating the communal forces flaring up passions on the issues of inter religious marriages, the realization of independence of the parties to choose their life partner irrespective of these divisive considerations is a welcome judicial step. It is also a practical reality that all these social ills can be considerably diluted if young persons are given a free hand in deciding their personal lives including a decision in matrimonial matters. It would not be trite to assume that the reason why parents and also society wants to play a dominant role in choosing a bride for the sons in the family is to re-enforce the patriarchal ideologies of subjugation of women and to perpetuate the ills of caste, religion, social and financial rigidity. Parents sit and love to negotiate dowry for the sons, in arranged marriages and children defying their wishes and marrying on their own actually strip them of the power they otherwise try to wield over their children. Additionally, their own beliefs of suitability of castes, sub-castes, gotra, sub-gotra, matching of horoscopes and the virtues necessary in the life partner, need not necessarily be shared by their off-springs. Their first admonishing the children because they have not been able to perpetuate the social ills, or themselves refuse to adjust in accordance with the changing times and later even resorting to

honour killings has been a vicious harsh reality of India to inculcate and create a horrendous fear psychosis in the mind of young people, who presently are the only hope for correction of social ills.

The judicial reprimand, to parents , not to interfere in the intimate decision of their children is a very healthy sign as the parental control over the personal lives of the children cuts across all financial, social, political and religious lines.

Proof of marriage

A true picture of celebrating unity in diversity, India presents a vast cultural variation that includes the manner of solemnisation of marriages regionally. Statutory recognition to disparate customary rights and ceremonies in matrimonial matters has therefore expressly been recognized in section 7of the Hindu Marriage Act, 1955. which provides that:

> a Hindu marriage can be validity solemnized in accordance with the customary rites and ceremonies of either the bride's community or the bridegroom's community,

A compliance with the requirements of proper solemnisation of marriage only gives the status of husband and wife to the parties of the union. Solemnisation of marriage is the starting point of a new relationship recognised by law and creating mutual rights and obligations. The issue whether a marriage has taken place or not casts a heavy shadow on the mutual succession rights of the alleged spouses. While mere living together as husband and wife is considered insufficient to establish a marital relationship, it is also a common practice not to give enough leverage to maintain or keep substantial proof of solemnization of marriage in wake of the large attendance. Hindu law places great emphasis on the formal validity of marriage but owing to presence of extensive and varied customs based ceremonies and their mingling in the erstwhile shastric ceremonies that were being observed from time immemorial, a huge variation is witnessed within the phrase: customary rites and ceremonies" owing to community and region linked variations, from very simple to elaborate. This extensive variations of the ceremonies is sometimes also linked with the marital status of the bride, *i.e.*, whether the marriage is of a maiden or that of widow. However, no written record of what are the essential ceremonies to be performed for the valid solemnization of the marriage is authentically documented. Consequently, it becomes imperative for the parties to be prepared for proving the valid solemnization in case the challenge comes at a later point of time, more importantly, post demise of the male party amongst issues of succession to his property. In such cases many times human testimony becomes tedious either due to their sheer unavailability or unwillingness to testify and the preserved documentation remains the solid evidence to prove or disprove the status of a party. The very persons who were witnesses to the solemnization of the marriage may turn against it and testify its invalidity or incomplete or defective solemnisation with an eye on the property of the deceased. But what is the kind of documentation that can conclusively establish the marital status, was the focal issue in a case that came before the apex court.[11] Here the court had to determine the validity of a

marriage that was performed in 1977, *i.e.*, 38 years after its alleged solemnisation. The facts showed that one Hindu couple had purchased/ acquired property individually. After a year of the death of the wife, the man allegedly remarried W_1. They lived together as husband and wife for around six to seven years when he died. Post his death, litigation over claim to his property started and W_1 was required to demonstrate her status as his widow. So in order to prove the factum of marriage she brought forward a temple receipt which was produced from the lawful custody of the trustee of the temple where the marriage according to her was performed; documents relating to the gifts made at the time of marriage; voter's list for two years, 1978 and 1983 whereby she was shown as his wife; the pass books and banker's reply again showing her as his wife and also a mortgage deed showing her unilateral description as the wife of the deceased man. The court had to assess the factum of the solemnization validity of the marriage from these documents. The compounding problem had been that due to lack of long cohabitation the presumption of their relationship being that of marriage could also not be imputed. The certificate issued by the trustee of the temple did not indicate anything about the fact of solemnization of marriage. The court dismissed all the documents produced by her as insufficient to establish solemnization of her marriage and acquisition of her status as that of the wife of H. In appeal she pleaded that in light of the apex court's earlier verdict in *Nagalingam* v. *Sivagami*,[12] the court should have held in favour of the validity of the marriage as it was performed in the temple and was in the nature of *siyamariyuthai* or *seerthiruththa* form of marriage. The court quoted from the above mentioned case and discussed that the only differential feature in these forms of marriages from the traditional shastric form of marriages is that the presence of the priest is not essential and the marriage can be validly solemnized in a simple manner in the presence of friends and relatives. Exchange of rings, tying of thali and taking of each other as husband and wife in presence of witnesses verbally are simple though essential components of solemnization of this form of marriage. Yet it is to be proved that the marriage has taken place. Where the temple receipts did not say anything about the solemnization of marriage let alone its form or ceremonies, a receipt could not be taken as proof that marriage has taken place. All the evidence that was produced, the name in the voter's list, the bank papers and a unilateral description of her as the man wife's , the court said were not sufficient proof to conclude the valid solemnization of marriage specially when the duration of cohabitation was for a short period. The marriage was thus held as not validly proved and the woman disentitled to claim the property of H.

The case highlights two major aspects; one that marriages performed in temple would still have to pass the solemnisation validity test through independent proof and second that assertions or even status written in documents at the behest of the parties may not be taken by judiciary as a conclusive proof of their legal status. The party may make these depictions under a *bonafide* belief of their marital status

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11 *Easwari* v. *Parvathi,* AIR 2014 SC 2912. (From Madras High Court)

12 AIR 2001 SC 3576.

but the factum of solemnization of marriage must be proved to the satisfaction of the court.

Formal validity or ceremonial validity of marriage in *Karewa* form

In the geographical region of Punjab and Haryana, *Karewa* form of marriage, that is also known as *Karao* or *Chadar andazi*, is a custom prevalent that involves a widow marrying one of the brothers of her deceased husband and is known amongst the Jats, Ahirs, Gujars and Harijans communities. *Karewa*, a white sheet colored at the corners is thrown by the man over widow's head signifying his acceptance of her as his wife and its other variations in terms of ceremonies are placing churis (glass bangles) on the widow's wrists in full assembly and sometimes even a gold nath (nose ring) in her nose and a red sheet over her head with a rupee tied in one of its corners, which is followed by distribution of gur (jaggery) or sweets. This is unaccompanied by ceremonies of any other kind. This custom represents social consent for cohabitation. The woman resumes her jewels and colored clothes which she may have ceased to wear after her first husband's death and this ceremony gives it a sanctimonious touch. The reasons might be the agrarian needs sanctifying widow remarriage. These ceremonies according to local customs bring legitimacy to a relationship and also a solemnity as *Karewa* form of marriage itself was a social response to bring respectability to young widows rehabilitated by marriage to certain class of persons such as deceased husband's brother or to a near relative. As such therefore they are not solemnized with gaiety or elaborate ceremonies. A case of this nature where the marriage solemnized in *Karewa* form was challenged as failing the test of valid solemnization came before the Punjab and Haryana High Court. Here,[13] after the death of her husband a Hindu Jat woman W, entered into another marriage in *Kerawa* form with H according to customary rites and ceremonies in 1972. In presence of the elders or friends the father of the woman had tied the turban on the head of the H and H in turn had put a chadar on W. This was followed by distribution of gur or sweets to those present and living together of H and W as husband and wife. A *Karewanama* in this connection was written and registered with the office of the sub registrar on the same day. The validity of the marriage cropped up much later in connection with the succession rights of this woman and her son after the death of H. The court held in favor of the marriage stating that in such forms of marriage there is no need to look for elaborate ceremonies and if it is proved that ceremonies have taken place and the parties thereafter have lived together as husband and wife, it is sufficient to prove the marriage. The marriage was declared validly solemnized and the widow is entitled to the property rights.

Registration of marriage by unauthorized persons/institutions

At a time when the mandatory registration of the marriage is strongly recommended by judiciary and is seriously under consideration by the parliament, in order to facilitate proof of solemnization of marriage, it is amazing how people

13 *Darbara Singh* v. *Jaswant Kaur*, AIR 2014 P&H 100.

well versed with law indulge in practices totally unwarranted in law. In *Satyam Kumar* v. *State of UP*,[14] a marriage certificate was issued by an advocate exercising powers as a marriage officer on his own. Since an advocate is neither authorized by any provision to register any marriage nor to act as a marriage officer, a marriage certificate issued by him would be a meaningless document and cannot be relied upon by the parties as a proof of their marriage. Consequently the parties would not be entitled to any protection on the basis of the said void document. Similarly, in another case from Orissa,[15] an organization under the name of AMOFOI, a registered society under the Indian Societies Registration Act, 1860, was conducting marriages in the *Gandharba* form under Hindu law and were also issuing certificates of solemnization of such marriages. A marriage of an underage girl was so solemnized by them with an issuance of a certificate. The girl attained the age of 18 years four months later and without putting an end to this marriage remarried another person on her own. Interestingly a false affidavit was given by the girl to the society that she was above the age of 18. The first husband with the support of AMOFOI challenged the validity of the second marriage and sought its annulment from the court. Consequently, the issue of validity of the second marriage was brought before the court. He contended that the first marriage was perfectly valid as not only it was solemnized by a registered organization which had been doing so extensively in past also, the marriage was registered by them as well. The court noted that as far as the form of solemnization of marriage was concerned, they could be solemnized in the *Gandharba* form but there were two problematic issues here. One that at the time of the first marriage, the girl was underage, consequently the marriage was in violation of the requirements of section 5 (iii) and secondly, the society failed to convince the court as to under which law were they not only authorized to perform marriages but also to issue certificates of registration of marriage. They did not occupy nor were conferred the position of the official marriage registrar. The court said that the power to register a marriage vests only with the marriage registrar as he is a person appointed by the authorities occupying a statutory post. A society cannot on its own assume functions that are within the domain of the statutory authorities. Under the Orissa Hindu Marriages Registration Rules, 1960, the state government may appoint any officer from time to time to be the registrar, who is empowered to register marriages performed in compliance with the requirements of the law, in the area within his jurisdiction upon an application presented by the parties to the marriage in complete conformity with the rules. The rules also provide in detail the procedural formalities of maintaining a register. Thus both the appointment of the registrar competent to register marriages as also the modalities of registration and procedure within which the registrar is to function are adequately laid down under the rules. No registered society including AMOFOI, was notified by the state for the purposes of the Act and the rules. This society, the court noted was not an organization authorized by state government to

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14 AIR 2014 (NOC) 104 (All)

15 *Amulya Kumar Jena* v. *State of Orissa*, AIR 2014 (NOC) 282 (Orissa).

either grant marriage certificates or register marriages. Thus this certificate of marriage would not be an adequate proof of solemnization of marriage. The court also noted that the society was engaged in felicitating the marriages of many minor girls without the consent of their parents with issuance of certificate of marriages and the same was causing disruption in the families of these minors. The representative of the society admitted the performance of marriages and their registration by them, but denied allegations of solemnization of marriage of minors. They stated that they were taking care of the age aspect but as they had no independent means of knowing the ages of the parties in certain cases, the only way to ascertain compliance with the age requirement was to ask the parties to give an affidavit to this effect. In the present case the girl herself had given an affidavit that on the day of the marriage she was 19 years old, though the same when compared by the court to her matriculation certificate showed her to be below 18. Taking a very serious note of the fact that the performance of the marriages by the society AMOFOI in clear violation of legal norms and issuance of marriage certificates on receiving hefty sums of money was becoming a potential source of social injustice and frequent disturbance in the bride's and the bridegroom's homes, and that for this the society deserved stringent penalties, a cost of Rs two lakhs was imposed on them to be deposited in the chief minister relief fund. With respect to the second marriage of the girl after attainment of the age of 18 years that was registered before the marriage office with an appropriate issuance of marriage certificate , the court ruled in its favour treating the first as a nullity and directed the investigating office to hand over the custody of the girl to the second husband. The judgment leaves some issues unanswered. The girl had voluntarily approached the society for marriage with a false affidavit. As she was a minor under the Prohibition of Child Marriage Act, 2006, the marriage was voidable and not void. The marriage had to be legally annulled before she could remarry and in absence of a prayer for nullity coming formally from the girl the marriage would be subsisting. In such cases where she without putting an end to the first marriage, remarries within a short span of time appears not only strange but for the judiciary to declare her first marriage as void, let her go with the second husband without any sanction and to vent out its anger on the society was a little too harsh on the first husband, whose marriage was terminated while what he wanted was a declaration of the second marriage as void.

A marriage certificate issued by the registrar of marriages under the provisions of the Special Marriage Act, 1954, is deemed to be a conclusive proof of solemnization of the marriage more so when one of the parties specifically admits it. The issue arose here,[16] in connection with the prayer for declaration of nullity of the marriage of the parties on the ground that at the time of the marriage, one of them had a subsisting marriage and therefore the second marriage solemnized during the life time of the first spouse would be null and void. The facts revealed that the first marriage of a Hindu woman was solemnized under the Special Marriage Act, 1954, but during the subsistence of this marriage, she remarried another man,

16 *Rajani Kanta Acharya* v. *Jyotshna Rani Triathy*, AIR 2014 Ori 21.

H_2 under the Hindu Marriage Act, 1955. The prayer for declaration of the second marriage as void came from the second husband. The first husband admitted the marriage under the Special Marriage Act, 1954, but made a futile attempt that he and his wife were first cousins and were prohibited from marrying each other as per the provisions of the Special Marriage Act, 1954, this marriage being void, the second marriage would be valid. The court disbelieved the contention of the parties being in degrees of prohibited relationship and observed[17]

> the story of prohibited degree of relationship was created for the purposes of presenting the case as Subhakanta filed the application to declare marriage as null and void.

Once this claim of the parties being in degrees of prohibited relationship was dismissed, the conclusion of the second marriage as void was inevitable. The court said that marriages covered under section 11 are void *ipso jure*, that is void from the very inception and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of the petition it is not essential to obtain in advance such a formal declaration from the court in a proceedings commenced specially for this purpose. It also opined that section 16(3) prominently bring about, the primary differences in the character of void and voidable marriage and while legislature has considered it advisable to uphold legitimacy of the paternity of the child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child and thus in a void marriage the spouse is a complete nullity while the children are recognized as legitimate for the purposes of property right. The marriage accordingly was declared as a nullity.

Pre-marital pregnancy of the wife

Marriage involves trust and mutual fidelity and entry in matrimony must be with complete disclosure of facts material for the start of a healthy relationship.

Where a woman who is pregnant gets married concealing from the husband, the fact of her pregnancy from another man, the same is considered an extreme case of fraud that is singled out and is kept as a separate clause enabling the husband to seek a decree of nullity. In order to annul such a marriage he has to prove three things to the satisfaction of the court, first that the wife was pregnant at the time of her marriage with a person other than him; two that he had no knowledge of such pregnancy and three, that post disclosure or discovery of this fraud there has been no voluntary marital cohabitation as between the parties. In a case from Karnataka this year,[18] soon after the solemnization of the marriage the wife resisted marital cohabitation on one or the other pretext with the result that the marriage remained unconsummated. She however gave birth to a healthy baby 161 days after her marriage and the husband prayed for annulment of the marriage

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17 *Id*. at 25.

18 *Neelawwa* v. *Maruti Ambi*, AIR 2014 Kar146.

on the ground of concealed premarital pregnancy by a person other than him. The wife denied the allegations pleaded consummation of marriage and now contended that notwithstanding the result of the DNA test, the husband must prove non access at the time of possible conception of the child or else he cannot legally deny paternity. She also contested the disclosure of the findings of the DNA report on the ground that if revealed it would lead to bastardisation of the child, and her being labeled as an unchaste woman. The court upheld the decree of nullity in light of the facts and circumstances of the case as also the conclusive DNA evidence that showed that the child was not fathered by the husband.

The presumptive legitimacy under section 114 of the Indian Evidence Act, 1872 was immensely useful at the time of its enactment. It accorded legal protection of legitimacy of birth and took care of the vulnerability of a woman in the eventuality of the husband unreasonably suspecting her fidelity and denying paternity of the child and the possibility of it being followed by extensive social stigma that both the wife and the child had to face as per the then prevailing social atmosphere. In cases of genuine doubts non access could be proved by the husbands, but the cases of exceptional hardships where while living together in a matrimonial relationship the wife would conceive as a result of an illicit affair, were the most tedious. Social setup has changed extensively, and with the advance in science and technology and accurate findings of the DNA analysis has presently made it impossible for unfaithful wives to hide behind the presumptive paternity clause under the Evidence Act, 1872 and to raise the bogey of them being labeled as unchaste women and that innocent children would be rendering fatherless. It is worth examining who would be branded as an unchaste woman: a woman who delivers the child of her spouse or that of another man while remaining married to the husband? It would be a natural and normal consequence of a deliberate and conscious act of hers. A woman who bears the child of her paramour cannot later say that her husband must be saddled with paternity as where she conceives the child from another man she must come up clean on who the real and biological father is? Can the child be rendered without a father, if it is conceived out of wedlock? He would have a biological father, but paternity cannot and should not be imputed on the husband of the child's mother, if it is not his child. Legal rules and presumptions for the protection of vulnerable cannot and should not be allowed to be twisted at the convenience of the undeserving, else injustice would prevail in the name of law. The judgment therefore is very positive.

Bigamous marriage

It has been six decades of imposition of compulsory statutory monogamy for Hindus yet, courts are accosted with voluntary commission of bigamy with flimsy excuses of its permissibility owing to awareness of marital status by the monogamous party. Under Hindu law, a marriage solemnized during the subsistence of the first marriage is void *ab-initio* irrespective of whether one or both parties knew of the relationship being a bigamous one or the fact that the parties might have lived together for a long time. In our patriarchal setup the awareness of the husband that his current wife is having a subsisting former marriage and his consent to it would not validate the marriage. In *B Vasundhara* v. *B Aswarthanarayana*

Rao,[19] a Hindu woman W married in 2004, lived with her husband for a period of three months and then left his company. Upon inquires it was revealed that she had earlier married another man, H in 2002 and divorce proceedings that commenced from him were still pending in the court. Additionally her application for claiming maintenance from her first husband under section 125 Cr PC was pending before the criminal court as well. The woman then filed another maintenance claim against the second husband. The facts presented a perplexing scenario. A woman marries, and files a criminal complaint against her husband for maintenance during the pendency of divorce proceedings emanating from him, remarries; then files a second claim of maintenance and then attempts to escape any contributory culpability on her part by pleading that since the proceedings for divorce were pending, a valid marriage should not be deemed to be existing and second, that the second husband's knowledge of her married status, and his resulting consent would automatically validate the second marriage. The court rightly held the second marriage to be a bigamous one and consequently void and granted a decree of nullity as claimed by the second husband. They also distinguished between a void and a voidable marriage and observed that it was only in respect of voidable marriages that the consent or acquiescence of a party can sustain the marriage, but the consent is irrelevant where the marriage is void. If the husband was aware of the subsistence of the valid marriage he was not supposed to marry but equally the wife was also not supposed to marry him and the marriage remains void. On the other hand in another case on more or less similar facts, the trial court came to a different conclusion though the incorrect proposition saw appropriate correction by the higher court. Here again,[20] a divorce petition was presented in the court in 2006 by a Hindu woman, and during the pendency of this petition, in 2007 she remarried, another man , lived with him for five years; bore him two children and thereupon went to America. The divorce petition filed in the court against the first husband culminated in 2010.

Upon a decree of nullity prayer coming from the second husband on the ground of contravention of statutory monogamy provisions by his wife, the additional district judge, concluded the improbability of ignorance of the existing marriage on part of the second husband as cohabitation extended over 5 years which in its opinion was extensive enough for the husband to know about her previous subsisting marriage. The second ground of rejection for a prayer for nullity, the court said was the inordinate delay in approaching the court. The petition praying for a decree of nullity was presented around two and a half years of the first marriage of the woman coming to an end, and the court drew an inference of collusiveness between the parties and thus dismissed their petition. The trial court said:[21]

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19 AIR 2014 AP 51.

20 *Harkanwalpreet Singh* v. *Harshpreet Kaur*, AIR 2014 P&H 60.

21 *Id*. at 61.

> …[O]nce the earlier marriage had been dissolved by the court, the present marriage...was not liable to be annulled on the basis of section 5(1) of the Act. The petitioner by his own act and conduct was estopped from filing the petition for annulment of the marriage. The present petition is nothing but an abuse of the process of the court.

Strangely the wife admitted solemnisation of her second marriage during the pendency of the divorce proceedings of the first marriage; stated that she had no objection to its annulment; and corroborated the date she left for USA. Post her departure from her second husband's home, she never resided with him and lived with her parents whenever she visited India. The present court held that since at the time of solemnization of the second marriage, her first marriage was subsisting, the case is squarely covered under section 5 and merely because they lived together for a considerable period or that there was an admission on part of the woman of her subsisting marriage it does not indicate collusion on part of the parties. The court further said that there can be no estopple against a statutory provision and if there is a contravention of s. 5(i) , the necessary civil consequences must flow and no purpose would be solved if the parties are forced to go in through a protracted litigative process.

The verdict and the reasoning of the trial court was perplexing. Consequences flowing from statutory prohibitions cannot be evaded by pleading active knowledge or even connivance. Where an unmarried man in ignorance or even knowingly marries a married woman her application for grant of a decree of nullity cannot be denied to her on grounds of collusion, the status of the marriage being void under section 5 (1) of the Hindu Marriage Act, 1955.

Divorce on ground of deception

Educational qualifications, linked with the avocation are a material fact relating to a person more importantly a man as despite increase in gainful employment of women, in India a man is still seen as a wage earner and a primary provider to the household. The girl's parents are excessively focused about the educational qualification, avocation and the salary that a man gets before taking a conscious decision of the finalization of a matrimonial alliance. It is all the more evident in cases of arranged marriages. In a case from Rajasthan,[22] the marriage negotiation commenced with an advertisement put on behest of the husband that desired a match for an MBBS doctor, pursuant to which the wife's father approached the groom and his family and finally the marriage was solemnized. The husband was told as a qualified doctor working in a specific hospital in Sujangarh, while the fact was that he had studied only till intermediate, *i.e*., 12th class and not further. Even in the ration card the husband was described as Dr. Anil Kumar Sharma. Marital discord was attributed by wife to discovery of this fraud, and cruelty by the husband and she left his house. Pursuant to the wife leaving the matrimonial home, the husband proceeded to remarry without putting an end to this marriage

22 *Anil Kumar* v. *Mamta*, AIR 2014 Raj155.

that was effectively stopped by the wife. She later filed a petition praying for a decree of divorce on grounds of cruelty. The court accepted her contention and a divorce was granted.

Though the wife deserved a remedy, the ground on which she was granted a divorce was fraud in educational qualification and avocation, which is a ground for annulment of marriage. His attempts to remarry while the marriage was subsisting pending marital discord was nevertheless a grave enough matrimonial misconduct and covered under matrimonial cruelty.

Automatic dissolution of marriage

The fact that matrimonial matters are still regarded under the personal sphere of the parties, confusions and ignorance of the legal provisions often lead to unpredictable situations unwarranted and uncomprehended by the parties. Adherence to proper procedures and timely legal advice must be sought before the assumption by the parties that they can themselves resolve their matrimonial discord while sidelining erroneously or deliberately the established legal procedure. In a case from Bombay,[23] the court was called upon to adjudicate very peculiar and unusual factual situation. Here, the parties married in 2007 as per Hindu rites and ceremonies with its registration at the office of the registrar of marriage, Mumbai, under section 8 of the Hindu Marriage Act, 1955. Within a year owing to incompatibility, inequality, difference on thoughts, resulting matrimonial discord, and failed conciliation attempts by the family and friends, they decided to part their ways. As per the advice of the well wishers in total ignorance of the legal procedure, they executed a document titled 'Deed of Divorce' in 2011, that was duly notarized before the notary. She remarried a year later to H2 who was working and staying in the US and was refused US visa from the US embassy on the ground of non production of a decree of divorce from her earlier husband duly issued from the Indian courts. Realizing that a deed of divorce has not resulted in the formal and legal dissolution of her marriage and that the only way to obtain a decree of divorce based on mutual consent is through filing of a joint petition in a court of law and then filing of a second motion after a compulsory wait of six months she decided to approach the court. The earlier matrimonial discord notwithstanding the first husband did agree to cooperate with her upon knowing the difficulties that she was facing in obtaining the visa and agreed to file a mutual consent based petition for divorce. Accordingly a mutual consent based divorce petition was presented in the family court along with an application seeking waiver of six months waiting time period giving in detail the peculiarity of factual situations regarding their case. The family court rejected their applications, both for waiver and also for seeking divorce by mutual consent on the ground that their marriage has already come to an end by the 'Deed of Divorce' executed by both the parties as per the customs and usage prevailing in the caste and community and therefore a petition in a court of law seeking divorce on mutual consent ground is not maintainable. It is pertinent to note here that the parties had never pleaded a

23 *In Re Mittal Ramesh Panchal,* AIR 2014 Bom 80.

customary divorce but had stated execution of a 'deed of divorce' in ignorance of legal procedure. The court also observed that the agreement based deed of divorce and its resulting affect can only be set aside on grounds that the procurement of consent at the time of execution of the deed was tainted with fraud, undue influence, coercion and misrepresentation etc and not otherwise. As this judgment did not apparently served the required purpose, the parties came in appeal before the Bombay High Court. The present court differed with the verdict of the family court and rightly so and held that the lower court had deviated from the main issue

Marriage, the court observed under Hindu law is not a contract but is treated as sacrosanct right from ancient times. There is no provision in Hindu law providing for automatic dissolution of marriage nor is there an automatic right of divorce. What weighed most with the present court was the unusual facts and circumstances. In the present case accepting the contentions of the parties the court noted that they were under a genuine and a *bona fide* belief that their marriage had come to an end through the act of execution of deed of divorce and it was only when the American embassy denied her the visa on the ground of non production of a decree of divorce issued by a court of competent jurisdiction, that she realized her mistake and wanted to rectify it by adherence to the legal procedure. In such a case to deny them a chance to correct their mistake and holding that their marriage has already come to an end was surprising as legally the marriage was still subsisting and the petition praying for divorce was thus maintainable.

On the issue of waiver of statutory six months time, the court again held in favour of the parties and explored the intent behind keeping the mandatory wait period. The intention according to the court was to explore the possibility of last minute reconciliation. The court noted that though the Act nowhere provides for any situation for waiver of the six months time period, the same can be read in provisions as its main object is to liberalize divorce. The provision cannot be and should not be read in rigidity so as to make it ineffective and meaningless. The period of six months is provided with a view to enable the parties to reconsider their decision and instead of dissolving the marriage resolve their differences and it was never the intention of the legislature that such period is to be observed irrespective of the facts of the case wherein the marriage has been irretrievably broken and there are no chances of a reconciliation between the parties or it would be a futile exercise to wait for six months. The court held that there was neither a legal impediment in accepting their petition for a prayer of divorce by mutual consent nor was there a reason due to peculiarity of the circumstances and facts to insist on adherence strictly on the compliance of six months waiting period.

Justifying their stand the court said that it is not possible for the legislature to foresee all the future possibilities, the inherent powers have been conferred on the court of law to adjudicate and take appropriate decision in a situation not visualized by law and section 151 of CPC enables the court to make such orders as may be necessary to meet the ends of justice or to prevent abuse of process of law and therefore since no fruitful purpose would be served in forcing the parties to wait for a period of six months as both had remarried , there is no question of any feasibility of reconciliation or reunion, the matter was referred back to the family

court with appropriate directions to hear and dispose of the petition for divorce by mutual consent as expeditiously as possible.

Here the parties had not pleaded that their marriage was legally dissolved as per the customs and usages of their community. On the other hand they had specifically pleaded that since it was not legally dissolved, due to their own ignorance of the correct legal procedure hence they were requesting the court for grant of a decree of dissolution. The rejection of their prayer for dissolution thus by the family court was not proper. The deed of divorce settlement resulting in automatic dissolution of marriage according to the court was not permissible in law as marriage can be brought to an end only by having recourse to law and the procedure provided in the Act.

Divorce by mutual consent: Financial settlement

The unnecessary expenditure incurred on the traditional weddings has an extremely unfortunate side effect. While it is true that money is spend on weddings perceiving it to be a onetime affair, in many cases, failed marriages and compromises often include a return of this highly unproductive amount by one of the parties and that adds considerably to its financial aspect. Many a times parties who are not desirous of living with each other enter a formal compromise, ponder over it without the fundamental aspect remaining unchanged, *i.e.*, that they are not going to revive the marriage. They still linger on break the compromise terms adding to the misery of both, wasting precious time and energies of the court as also of themselves with futile gains. In a case from Allahabad,[24] the parties post marriage lived together briefly and decided to part but not before filing several civil and criminal cases against each other. Pursuant to the effort of the mediators, a compromise fixed the responsibility on the husband to pay a sum of Rs. nine lakhs to the wife, an agreement to dissolve the marriage through divorce by mutual consent and to withdraw all cases against each other. The most important component of the compromise was that the wife was to vacate the house upon the husband depositing the amount with the court. The suit was disposed off the same day on which the compromise was entered into. Despite initially agreeing to abide by the compromise terms, the wife neither withdrew the cases nor vacated the house but alleging that her signatures were obtained by fraud made a fresh demand of money. She was already paid one lakh in cash and the remaining amount was with the court, but instead of withdrawing it she demanded additional amount from the husband in lieu of vacating the house and kept on filing additional criminal cases against him and his parents. When the amount of Rs nine lakhs was paid to her, she asked the husband to arrange for an alternative accommodation for her at his expense and sought the help of the court that she should be granted a share in his property. The court rejected her claim of a share in her husband's property over and above the sum of nine lakh and an additional sum of two lakhs conditional upon her vacating the house. Her supplementary affidavit raising the issues of validity of compromise and a prayer for a direction to be given to the husband to provide a safe sheltered

24 *R U Rinki Renu* v. *Pradeep Kumar,* AIR 2014 All 30.

place where she may shift and an order to get her a share in the property of her husband to enable her to purchase her own house, was held highly unreasonable by the court. A sum of Rs 11 lakhs the court said was appropriate for her to make her future plans for accommodation and rejecting her claim for more money, divorce was granted to the husband.

In another case with comparable but not parallel facts, the Kerala High Court took a different stand. Here[25] the parties after the birth of a male child separated and lived away from each other for four years. After failed mediation attempts, a petition for restitution of conjugal rights was filed by husband and a counter claim of maintenance presented by the wife. In pursuance to a compromise and a financial settlement under which the wife agreed to forego her maintenance claim, the parties filed a joint petition praying for divorce through mutual consent, but on the second date the wife did not appear and later filed a formal application withdrawing her consent citing fraud and coercion by the husband in procuring her consent. Her husband, she claimed had agreed to return her money and ornaments only if she would sign the petition. The family court dismissed the mutual consent based divorce prayer on account of withdrawal of her consent and the husband went to the high court challenging that order and urging the court to examine the *bona fide* of her allegations of fraud. The main issues before the court were: whether the unilateral withdrawal of consent by one of the party is permissible in law; whether the court can enquire into the *bona fides* of such withdrawal; and if it is found that it is not bona fide, whether a decree can be passed even if the second motion is unilateral? The court said that the primary purpose of keeping the six month cap is for exploring the possibility of conciliation. The mere filing of the mutual consent petition does not authorize the court to pronounce the decree and sub section 13(2) requires the court to hear the parties. The reference is to 'both the parties' and therefore if one of the parties withdraws the consent the matter cannot be proceeded upon and the court would have no alternative but to dismiss the petition. The court thus reiterated that in an application for divorce by mutual consent, both at the time of the presentation of the first petition and the second motion after a minimum gap of six months the consent of both parties to marriage is mandatory. If one of the party does not wish to go ahead with the divorce, the consent can be withdrawn by him or her as the withdrawal can be unilateral and is unqualified and unconditional.

Customary divorce

The remedy of statutory divorce co-exists with the recognition of customary divorce under the Act. Section 29 provides

29. Savings.-

(1) .....

(2) Nothing contained in this Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain

25 *Rajesh R Nair* v. *Meera Babu,* AIR 2014 Ker 44.

the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.

Despite the fact that Hindus generally do not recognize divorce, as a matter of custom a woman could earlier be turned out of the matrimonial home by her husband on grounds of unchastity or apostasy. According to the custom prevalent in Hisar, amongst Bishnois, a wife may be divorced only for change of religion or bad character. Amongst Dogras, Muslims, Rajputs and Pachadas, she can be divorced for bad character and for other Hindu tribes divorce is unknown. However stringent requirements are necessary for proving a customary divorce as it has the potential of wide repercussion on the status of the parties and holding of individual properties specifically where the land held together by spouses is subject to the provisions of the Land Holdings Acts. Cases of unscrupulous people aiming at conserving property within the family and attempting to ensure that it does not exceed the limits many a times try to divide the consolidated land belonging to the spouses by a feigned divorce. In a case from Punjab and Haryana,[26] the question of validity of customary divorce arose as an incidental issue. The property that a family held here was subject to the application of the rules of Haryana Ceiling on Land Holdings Act, 1972. As per its provisions, the cumulative land that a family held if exceeded a particular limit could be taken by the government as excess land. While computing the land held by this family represented by a Hindu man, H, the land in the name of his wife was also included. H however came up with a plea that since he had already divorced his wife under a customary divorce, the land that stood in her name cannot be included as the land belonging to his family. In support of the plea of customary divorce he produced an agreement and tried to prove that a custom existed in his community by which extra judicial divorce could be obtained by them.[27] The ground on which he had allegedly divorced his wife was her inability to give birth to a child.

This agreement produced by the husband showed a statement signed by the wife wherein it was stated that she had no objection to her husband getting married again as she was unable to conceive and that there would be no relation between her and her husband. The effect of the document was that the appeared an understanding between the wife and husband that in the event he committed bigamy, she would not initiate action against him. It was done in 1969 when no provision of divorce by mutual consent existed in the Hindu Marriage Act, 1955. The court held that an alleged customary divorce cannot be affirmed without a decree of the court. On the facts and circumstances of the case it concluded that if at all a divorce operates it would do so from the date of decree by the court which was not procured in this case. The court raised concerns about the genuineness or *bona fide* of this

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26 *Sunder Devi* v. *State of Haryana*, AIR 2014 P&H 139.

27 Rattigen's book on Custom in Punjab is an important text that recorded several instances of customs existing in erstwhile unified State of Punjab that includes the present state of Himachal and Haryana. S. IV of the book refers to grounds of divorce in the district of Hisar.

divorce and said that even if it was a genuine divorce it was not sufficient to exclude the property held by the wife from the holdings of her husband at the time when the Act was passed. An additional reason for the courts to doubt the *bona fide* of the claim of customary divorce by the husband was the fact that an earlier declaration made by the husband about his property before the financial commissioner included the property held by his first wife and he never stated that he had already divorced his first wife. The court therefore held that the divorce was not proved.

IV HINDU MINORITY AND GUARDIANSHIP ACT, 1956

Change of middle and surname of the child to that of the mother

In a patriarchal society, the child irrespective of its sex ordinarily gets the surname of the father. This also remains one of the major issues in our society; *viz*., the continuation of the family name of the father that only a son is capable of perpetuating. In an interesting but realistic case from Gujarat,[28] pursuant to a divorce between the parents the child was with the mother and the father right from her birth had evinced no interest in her. The mother nurtured the child from the beginning. As per the normal customary practices the child's surname was that of the father. The child later filed an application in the court for a permission to change her middle and surname from that of her father to that of her mother. The court allowed the application of the replacement of middle name and surname of the father by that of the mother and held that in case of indifference of the father in matters of minor, mother being the natural guardian can be considered guardian and that an application filed for a change of her middle and the surname by the girl can be allowed.

The judgment though simplistic seemingly has wide ramifications. It may have the correctional effect on several social practices defining gender roles and enforcing the necessity of importance of the name of the father to be tagged to the child for its presumptive respectability. Earlier practices of bringing infamy both to the mother and the child in absence of the revelation of the father's name have witnessed a considerable dilution and a practicality. Presently the children accosted with denial from callous fathers assert a determination of paternity through judiciary and expose their hollowness. The mothers have also come out of the shadow of the social protection of their husbands and single, married and separated women hold on to their respectability. Taking of the name of the mother instead of the father should increasingly be the choice of the child and not a social compulsion and it should not be a matter of absolute propriety for a child to mandatorily carry the name of the father alone. The judgment is very progressive but two question may be raised here, one, what would have been the verdict of the court if the prayer for substitution of the name had come from the son instead of a daughter and two, what would have been the reaction of the court if the parents were living together and the father was indeed taking a normal and active role in the well being of the child?

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28 *Neha Bina Ramani* v. *State of Gujarat*, AIR 2014 (NOC) 87 (Guj).

Preferring maternal grandparents to father of the child

It is a settled rule that in matters relating to minor children there is no 'custodial rights of elders' but only the 'welfare of the child' concept. It is the right of the child to be in company of those who can best sub serve its interests, rather than the right of the relatives to have the custody of the child which is indicative of the strong presumption that looking after a child is primarily a matter of discharging of responsibilities and the joy that a child's company may provide to the respective parent is not a material factor for the courts. A child is not a mere material asset, possessing whom may be a game of one upmanship as between the warring parties at the cost of its emotional and material well being.

As between the mysterious death of the mother and the accusing finger pointing towards the father, a six months old child was handed over to the maternal grandparents by the father himself. Eight years later, with assertion of his rights as the natural guardian and therefore a legal claimant to its custody, he approached the court for its custody.[29] The main factor that weighed with the court in denying the custody to the father and maintaining continuation of the child with the maternal grandparents was the welfare of the child. With a deep sense of understanding of the child's psychology, the court observed that since the child was six months old, it had been with the maternal grandparents and was nurtured by them. Despite the age difference, the child would be used to a particular set of caretakers, the bonding with them, their physical presence, the security of togetherness, and the comfort level would have been set in. The father on the other hand would be a complete stranger to the child due to his sheer physical absence and to transplant a child of eight while since infancy he was with a particular set of people would cause extensive emotional trauma to him. Continuity of familiarity, the court said was more important to the child for its welfare more so when in the set of circumstances, it was the father only who in the first place had entrusted the responsibility of bringing up the child with maternal grandparents. The court further said that in contradiction to the welfare of the child, any sentiments of the paternal grandparents cannot be a lone guiding factor. Even though financial capacity of competing claimants is not a major factor in deciding the custody issue, here the maternal grandparents were financially in a better position to look after the child and the court said that in this competitive world financial position may matter which in the present case tilted the balance further in favour of the maternal grandparents. Thus noting that despite the fact that father is the natural guardian of the child, yet if the welfare of the child so demands as in the present case, the custody was allowed to continue with the maternal grandparents.

Conflict of laws

Rapid globalisation and the increase in the number of Indian couples settling abroad has also resulted in a number of instances where one of the parties to the marriage obtains favourable orders from the courts in US but then their attempted deviation at their own convenience results in avoidable aspects of conflict of laws.

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29 *Anjani Kumar* v. *Shambhu Prasad*, AIR 2014 Pat 218.

In *Arathi Bandi* v. *Bandi Jagadrakshaka Rao*,[30] the parties were married in US in 2003 and a male child was born to them two years later. At the time of marriage both were divorcees. Strained matrimonial relations led to a divorce at the initiative of the husband, the wife choosing to abstain from the litigation but she did file a counter in the court complaining domestic violence, wherein the husband was directed to move out of the home and the male child was to remain in the custody of the wife with visitation rights to the father. In an extensive court battle, the request of the wife to take the child to India was denied by every court including the supreme court of Washington, and the husband was ordered to pay child support with grant of limited visitation rights. In violation of the court orders the wife brought the child to India, but wrote an email to the father attaching a confirmed itinerary that she would be bringing the child to US by a specific date that she failed to honour. Thereupon, on an application filed by the husband he was made the permanent custodian of the child again by the court in US. He then travelled to India and filed a writ of habeas corpus in the Andhra Pradesh High court that directed the wife to produce the child that she had relocated in violation of the US court orders. The wife failed to produce the child despite the husband purchasing the tickets and moved the Supreme Court as against this order. Due to consistent non appearance of the wife and also her failure to produce the child, non bailable warrants were issued as against her along with a look out notice. She then appeared and contended that since she was gainfully employed in India the child must be allowed to remain with her as he was in India since 2008; was eight years old, had his roots in India and was totally averse to living with his father who suffered from alcohol and smoking problems and had job issues. The court that allowed a meeting of the father and the child for three hours found that the initial brainwashing against the father notwithstanding the child was in fact neither averse to meeting nor residing with the father. Post unsuccessful reconciliation attempts at the court's behest, an order was passed directing the wife to hand over the child to the husband who was allowed to take the child and the wife to the US; make arrangements at his expense for both of them to stay there for a period of three months. As the wife in defiance of the US court's order had removed the child and brought him to India she was not allowed to gain advantage from her wrong and the order to return the child to America, the court held was justified.

As far as the rule of private international law and the comity of courts in matters of custody of children from one country to another was concerned, the court held that judicial institutions in other country must ensure that those flouting judicial orders do not gain advantage of wrong doings as allowing the court in another country to assume jurisdiction would result in encouraging forum shopping. The present court after observing that this eight years old boy who had not been with the father since infancy was not averse to living with him, neither accepted the contention of the mother nor went further into the concept or plea of 'welfare of the child; continuity and familiarity of residence and that of the parent and even

30 AIR 2014 SC 918.

refused to entertain the contentions of Indian child and the desirability of Indian cultural upbringing. It effectively thwarted the attempts of the erring parent to reap the benefits of flouting the court orders with impunity by retaining custody and then trying to put forward the argument of continued habitat and familiarity with one parent to play the card of non disturbance of continuation of familiar surroundings.

V HINDU LAW

Exclusion of daughters from inheritance

Legislative concerns over son preference are overshadowed, by adoption of socially sanctioned contradictory stand in conferring benefits on sons alone and depriving daughters of a chance to inherit the property of the father under the name of custom, marriage and also compulsory shifting of their residences to that of their husband's. Marriage of a girl snaps her physical ties from the natal family and the legislative perception of her exclusion from her father's family is amply reflected in state's policies and legislative rules. They strip a married girl, the membership and all benefits that may come her way in her natal family and make the sons only as the rightful claimant of the father's property. Governmental benefits are accorded only to a man and though heritable in nature are inherited by his sons only. This year in a case under survey, the facts revealed the allotment of three items of immovable property in Jammu to a man A, who was a refugee, in lieu of the property that he left in Pakistan.[31] Upon A's death, his property devolved on his son B. B had a son S and a daughter D. Upon B's death the property was taken by S to the complete exclusion of D. She filed a suit claiming her share in the property under the Hindu Succession Act, 1956, as against her brother but the same was denied to her by the trial court in accordance with the provisions of the Displaced Persons Rules, 1954.[32]

The cabinet order read as under:

> If an allottee dies, his interest in the allotted land shall devolve on other members of this family in whose favour allotment of land has been originally made or regularized under these rules and on those who may have become members of the family by way of marriage, birth or adoption after such allotment excluding those who may have died earlier or may have left family on account of marriage or adoption.

The daughter filed a writ challenging the *vires* of this rule on the ground that exclusion of three categories of persons from inheritance is violative of sections 5 and 6 of the Hindu Succession Act, 1956. The three categories are:

i) those who have died;

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31 *Joginder Kour* v. *State of J &K*, AIR 2014 J&K 63.

32 Promulgated *vide* cabinet order No- 578-C of May 7, 1954.

ii) those have been given in adoption and

iii) those who have left family on account of marriage.

Two main arguments were put forward by the daughter; one that the cabinet order is a piece of delegated legislation and cannot run contrary to the supreme legislation, *i.e.*, the Hindu Succession Act, 1956, hence it would be void and secondly that exclusion of a married daughter from succeeding to the interest of allottee in the land allotted is arbitrary and therefore violative of article 14 of the Constitution as applicable in the State of Jammu and Kashmir. The state's contention on the other hand was that the cabinet order is intended to rehabilitate the displaced persons by allotting the state/evacuee land for agricultural purposes so as to provide subsistence to the displaced family. As land was allotted to her ancestors and they had accepted it on the terms and conditions it was not open to her to now challenge the *vires* of the order. They further said that the allottee becomes an occupancy tenant and only holds the land for use and occupation. The court dismissed the claim of the daughter and said that it has to proceed on the presumption of the constitutionality of the provisions and the onus would be on the petitioner to prove that it is void.

The spirit and the language of the rule are indeed discriminatory. The order excludes three categories of people who are; those who have died; those who have been given in adoption and those who have left family on account of marriage. The first category clearly speaks of members who are dead, the second category also has a judicial implication of death, *i.e.*, adoption of a child has the effect of severance of complete ties with the biological family as the child is presumed to be dead for the family of birth and is deemed to be reborn in the family of adoption. Thus the two categories exclude those who are in fact dead and those who are deemed to be dead. The legislative intent in keeping married daughters in the third category strongly hints her presumptive death for her natal family which is in fact undesirable and unwarranted. It is suggestive of reinforcement of the traditional and parochial perception of the daughter being a member of her father's family only till marriage and after that ceasing to be a part of it. This in fact is the root cause of gender subjugation leading to unfair and unequal status of girls and has a further and eventual impact on her existence. Skewed sex ratio and adoption of heinous practices of female foeticide, infanticide and son preference are all inter-connected and the fundamental reason for it is her total exclusion post marriage from the natal family. It is high time that the responsibility of providing a matrimonial home be shared by the spouses and the legislation should stop enforcing the patriarchal ideologies of this being exclusively a man's /son's responsibility only to provide sustenance to the family. This promotion of culture of dependency leading to stereotyping of roles labels the man as provider and a woman as in a subservient role.

The order and judicial upholding of the same therefore runs contrary to the cause of gender empowerment and has the effect of reinforcement of patriarchal stereotypes. It imposes a supportive status on a married girl with a statutory recognition of a man only in the role of a provider of the family. The family descent being traced through sons staying with the allottee and stepping into his shoes

irrespective of their place of residence and married daughters no longer even entitled to continue the father's legacy is the root cause of gender subjugation. The property in the present case was initially allotted to the grandfather of the claimant and upon his demise was taken by his sons, *i.e.*, claimant's father. To ensure the conservation of the property only for the benefit of the males in the family to the complete exclusion of the daughters has consistently been upheld as the chief reason for relegation of women as nugatory and meaningless for the natal family leading to her perceived inferior status as ownership of material assets do have a major impact on the power and decision making. Thus both the rules and judicial upholding of its constitutionality are extremely disappointing and unwarranted in the present times.

Determination of joint family property

The issue of the right of the females over property obtained in *lieu* of the one that was left behind in Pakistan at the time of partition of the country and the ones that were acquired with its aid was again adjudicated upon in another case though this time positively in favour of the daughters.

The family in this case comprised of five sisters and three brothers,[33] of which one brother had died as a bachelor in 1978. Their father F had died in 1960 and mother M in 1978. Here, prior to the partition of the nation one F and his family were settled in parts of Punjab now in Pakistan. This undivided Hindu Joint family was engaged in several businesses as contractors and running of petrol pumps. Post partition they came to India; settled in Delhi and furnished a claim for allocation of property with the Ministry of Rehabilitation in lieu of the ones that they had left behind in Pakistan. The allotment under the rehabilitation scheme included a petrol pump in Delhi, compensation amount that was used by F as Karta for conducting profitably several business activities, a house, several plots; houses purchased out of the income coming from these business activities and cash deposits in several bank accounts. F had three sons and three daughters. Upon the death of F, his eldest son S carried on the activities till his death in 1978 without getting married. The properties earlier stood in the name of either F or S and one even in the name of M. After the death of the parents, the three daughters filed a case for claiming one seventh each of the complete property as the class-I heirs of the deceased couple F and M. The property of S, they claimed as his class-II heirs in the capacity of his sisters. Their main contention was that till date no partition of the family property had ever taken place and as per the law of succession they were entitled to the share.

The two brothers against whom the petition was actually directed, as they had the possession of the entire property, contended that these sisters were married much before the coming into force of the Hindu Succession Act, 1956, and since they ceased to be members of the Hindu Undivided Family (HUF) due to their marriage, they were not entitled to any share in the coparcenary property of which they were not members. They further refuted the claim of sisters pleading a family settlement and that post death of the father the statutory fictional or notional partition

33 *Swaran Lata* v. *Kulbhushan Lal*, AIR 2014 Del 86.

had already settled their shares and daughters cannot reopen it. As the properties were divided or partitioned, the sisters had no right over the property.

The trial court accepted their contention and held that as the amendment of 2005, is not retrospective, the daughters cannot take its benefit. They further said that the death of F had taken place 35 years prior to the amendment in 2005, therefore daughters would have no right as they were not members of this coparcenary any longer. The matter then went to the Delhi High Court. The present court adjudicated on four main issues:

> i. whether the properties in question were coparcenary properties to begin with or the self acquired properties in the hands of F;
>
> ii. whether the properties in question are deemed to be partitioned as on the date of the death of F due to notional partition or on a later date;
>
> iii. whether the 2005 amendment to sec. 6 is operative in this case and consequently, what would be the share of the parties; and
>
> iv. whether any of the property was governed by the succession rules under the Delhi Land Reforms Act and thus was beyond the subject matter jurisdiction of the court.

On the first issue, the court held that since the properties were originally acquired in lieu of those left in Pakistan under the title in the application as 'Bakshi Ram and sons' and projecting Bakshi Ram as *Karta*, they were joint family properties. The present properties were allotted to him in lieu of the one that the family had left in Pakistan. The character of property added subsequently through the compensation and the usufruct of this property, would also be treated as the joint family property. Thus the entire suit property did bear the character of the joint family property.

On the second issue of whether a deemed partition took place or not at the time of the death of F, the court said that if the rest of the family members continue to maintain the joint status, even after the death of the father such joint status would continue. Thus they did not accept the contention that a notional partition at the time of the death of F has resulted in effecting a partition of the joint family property. There was also an express admittance by the two brothers in a partnership deed in 1968, representing the properties as the HUF properties.

The court further held that mere death of a family member does not lead to a division of the coparcenary interest, but rather a revision of it amongst the remaining coparceners.[34] This revision of interest according to the court was in 1960, with the death of F as a member of undivided *Mitakshara* coparcenary. Quoting and analysing section 6 as it stood before the amendment, the court said that survivorship applied only in cases where a coparcener died in absence of class-I female heirs or a male claiming through a female, but here as the deceased was survived by his wife and daughters, according to section 6 a deemed partition or notional partition

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34 *Id.* at 95.

to ascertain the share of F in the property would apply, but that in itself would neither translate into an actual partition between the family members nor would it affect the continuity of coparcenary amongst the remaining male members of the family. On the other hand in terms of section 8, the share of the deceased so calculated after affecting a partition is to be divided amongst his class-I heirs , but the remaining property would continue as the coparcenary property. Thus though there was a deemed partition at the time of the death of F this does not mean that the shares became fixed owing to that event or that the shares would become crystallized and become unalterable. Rather the coparcenary continued and the extent of the shares would be decided at the time of actual partition, either through a registered deed of partition or a decree of court.

On the third issue, *i.e.*, with respect to application of the amendment of 2005 for the benefit of daughters here, the court quoted and also analysed all the relevant portions of the amending Act and concluded that according to these provisions no past partition or testamentary disposition of property is to be affected or re-opened in order to include the newly created shares of the female members of the Hindu joint family in the coparcenary as the intention of the parliament was not to create a chaotic situation by reopening all previous family settlements but it was primarily to indicate that in future the female members would be entitled to a share in the same manner and to the same extent as the male counterpart and also that instead of survivorship it is the rules of succession that would apply. The Act also clarified the meaning of the term 'partition'. For the purposes of the amended Act, 'partition' implied a registered partition or the one effected by a decree of court prior to 20.12.04. If a registered partition, *i.e*., effected and executed through a registered instrument or through a decree of court is effected prior to this cut off date, then amended section 6, can be ignored by the court otherwise the Amending Act would apply to all other cases and also to unregistered partitions effected even prior to this date. In the present case therefore it became imperative, the court said, to examine the date of the partition and how it was effected. Here, the court said neither of the two occasions, namely the time of the death of the *Karta*, nor the date of the filing of the suit was important as in the first case the family did not get partitioned but only the share of the deceased was to go by intestate succession and in the later, the shares were neither fixed nor became final simply by filing a suit for partition. On the other hand the HUF and specifically the coparcenary continued even after filing a suit. The filing of the suit by itself does not mean that a partition has taken place, until a decree of court effects partition, or a registered deed of partition is signed *inter se* the parties.

Accordingly, the death or birth of family members during the pendency of a suit will affect the shares in partition. Similarly, any change in law during the pendency of the suit would affect the ultimate shares of the parties. A contrary conclusion would not only fly in the face of the definition of partition in section 6 (5) but would also mean for example, that no partition suit can be withdrawn after it is filed, a proposition which has been rejected on various occasions.[35] The court

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35 *Id.* at para 26.

also quoted and followed an earlier apex court judgement,[36] in which it was observed as under:[37]

> A preliminary decree determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of the joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e., after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree predetermining the rights and interests of the parties having regard to the changed situation.

The court on the issue of whether after the preliminary decree has been made, with the Amending Act coming into force, the daughters would be entitled to get the share as coparceners even though both at the time of the institution of the suit as also at the time of passing of the preliminary decree they were not coparceners, held that despite passing of the preliminary decree a subsequent change need to be accommodated as the same is a piece of beneficial legislation and said:[38]

> since the legislation is beneficial and placed on the statute book with the avowed object of benefitting women which is a vulnerable section of the society in all its strata, it is necessary to give a liberal effect to it.....we are of the view that unless a partition of the property is effected by metes and bounds the daughters cannot be deprived of the benefits under the Act.

The court also said that only a final partition and not a deemed partition crystallizes the interests of each and every member of the family and since the son's rights continued and were also subject to fluctuation, the rights of the daughters were also to be upheld. It finally concluded that the daughters cannot be denied their rights and remanded the matter back to the trial court for effecting the division of the property by metes and bounds.

VI HINDU SUCCESSION ACT, 1956

Non application of the Act to Hindu members of scheduled tribes

The multiplicity of succession laws in vogue in India and exceptions from the application has not only posed unique challenges but has ushered in lack of clarity and uncertainty about application of a relevant law. Succession matters get

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36 *Ganduri Koteshwaramma* v. *Chakiri Yanadi*, AIR 2012 SC 169.

37 *Id.* para 173.

38 *Id.* at 174.

inordinately delayed as doubts loom large over which succession law out of the various disparate laws would govern succession to the property of the intestate. It is irrespective of the religion and sometimes even the region of the intestate.

In matters of succession, Hindus generally are governed by the provisions of the Hindu Succession Act, 1956, but the statutory exception in favour of the members of the Scheduled Tribe, exempts them from the application of the Act. This is also in furtherance of the provisions contained in article 366 (25) of the Constitution of India. Even where the provisions appear to be patently discriminatory and totally contradictory to the provisions of the Hindu Succession Act, 1956 the members of scheduled tribe due to the constitutional protection of their identity and culture cannot be made subject to the application of the Hindu Succession Act, 1956. In a case from Chhattisgarh,[39] the issue was with respect to determination of heirs and distribution of property of an intestate who was a member of the Halba tribe of Bastar, a tribe, specified as a scheduled tribe in the Constitution of India. Here the deceased professed Hindu religion and was survived by eleven grandchildren, five through a deceased daughter and six through a deceased son of his, the daughter survived by four daughters, DD_1, DD_2, DD_3, DD_4 and a son, DS and the son survived by four daughters, SD_1, SD_2, SD_3, SD_4 and two sons, SS_1 and SS_2. After the death of these siblings, S and D, DD_1, the daughter of D filed a suit for declaration of title, partition and possession of her share in the property claiming that she is a member of the Halda tribe that has inheritance laws similar to Mitaksahara school of Hindu law whereunder she is entitled to a share. The sons on the other hand claimed that since they were members of a scheduled tribe, the principles of Hindu law including the statute were not applicable to them and as per their custom, daughters were not entitled to claim any share in the ancestral property of the father. The court in the first instance accepted the contention of non applicability of the Hindu Succession Act, 1956 and held that the tribe Halba[40] is a scheduled tribe within the meaning of the Constitution as notified by the President of India. The provisions of the Hindu Succession Act, 1956, does not *pro-tanto* apply to members of scheduled tribe,[41] because of non-obstante clause in section 2(2), as the customary law of the Scheduled Tribe has been preserved by the legislature.

The second issue was very interesting. If the Hindu Succession Act is not applicable which law of succession would govern succession to the property of the intestate? As the parties were following Hindu customs etc, can they be governed by the classical principles of Mitakshara law of inheritance? Alternatively should they be subject to the tribal customary laws that are patently discriminatory? The issue gained additional relevance due to established precedents that hinted resolving applicability disputes of classical law of Mitakshara *vis- a -vis* customary law of succession to the property of a Hindu

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39 *Butaki Bai* v. *Sukhbati*, AIR 2014 Chh 110.

40 Mentioned at entry 17 in relation to Chhattisgarh.

41 S. 2(2) of the Act of 1956.

deceased and its connection upon satisfaction of proving his complete and sufficient Hinduisation.

An earlier division bench decision of Patna High Court,[42] had held that in cases where complete Hinduisation of the intestate is proved , the parties are to be governed by the rules of the Hindu law and the burden of proving that any special custom obtained in their community either as a relic of their non Hindu period or otherwise is upon the party who sets it up. The judgement was based primarily on the argument that as the Hindu law of inheritance (amendment) Act, 1929, applies also to those persons who but for the passing of the Act would have been subject to the application of Hindu law of Mitakshara, therefore it is not necessary for the purposes of application of Hindu law that the non Hindu tribes must have been totally Hinduised.[43] The possibility of resolving the conflict between the application of customary law and classical Hindu law was in the event of demonstrating that the community was Hinduised or not. If yes, classical Hindu law *i.e.*, law of Mitakshara could be applied to them and if not than it would be the customary law of inheritance that would be applied. The essentials for Hinduisation of a tribe as deducted from the analysis of the cases by the court were as follows;

i. it is a mixed question of fact and law as to whether a family or a tribe of non Hindu origin has become sufficiently Hinduised to be subject to the principles of Hindu law;

ii. it is possible in law that aborigines of non Hindu origin can become sufficiently Hinduised so that in matters of inheritance and succession they are prima-facie governed by the Hindu law except so far as any custom at variance with such law is proved, that for the purpose of Hinduisation any formal ceremony of conversion is not necessary, that the test as to whether people of non-Hindu origin have become Hindus out and out consists not in their following the religious rules of the Srutis and Smritis or their completely giving themselves up to Brahminical rules and rituals but in their acknowledging themselves to be Hindus and in adopting Hindu social usages, the retention of few relics of their ante-Hinduism period notwithstanding.

iii. the burden of proof that the parties have hinduised is initially upon the plaintiff so that they can be governed by Hindu law, once that is proved, then it shifts to defendants to prove that the parties are still governed by their tribal customary laws.

iv. strong proof is required to show that the law of origin has been given up in favour of a new law.[44]

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42 *Chunku Manjhi* v. *Bhabani Majhan*, AIR 1946 Pat 218.

43 *Budhu Majhi* v. *Dukhtan Majhi*, AIR 1956 Pat 123; *Langa Majhi* v. *Jaba Manjhain*, AIR 1971 Pat 185; *Dhani* Majhi v. *Ranga Majhi*, 1999 AIHC 2156; *Labishwar Manjhi* v. *Pran Majhi* (2000) 8 SCC 587.

44 *Sonabai* v. *Lakhibai* (1902) ILR 29 Cal 433 (PC).

v. Halba is a caste of cultivators and farm servants whose home is the south of the Raipur District and the Kanker and Baster states, they are a mixed caste born of irregular alliance between the Uriya, Rajas and their retainers with the women of their household servants and between the different servants themselves, and linguistic evidence also points out that Halbas are an aboriginal tribe, who have adopted Hinduism and an Aryan language.[45]

Whether they have become Hindus out and out or have become sufficiently Hinduised so as to be governed in their matters of succession and inheritance by principles of Hindu law or still they are governed by their tribal customary law the court explored what are the purification ceremonies for a Hindu ; whether an aboriginal of non Hindu origins can become sufficiently Hinduised, or that conversion to Hinduism need not be preceded with any formal ceremonies and finally concluded taking into account the complete facts and circumstances of the case, that the mere fact that the tribe Halba has been observing some customs or Hindu festivals or were getting married in accordance with Hindu rituals, it would not mean that they have been completely Hinduised. Application of classical Hindu law to them would therefore be inappropriate and they would continue to be governed by their uncodified customary law of succession. As per this customary law, daughters were not entitled to a share in the ancestral property. The claim of the daughter was accordingly dismissed.

The constitutional validity of the Hindu Succession Act, 1956

Heirs to the property of a male intestate under the Hindu Succession Act, 1956 are classified in four categories. While in class I and class II category, heirs are described by specific terminologies depicting exact relationship with the intestate, class III and class IV are referred to as agnates and cognates without any specification. The term agnates and cognates covers a wide category of unspecified relatives of the intestate. The category of class I relatives, include primarily the spouse of the intestate and his descendants. Though the mother and widows of predeceased son and that of a son's son also find place here. The class-II category comprise of the brothers and sisters of the intestate and their descendants, maternal and paternal grandparents, uncles and aunts, besides widows of brother and that of the father.

The constitutional validity of the Hindu Succession Act, 1956, was challenged this year in a case[46] coming from Meghalaya. The challenge was to the *vires* of entry IV of class-II heirs mentioned in the schedule of the Hindu Succession Act, 1956 along with a prayer to include the children of deceased brothers and daughters in this category along with brother and sister.

Here, after the death of a Hindu male intestate, the survivors included a living brother and children of another brother who had predeceased the intestate. The sons of the predeceased brother of the intestate claimed that they were unreasonably

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45 *Krittibash Mahton* v. *Budhan Mahtani*, AIR 1925 Pat 733.

46 *Pranab Kumar Deb* v. *The Union of India*, AIR 2014 Meg 24.

and arbitrarily discriminated against the living brother of the deceased. The court explored the classical law and said that the differentiation between the brother on one hand and the sons of a deceased brother is based on the Shrutis, Smirits and custom of Hindu law.[47] As per the order of succession among Hindus governed by the Dayabhaga school of Hindu law prior to the codification in 1956, the surviving brother of whole blood, and the half blood were given preference to the deceased brother's sons simply because of their superiority conferring spiritual benefits to the deceased over the son of the deceased brother. It further said that the law of heirship has close connection with the doctrine, "he who inherits the property also offers the pinda, and that it is based on consanguinity"

The Hindu Succession Act, 1956 the court observed has not only amended but also codified the law relating to intestate succession among the Hindus as mentioned in the preamble leading to some fundamental and radical changes including the modification of the two systems of succession, Dayabhaga and Mitakshara to make them one. The classes of heirs recognised by Mitakshara namely Gotras, Sapindas, Samanodakas and Bandhus and three classes of heirs recognised by Dayabhaga, *i.e.*, Sapindas, Sakulias and Bandhus were replaced by four categories of heirs divided in four classes called class-I, class-II, agnates and cognates. The court said that it cannot be said that the classification is arbitrary or discriminatory and thus the provisions are in conformity with the Constitution of India and are not *ultra-vires* the provisions of the constitution. It thus upheld the constitutional validity of the Hindu Succession Act and dismissed the petition.

The present scheme of succession has totally abrogated the Dayabhaga principles of succession and has considerably modified the Mitakshara rules of inheritance in the process replacing the primary criteria's of heirship. It is neither based on spiritual salvation nor on sapinda concept but is based on the principles of nearness in relationship. The inclusion of daughters irrespective of her marital status has given it a new dimension and the principles of nearer in blood excluding the remoter is amply reflected from the class-II category onwards. In presence of a son, his progeny cannot inherit and similarly brothers and sisters are preferred to their descendants on the principle of nearer in blood excluding the remoter. It is a perfectly justified principle and accepted jurisprudentially.

Right of daughters as coparceners retroactive

Gender equations stood considerably modified with entry of females into the erstwhile exclusive male club titled coparcenary with the commencement of the amendment to the Hindu Succession Act post 2005 , introducing for the first time daughters of coparceners as coparceners. The Act was promulgated with effect from 09.09.05.[48]

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47 *Id.* at 25.

48 See The Hindu Succession Act, 1956, s. 6 post 2005 reads as under:

6. Devolution of interest of coparcenary property:-

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005 in a joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,

While the general accepted meaning of section 6 indicated inclusion of daughters as coparceners from the date of the promulgation of the amending Act, without any reference to either her marital status or the time of her birth, an earlier judicial pronouncement had created an undesirable controversy and confusion by bringing in an erroneous dictate linking her rights to her date of birth.

This pronouncement[49] by a single bench had held that as per section 6 it is only a daughter who was born on or after the date of promulgation of Act, who could become a coparcener as per the Act and a daughter of a coparcener born earlier to 9th September 2005, would neither be a coparcener nor entitled to a share in the coparcenary property. The effect of the Act according to this pronouncement was that only such a daughter of a coparcener would herself be a coparcener, who was born either on or after the day of commencement of the Amending Act, and if she was born earlier to this date than despite the fact that she might be alive on the day of promulgation of the Act, she would not be a coparcener. Daughters who were born earlier to this date would get the rights in coparcenary property only after the demise of their father on or after 9th September 2005 and not before that. An appeal filed as against this judgment in the apex court was dismissed but this question of law was kept open without the court making any final determination. This year, an identical issue surfaced before the division bench of Bombay High Court.[50] The court analysed the language of the amended section, the statement of objects and reasons of the amendment; the Law Commission 174th report on the status of women under Hindu law, and rightly concluded that the primary intention of the legislature was to ameliorate the status of women and to remove statutory discrimination in matters of inheritance. It then proceeded to examine the two main questions raised before it as under:

i) whether section 6 of the Hindu Succession Act, 1956, as amended by the amendment Act is prospective or retrospective in operation; and

ii) whether section 6 of the Hindu Succession Act, 1956 as amended by the amendment Act, 2005 applies only to daughters born after 09.09.05 and observed:[51]

> having regard to various considerations...as well as reasoning of the learned single judge, we are compelled to reach the conclusion that the

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a) by birth become a coparcener in her own right in the same manner as a son;

b) have the same rights in the coparcenary property as she would have had if she had been a son;

c) be subject to same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener.....

49 *Vaishali S Ganorkar* v. *Satish Keshavrao Ganorkar*, AIR 2012 Bom 101.

50 *Badrinarayan Shankar Bhandari* v. *Omprakash Shankar Bhandari*, AIR 2014 Bom 151.

51 *Id*. at 164.

> principle laid down in Vaishali's[52] case was erroneous and it must be corrected. The court also said that the statute should be given a plain meaning but if giving it so the result is not clear than as an appropriate tool of interpretation, an interpretation in furtherance of the objectives of the enactment should be adopted.

The term used in section 6 is 'on and from the commencement of this Act, a daughter of a coparcener shall by birth become a coparcener in the same manner as a son'. This term on or after the commencement of the Act does not refer to the time of the birth of the daughter, but is indicative of the time of her inclusion in the coparcenary irrespective of the time of her birth. Thus the legislative intent in enacting this clause (a) is prospective *i.e.*, daughter born on or after 09.09.05, will become a coparcener by birth but the legislative intent in enacting clause (b) and (c) is retroactive as the rights of coparcenary are conferred on the daughters who were born earlier than this date and who were alive on the date of the promulgation of the amendment. If she was dead on this date, than she would not be a coparcener herself retrospectively and her heirs would not be benefitted by this provision. The court held that two conditions were therefore necessary for the application of grant of coparcenary rights to daughters: first, that the daughter of a coparcener intended to be benefitted by this provision should be alive on the date of promulgation of the Act and second that the property should be available on the date of commencement of the amending Act, *i.e.*, it should not have been partitioned.

On the issue of a notional partition to be effected on the death of a coparcener in order to ascertain his share that has to go by intestate or testamentary succession in accordance with the provision of section 6 the court said that a legislative presumptive partition cannot be equated with a real partition and therefore even if a coparcener dies and his share was ascertained with the help of such fictional partition, the status of the rest of the family members and the character of the rest of the family property as joint family property would not be affected. Further all partitions beyond the date of 20.12.04 including registered or even through the decree of the court are not saved expressly as the possibility of collusive partitions through registration deeds and or through collusive court decrees might not be ruled out. At the same time, the partitions effected prior to 20.12.04 were saved. The court concluded that:

i) section 6 as amended by the Amending Act of 2005, is retroactive in nature making available to all daughters living on the date of coming into force of the 2005 amendment coparcenary rights, even though they were born prior to this date along with daughters born on or after this date. Heirs of a daughter who died earlier to this date, would not get any right in the property and

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52 *Vaishali S Ganorkar* v. *Satish Keshavrao Ganorkar*, AIR 2012 Bom 101.

ii) The Amending Act therefore, is not retrospective in nature as relating back to 17.06.56, so as to unsettle all partitions which were not affected by decrees of court or registered instruments even if executed prior to 20.12.04.

The final conclusion of the court was as follows:

i) amended section 6 is retroactive in operation

ii) s. 6 (1) (a), is prospective in operation

iii) s. 6 (1) (b), (c) and s. 6 (2) are retroactive in operation

iv) amended Act applies to daughters born both prior to as also after September 9, 2005 provided they were alive on this date as well and

v) that the decision of the court in *Vaishali S Ganorkar* case is *per incuriam* without taking in account and contradictory to the apex court's verdict in *Ganduri Koteshwaramma*.[53]

The interpretation clarifying the precise implication of the Amending Act and undoing the incorrect proposition of law is both timely and contemporary. In the present case the history of legislation with respect to women and the gradual changes were all gender friendly, and the amendment only carried it further. From a stage of either total exclusion or marginal inclusion of Hindu women in property ownership through inheritance or in ancestral property, a situation of ability of a daughter to be a coparcener ushered in through legislative instrumentality necessitates an appropriate interpretation of a daughter friendly approach. The earlier judgement had undone the progressive legislation and in fact negated the primary purpose of the amendment.

Share of daughter

Removal of obstacles in the path of realisation of inheritance rights through legislative measures post 2005 were marked with deletion of section 23 and introduction of daughters as coparceners in the Mitakshara coparcenary. In *Pratibha Rani Tripathy* v. *Binod Bihari Tripathy*,[54] involved a case where a daughter in law filed a suit for partition as against her father in law on behalf of her son. Her claim was that her husband died as an undivided member of the Mitakshara joint family, and that this ancestral property that was currently managed by the parents in laws was never partitioned. Since the property was in the nature of joint family property, the trial court ordered that each of the three members, the father, mother and the daughter in law representing the minor grandson would be entitled to one third of the total property. The court held so in accordance with the rule, that where a partition takes place between a father and a son, father's wife is also entitled to a share equal to that of the son. After securing property right to the extent of one third share, the daughter in law raised additional issues relating to usage and

53 AIR 2012 SC 169.

54 AIR 2014 Ori 74.

ownership of some movable properties in the nature of furniture, and preferred an appeal against the decision of the trial court in the high court. What is noteworthy is that though the decision was given post 2005, the two daughters of the couple were not assigned any share. Accordingly, during the pendency of the appeal, these two daughters preferred their respective claims. Post 2005 with the amendment introduced in the Hindu Succession Act 1956, they contended that their status as coparceners, entitled them to their respective share in the joint family property which was divided at the instance of the trial court but in which they were not given any share. The distribution of the joint family property according to the trial court was thus sought to be reopened in light of the 2005 amendment. With the addition of the two daughters the number of claimant or shareholders in the property would be five with the result that at the time of the partition of the coparcenary property the share of the father, his wife and the three children would be one fifth each instead of one third. The court referred to section 6 of the amending Act and held that since after 2005, a daughter of a coparcener has also become a coparcener, she is entitled to a share equal to the share of a son. As no partition of the ancestral property was affected between the father and the son with the coming of the amendment, and inclusion of the daughters as coparceners, they are also entitled to their respective share so much so that if a share is denied to them or if they are ignored at the time of affecting partition of the property post 2005, they can seek the help of the court by filing a petition for demarcating the share and its claim. Post 2005 if the share is not given to them they even have a right to re-open the partition. The claim of the daughters was thus upheld and the shares were recalculated. The usual approach while deciding the shares at the time of effecting a partition is to ascertain the exact number of family members entitled to a share. It is amazing how the trial court fell in error in ignoring the presence of the daughters as the rightful claimants.

Property of a Hindu female

Meaning of the term 'daughter of an intestate'

With the three fold classification of the property of a Hindu woman intestate, the reversion of the property to the heirs of the husband or that of the father is an imminent requirement in case the property in question was inherited by her from any of them. In a case from Orissa,[55] a woman from her first marriage had a daughter. Post death of the first husband she remarried, but her second husband died later leaving behind property that she possessed as a full owner thereof. The successors included her daughter, though born to her from her previous marriage, and the collaterals (male agnates) of her deceased husband. Upon her death her daughter took possession of the property that originally belonged to her step father and the same post his death was inherited by her mother. The descendants of the elder brother of the deceased step father claimed succession on the ground, first that since the deceased woman was being maintained by them, property that originally belonged to their collateral would revert back to them and second, that since the

55 *Sashidhar Barik* v. *Ratnamani Barik*, AIR 2014 Ori 202.

deceased had inherited this property from her husband and this daughter of hers was not the daughter of her second husband, the property would revert back to heirs of her husband and they being his agnates would be entitled to get it. The court in a reasoned judgment concluded that the term used in section 16 is 'in absence of the issue of such woman the property would revert back to heirs of the husband'. The issue have to be reckoned with respect to the female intestate whose property is in question and not with respect to her husband from whom she had earlier inherited the property in question. Thus it is not necessary that she must have left a child of the husband from whom or from whose father she had inherited the property, and if she has left a child of her own even from a previous marriage, the child would be eligible to inherit the property. A daughter born out of the womb of Hindu female inheriting property of her second husband comes within the expression 'daughters' appearing in section 15 (1) (a).

Right of husband in the property inherited by a woman from her mother

The source of acquisition of the property left by a Hindu woman continued to be subject to adjudication in another case this year from Karnataka.[56] Here, upon the death of a Hindu woman intestate, who was survived by her husband on one hand and her sister and brother on the other, an issue arose as to who would be entitled to the portion of immovable property that she owned. The property originally belonged to her mother. Upon the death of the mother W, her three children, two daughters D_1, D_2, and a son S inherited the residential property in equal shares, *i.e.*, one third each. D_1, one of the daughters later filed a suit for partition and ascertainment of her one third share in this property but during the pendency of the litigation she died issueless and her husband filed for substitution that was allowed. The trial court also granted him a claim of one third of the total property as the legal heir of his wife. The other party however objected to the same on the ground that as per the laws of inheritance available under the Hindu succession Act, and applicable to the parties here, upon the death of an issueless Hindu woman, the property goes back to the source from where she had inherited it. Here the property that was the subject matter of litigation was inherited by D_1 from her mother and upon her death would go back to heirs of her father and her husband would not be entitled to claim any portion of it. The Karnataka High Court accepted their claim; reversed the order of the trial court; dismissed the claim of the husband and consequently the brother and sister of the deceased woman became entitled to a half share each in the property. However, meanwhile the husband of the deceased suppressing the fact of an appeal and the reversal of the lower court order approached the authorities to transfer the property as per the trial court order, which was transferred in his name by the authorities without making any enquiry or even giving a notice to the other claimants of the property. A suit was filed by the sister of the deceased and the mutation was accordingly stayed but the same property was purchased by S on a nominal rate despite being fully aware of the factual situation. D_2 therefore filed a case in the Karnataka High

56 *V Ethiraj* v. *S Sridevi*, AIR 2014 Kar 58.

Court for partition and separate possession of her half share that was illegally claimed by the husband of her deceased sister in the first place and later bought by her brother at throwaway price.

The court quoted sections 15 and 16 of the Hindu Succession Act, 1956 and held that under the Act, the source from where the property was inherited by a Hindu female is extremely important otherwise those who are not even remotely related to her would acquire the rights in that property, and the whole purpose and intent of section 15 (2) would be defeated.

The court reiterated that upon the death of the deceased without any issue the property that she had inherited from one of her parents would revert to the heirs of her parents and the husband in the very first place was not entitled to any title over the suit property. A mutation and a sale at his instance while hiding the fact of subsistence of an appeal was illegal and was not to be sustained in eyes of law.

VII CONCLUSION

The attempts to gain mileage from an impermissible adoption were effectively thwarted by the judiciary this year, but in another it failed to comprehend the effects of a valid adoption under the Act that in clear terms indicates the result and laid down an incorrect proposition. It is unfortunate that a lack of understanding of the classical concepts and incidents of coparcenary under Hindu law are on a consistent basis displayed by the judiciary leading to an anomalous situation unwarranted in the judicial system. One incorrect precedent has the potential of extensive damage to the rights of the individuals as was demonstrated in this case. Judicial insistence on production of necessary proof of solemnization of marriage for enforcing conjugal right was visible and it came down effectively and heavily on parties to the marriage who attempted unjust enrichments by violating compromise terms and seeking additional unjustified benefits. A seemingly simple but powerful judgment having far reaching consequences on gender equations in the patriarchal families permitted a child to substitute the surname of the mother in place of the father. In the area of succession laws, while on one hand the judiciary upheld the patently discriminatory rules excluding daughters from inheritance in certain contingencies, leading to complete monopoly of the sons in assets acquisition, under the Hindu Succession Act 1956, her rights were re-recognized and re-enforced with correctional attitude of earlier bad precedents.