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FAMILY LAW AND SUCCESSION

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I INTRODUCTION

IMPORTANT JUDICIAL pronouncements relating to bigamy after conversion; section 125 of the Criminal Procedure Code, 1973; Cr PC and the Muslim Women's Protection of Rights on Divorce Act, 1986; Dowry Prohibition Act, 1961/ Indian Penal Code 1860; Family Courts Act, 1984; Guardians and Wards Act, 1890; Indian Divorce Act, 1869; the Special Marriage Act, 1954, and the Indian Succession Act, 1925 have been discussed here.

II BIGAMY AFTER CONVERSION TO ANOTHER RELIGION

The multiplicity of personal laws coupled with a freedom of conversion has reduced the whole scenario of family laws to a shopping forum. The applicability criterion of the religious based family laws is the religion of the parties and thus a provision of personal law in certain cases can be availed of by an Indian by simply converting to that religion if the same is allowed under the respective faith. In two areas conversion to another faith or the elective application by the parties of another family law have been amply demonstrated. One is conversion by married Hindu men to Muslim faith to avail and exploit the provisions of bigamy available under Islamic law and another is registering of marriages solemnised in accordance with classical Muslim law under the Special Marriage Act, 1954, to escape the rigours of the traditional law of intestate and testamentary succession. While the latter has not attracted much attention, the former has been a subject of deep concern and controversy due to a number of issues involved including conflict of diverse family laws. Unlike the Parsi Marriage and Divorce Act, 1935[1] and the Special Marriage Act, 1954,[2] which specifically provide that the second marriage of any party whose first marriage was solemnized under these Acts and is subsisting, would be void and will attract the penalty of bigamy, the Hindu Marriage Act, 1955 (HMA) is silent about the status of the second marriage of a man who converts, and thus ceases to be a Hindu and whose earlier marriage was solemnised under the Act. While prescribing punishment for bigamy it is silent on this aspect. It says:[3]

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1 See ss. 4 and 5, the Parsi Marriage and Divorce Act, 1935.

2 See s. 43, the Special Marriage Act, 1954.

3 See s. 17, the Hindu Marriage Act, 1955.

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> Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living ; and the provision of Sections 494 and 495 of the Indian Penal Code shall apply accordingly.

Thus, to be guilty of committing bigamy under the HMA, and to invite punishment under the Indian Penal Code, 1860 (IPC) the bigamous man has to be a Hindu. If he converts to Muslim faith section 17 of the HMA would no longer be applicable to him. The confusion persists as HMA is applicable only to Hindus and he being a non Hindu cannot be subject to the application of this Act.

Thus, it leaves open vital questions like status of the second marriage, legitimacy of the children born from this relationship, the rights and obligations of the parties and also whether the newly converted Muslim man would invite any punishment of bigamy under the Indian Penal Code? Where a Hindu married man gets converted to Muslim faith without any real change or belief, merely with a view to contract a second marriage, would the second marriage solemnised after conversion under the new religion be void? The judiciary has been confronted with this issue for quite sometime. In the case in question[4] a Hindu man and a Hindu woman converted to Muslim faith; had a certificate of conversion issued to this effect in 1992 and got married to each other according to Muslim rites. The man's earlier marriage solemnized under the HMA was subsisting. They did not practice the Muslim religion as enjoined by the Quran. Though at the time of conversion they were given Muslim names they neither adopted these names nor used them in their official records. From this second marriage a son was born to them. On three distinct occasions they were asked to specify their religion after their conversion to Islam, and it was expressly stated by them that they were Hindus. In the hospital records, the religion of both the husband and the second wife and the child was stated as Hindu. The names as shown in the electoral records after his alleged conversion of himself and his second wife were the original Hindu names and on the third occasion, when the man applied for a visa, he again wrote his religion as Hindu. The question before the court was whether the man was guilty of committing bigamy within the meaning of section 494 of IPC and would be liable to be punished? The court held that he would be guilty of committing bigamy. As Muslim men are allowed in law to be polygamous, what, if any, can be the distinguishing feature of this case? The court created a distinction between polygamous marriages ordinarily contracted under Muslim law and the one contracted by the convert Muslims in this manner and observed that the position under Mohammedan law would be different as in spite of the first marriage, a second marriage can be contracted by the husband subject to such religious restrictions as specified. This becomes the vital difference between the Mohammedan law and other personal laws. Prosecution under section 494 in respect of a second marriage under the Mohammedan law can be avoided only if the first marriage was also under the

4 *Lily Thomas* v. *Union of India,* AIR 2000 SC 1650.

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Mohammedan law and not if the first marriage was under any other personal law where there is a prohibition on contracting a second marriage in the lifetime of the spouse.[5]

On the question of exploitation of the facility of conversion to evade the application of penal law, the court observed:[6]

> Religion, faith or devotion are not easily interchangeable. If a person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution. Under Hindu law marriage is a sacrament. Both have to be preserved.

It was contended by the accused husband that the distinction made between the rights of a born Muslim and a convert Muslim like him in this manner and the application of section 494 of IPC in his case would be contrary to his fundamental right to life and personal liberty guaranteed under article 21 of the Constitution. Sethi J pointed out that what the Constitution guarantees is that no citizen should be deprived of his life and liberty except under a procedure established by law. Also the judgement has neither changed the procedure nor has it created any law for the prosecution of the persons sought to be proceeded with for the alleged commission of the offence under section 494 of the IPC. With respect to *Sarla Mudgal's* case[7] earlier decided by the court and reaffirmed firmly in this case, the court said that the grievance that the judgment of the court amounts to violation of the freedom of conscience and free profession, practice and propagation of religion was far fetched and apparently artificially carved out by such persons who are alleged to have violated the law by attempting to cloak themselves under the protective fundamental right guaranteed under article 25 of the Constitution. No person by that judgement was denied the freedom of conscience and propagation of religion. The court clarified that the freedom guaranteed under article 25 is such a freedom which does not encroach upon a similar freedom of other persons. Under the constitutional scheme every person has a fundamental right not merely to entertain the religious beliefs of his choice but also to exhibit his belief and ideas in a manner which does not infringe the religious right and personal freedom of others. The court pointed out that the concept of Muslim law is based upon the edifice of the *shariat* and even under Muslim law plurality of marriages is not unconditionally conferred upon the husband. It would, therefore, be doing injustice to Islamic law to urge that the convert is entitled to practice bigamy notwithstanding the

5 *Id.* at 1660.

6 *Ibid.*

7 *Sarla Mudgal* v. *Union of India,* AIR 1995 SC 1531.

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continuance of his marriage under the law to which he belonged before conversion. The court observed:[8]

> The violators of law who have contracted the second marriage cannot be permitted to urge that such marriage should not be made subject matter of prosecution under the general penal law prevalent in the country. The progressive outlook and the wider approach of Islamic law cannot be permitted to be squeezed and narrowed by unscrupulous litigants, apparently indulging in sensual lust sought to be quenched by illegal means, who apparently are found to be guilty of the commission of the offence under the law to which they belonged before their alleged conversion. It is nobody's case that any such convertee has been deprived of practising any other religious right for the attainment of spiritual goals. The Islam which is pious, progressive and respected religion with rational outlook cannot be given a narrow concept as has been tried to be done by the alleged violators of the law.

The judgement leaves certain important questions unanswered. It would have been desirable if the court had settled the law on this point as well. The judges did talk about the status of the first marriage when they observed that mere conversion to Islam would not affect the first marriage yet, at the same time, it would give rise to a right to the non converting party to file a petition for divorce against the one who has converted, they did not elaborate on the status of the second marriage. Rather they said: "We are not concerned with the status of the second wife or the children born out of the wedlock as in the instant case we are concerned with the effect of the second marriage qua the first subsisting marriage in spite of the husband having converted to Islam."[9]

Can the second wife also be called a "wife " and be eligible for maintenance or inheritance to his property? Are their children born of this relationship legitimate and entitled to inherit the property of the parents?

The court noted with approval the cases[10] earlier decided by the Supreme Court, namely, *Bhaurao Shanker* v. *State of Maharashtra*,[11] and *Kanwal Ram* v. *H. P. Administration*[12] wherein it was held by the court that a Hindu man marrying during the lifetime of his spouse would be guilty of committing bigamy under section 494 of the IPC.

However, it is submitted that quoting *Bhaurao Shanker* and that too with approval was incorrect as the ratio of *Bhaurao's* case goes against the judgment of the present case. Not only the ratio of the case was different but the facts of the case were also entirely different. In *Bhaurao's* case, a Hindu man while

8 *Supra* note 4 at 1667.
9 *Id.* at 1660.
10 *Id.* at 1658.
11 AIR 1965 SC 1564.
12 AIR 1966 SC 614.

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remaining a Hindu had undergone a defective or an incomplete marriage ceremony with another Hindu woman while the first marriage was subsisting. It was not a case where a married man had converted to another faith and then got married to another woman who like him had converted with the sole objective of getting married. The court had held in that case that this man was not guilty of committing bigamy as for attracting the application of section 17, two conditions must be satisfied. One, that the second marriage has been solemnized after the commencement of this Act and that the second marriage has been "solemnized". The term solemnised according to the Supreme Court did not mean solemnization which was either defective or incomplete or in accordance with the rites of another religion but a valid and complete solemnization in accordance with the Hindu bride's or the bridegroom's community. If the man deliberately undergoes a defective or incomplete ceremony of marriage then despite his living with the second woman he would not be guilty of committing bigamy as for the prosecution of bigamy both the marriages, the first and the second, should be validly solemnised under the HMA itself. If a man and a woman marry in accordance with Muslim rites of offer and acceptance they would not be called husband and wife under the Hindu Marriage Act and would not get the status of husband and wife under the Act.

The judgement sets at rest the exploitation of the multiplicity of religious based personal laws by unscrupulous persons who try to give legitimacy to the illicit unions. The popular belief that a Hindu man can escape the punishment for bigamy if he remarries after conversion to Muslim faith as he ceases to be a Hindu, has also been very effectively dispelled by the court. The message that the judgment is going to send to the society is bound to be very effective and very timely.

III CRIMINAL PROCEDURE CODE, 1973, SECTION 125

Duty of parents to maintain their child and compensation for birth and upbringing of an unwanted child

The primary duty of maintaining the child is that of the parents. Are they entitled to shift this responsibility on the authority due to whose negligence they brought yet another child into this world without wanting to? Can they claim either compensation or full maintenance expenses for this unwanted child till it attains majority? A mother[13] of seven children and a labourer by profession, took advantage of the government sponsored family planning program. She underwent sterilization operation and was issued a certificate stating that the operation was successful. However, she conceived subsequently and a girl child was born to her. She filed a claim for compensation for the failed sterilization operation due to which she had to parent yet another child. It was held by the Supreme Court that she was entitled to full compensation to bring up the child till the age of puberty. The statutory as well as personal liability of the parents to maintain their child, the court said, arises on account of the fact that since they have

13 *State of Haryana* v. *Santra,* AIR 2000 SC 1888.

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begotten a child they are bound to maintain that child. But a claim for damages is based on the principles that if a person has committed a wrong he must pay compensation by way of damages to the person wronged. The provisions for maintenance would include provision for food, clothing, residence, education and medical attendance or treatment.

Strict proof of marriage

The statutory economic responsibility of the husband to maintain his legally wedded wife is undisputed. However, the existence of a valid marriage between them is a condition precedent for her eligibility to claim maintenance. HMA specifies clearly that a marriage in order to be called a validly solemnised marriage and to give rise to rights and obligations between the parties, must be solemnised in accordance with the customary rites and ceremonies of either the bride or the bridegroom's community. It is not open to the parties to get married in accordance with any ceremony which is not recognised by the Act or their community. Such a marriage performed even though with well meaning intentions in ignorance of law and legal procedure or otherwise would not make the parties husband and wife and no rights and obligations would arise in law as between them. However, of late the husbands to evade their economic responsibilities have often used this very provision. Where a man enters in an intimate physical relationship with a woman under the promise of marriage as a result of which she conceives and then they undergo through some form of marriage which is not complete and perfect under the Act, is the woman competent to claim maintenance from him following his desertion of her? The Supreme Court was confronted with this question in *Dwarika Prasad Satpathy* v. *Bidut Prava Dixit*.[14] Here the husband had premarital sexual relations with the wife as a result of which she conceived and insisted on marriage. Upon the hesitation of the husband the relations intervened and the marriage was performed in presence of witnesses in front of Lord Jagannath, in the temple when the wife was already in an advanced stage of pregnancy. After the marriage that was not a properly solemnised marriage according to their customary rites and ceremonies, the wife was left at the house of her parents and since then the parties lived separately. She filed a claim for maintenance for herself and her child who was born after 3-4 days of her marriage with the husband and the husband denied the existence of a valid marriage between them though he did not dispute the paternity of the child. The question was whether the marriage between the man and the woman valid ? On the question of the standard of proof required in proceedings for claim of maintenance by the alleged wife, it was held by the Supreme Court that if it can be established there was some sort of ceremony even though not a perfect one and that the parties had a sexual relationship, it would be sufficient to uphold the claim of the wife for maintenance. The court held that in their view validity of the marriage for the purposes of summary proceedings under section 125 Cr PC is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceedings

14 2000 Cri LJ 1 (SC).

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is not as strict as is required in a trial of offence under section 494 of the IPC. If the claimant in proceedings under section 125 of the Code succeeds in showing that she and the respondent have lived together as husband and wife the court can presume that they are legally wedded spouses and in such a situation the party who denies the marital status can rebut the presumption. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe into whether the said procedure was complete as per the Hindu rites in the proceedings under section 125. Husband had claimed that he underwent the imperfect marriage ceremony on point of knife. The court observed:[14a]

> After not disputing the paternity of the child and after accepting the fact that marriage ceremony was performed, though not legally perfect as contended, it would hardly lie in the mouth of the appellant to contend in proceedings under Sec 125 Cr PC that there was no valid marriage as essential rites were not performed at the time of the said marriage. The provision under Section 125 is not to be utilized for defeating the rights conferred by the legislature to the destitute women, children or parents who are victims of social environment.

The application which was filed in March 1989 took 11 years to be decided. The amount of maintenance awarded by the court was Rs. 400/- to the wife and Rs. 200/- to the daughter till she attains majority.

Veena Devi v. *Ashok Kumar Mandal*[15] is yet another case which shows why registration of marriages solemnised under the traditional laws is very important. The most popular defence taken in a majority of cases in the event of a dispute is the denial of solemnization of the first marriage. Here again, a man got married to a woman and according to her case deserted her after torture as she was unable to bear a child. He remarried and refused to maintain the first wife and when she being unable to maintain herself approached the court denied his marriage to her. The lower court believed him and refused maintenance on the ground that at the time of filing of the petition for maintenance she was earning Rs 300/- per month, despite the fact that the husband was a government servant and was earning Rs 5000/- per month. Secondly, he was not under any obligation to maintain her, as she was not his wife. On appeal, the Patna High Court held that the proceedings of maintenance are of a summary nature and the court is not to act as a matrimonial court trying to find out the factum of establishing a marriage between the parties. The court thus did not insist on strict proof of marriage and allowed her claim for maintenance.

Maintenance under a live in relationship

Where the parties never underwent any ceremony of marriage but were living together and were having an intimate sexual relationship would that be sufficient to qualify the woman to claim maintenance from her paramour when

14a *Id.* at 4.

15 2000 Cri LJ 2332 (Pat).

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the man threw her out of the house? In *Malti* v. *State of Uttar Pradesh*,[16] the woman was working as a cook in the house of a married man and shared an intimate sexual relationship with him. She was later turned out of the house by his wife and he denied any economic support to her. She filed a petition for maintenance against the paramour on the ground that since they were sharing an intimate physical relationship and were living together under the same roof for quite some time he was under a duty to maintain her. The admission to relationship was made by the accused man but he stated that he was not married to her. The trial court granted her maintenance on the ground that they were living together under one roof and that according to him was sufficient to make the woman eligible for claiming maintenance against the partner. The judge failed to note that the term used under section 125 is "wife" and not an unwed partner. There was also absolutely no evidence of performance of any sort of ceremony real or defective between them. The man filed an appeal and the High Court which reversed the judgement of the lower court and held that grant of maintenance solely on the ground of parties living under one roof on account of their illicit relationship is not proper.

The court said that if a man and a woman choose to live together and indulge in sex no such marital status is conferred upon them automatically by their so living. The two may also agree to live together to satisfy their animal needs. But such a union is never called a marriage nor a woman leading such life is bestowed with the sacrosanct honour of a wife. No marital obligations accrue to such a woman against her partner. The trial court had returned the finding only on account of their having lived together under one roof . The court said:[17]

> This in law is not enough to declare any woman a legally wedded wife. Wife means a legally wedded wife. According to section 125 of the Cr PC there ought to be a marriage according to the custom or religion prevalent among the community. A marriage carries a legal, social or religious sanction behind it.

Thus, the order of the magistrate according to the court was not based on the principles of law and was, therefore, bad.

Maintenance to second wife and child

The courts have repeatedly been emphasising the fact that in law it is only a legally wedded wife who is entitled to claim maintenance from her husband. Rules have been liberalised to accommodate women whose marriages were imperfectly solemnised. Section 125 of the Code includes the rights of maintenance of not only the wife of an existing marriage but also a divorced wife who is not remarried. However, can the term wife include the "second wife", where the first wife of the husband is alive and not divorced, therefore

16 2000 Cri LJ 4170 (All).
17 *Id.* at. 4172.

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the earlier marriage is subsisting and this second wife is a party to a void marriage? Would the defence put forward by the wife that she was treated cruelly by the bigamous husband and that she was ignorant of his first marriage be material or not? In *Mallika* v. *P. Kundanlal*,[18] the accused having a wife and a child got married a second time without disclosing the fact to the second wife that the first marriage was subsisting. On the other hand, she was made to believe that the first wife was dead. The first wife, it was later told to the court, was mentally retarded and therefore was sent back to her parent's house. The man had also fathered a child from the first marriage. He lived together with his second wife for around five years and a child was born to them, after which as per the allegations of the second wife she was forced to leave the house due to demand of dowry. She filed a claim for maintenance and the husband took the defence that she was never married to him and was his domestic servant. The wife was able to prove her relationship with the help of the letter written by the husband to her father addressing him as his father-in-law. The court held that there was a misrepresentation on part of the husband in concealing the factum of first marriage. Thus, the second marriage would be called a subsisting one and at the most it would be called a voidable marriage as fraud was involved and that it can be avoided by the second wife. The husband, it was held, was duty bound to provide maintenance to her. The case which took nine years to be decided granted her a maintenance of Rs. 250/- and Rs. 50/- per month for the child.

The judgement raises certain disturbing issues. The Cr PC grants a remedy of maintenance to a wife and also to an ex wife, who does not remarry. However, where a woman gets married to a man who is already married with the first wife living, can her claim under Cr PC be sustained? Would the fact that the first wife is alleged to be mentally retarded (no proof of that was adduced in the court with respect to that) and the fact of the first marriage was not disclosed to the second wife liberalize the rules of criminal law and make the husband liable to pay maintenance to the second wife? Would this second marriage be voidable in absence of any ground under section 12 of the HMA? Irrespective of the mental condition of the first spouse where the first marriage is subsisting the second marriage would be not only void but the woman would not be the legally wedded wife. Section 5 coupled with section 11 of the HMA clearly says[19] that a marriage solemnized in contravention of section 5(i) would be void *ab initio* and the facts of the present case cover it squarely. It does not say whether and in what manner the consent of the man or the woman was obtained. Where the consent of the spouse was obtained by fraud it would be a voidable marriage but only in those cases where this is the only marriage that they have. The innocent party without the help of the court cannot avoid such marriage. The court annuls it, after the parties lead evidence before the court to its satisfaction that there has been fraud with respect to a material fact relating to the respondent. Then there are also detailed rules that such a petition should

18 2000 Cri LJ 142 (Mad).

19 See ss. 5 and 11, Hindu Marriage Act, 1955.

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have been filed within one year of the discovery of the fraud and that since the discovery of the fraud the parties should not have voluntarily lived together as husband and wife. The non-compliance of any of these conditions would have an effect of forfeiting the right of the innocent party even where fraud is established, to apply and get a decree of annulment. In case of a second marriage where due to operation of law it becomes a void marriage there is no need for the parties to avoid it or have it annulled with the help of the court. This is not a relationship recognized by law and, therefore, they are free to walk out on each other on their own without involving the court and remarry. The element of fraud is not relevant in cases of void marriages with respect to a discussion on its validity. But fraud would have a bearing on those cases where the man is sought to be punished for committing bigamy and the woman is punished as an abettor. That she did not know the marital status of the husband would be material factor at that time and not at the time of deciding the validity of the marriage. Where the law is absolutely clear the judiciary should not introduce uncertainty and create unnecessary confusion. By no stretch of imagination can the marriage be called a voidable one. Section 12 of the HMA does not include bigamous marriages within its fold.[20] The law clearly says that it is a void marriage and the wife of a void marriage is not entitled to maintenance under the provisions of Cr PC. At the most she might get damages or compensation but proceeding under section 125 and an order granting maintenance to her under this section was not proper.

Refusal of the wife to live with the husband

The husband's duty of maintaining his wife also puts an obligation on the wife to live with him. Where the wife withdraws herself from the society of the husband with a reasonable excuse her rights of maintenance would be protected. However, where the refusal is unjustified the claim of the wife would be negativated by the courts. In *Sulochana Devi* v. *State of Bihar,*[21] the wife left the house of the husband on account of his second marriage and cruelty and torture committed on her. The criminal case instituted by the wife earlier established torture and neglect on part of the husband. Wife claimed that she was unable to maintain herself. The husband was having a shop and landed property and also independent income Even in absence of proof of bigamy that she also alleged, the husband was directed to pay Rs. 400/- per month to the wife. In another case[22] the wife left the husband and he filed a petition praying for a decree of restitution of conjugal right against her. The wife filed a petition for interim maintenance which was granted to her by the family court. The decree of restitution of conjugal rights was passed as against her and in favour of the husband. Without complying with the decree she applied for maintenance. Refusal by the wife to comply with the directions regarding restitution according to the court would amount to refusal to live with husband without

20 See *Id.*, s. 12.

21 2000 Cri LJ 4360 (Pat).

22 *Balaram Dash* v. *Gitanjali Dash*, Cri LJ 2000 4175 (Ori).

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sufficient reasons and such a wife, they held is not entitled to the grant of interim maintenance.

Maintenance granted under section 24 HMA, not a bar for granting maintenance under section 125

In *Vallabhaneni Yedukondalu* v. *Vallabhaneni Nageswaramma*[23] the husband had filed a petition for seeking divorce against his wife on grounds of desertion and cruelty. The respondent wife claimed interim maintenance for herself and her three children which was granted by the court. Her petition under Cr PC was also pending in the criminal court which was awarded in her favour two days after the interim maintenance petition was decided. The husband denied the paternity of the third child claiming that the child was conceived when he had no access to the wife which was rejected by the court on the ground that the basic presumption that if a child is born during the subsistence of a valid marriage, the husband of the mother is presumed to be the father of the child unless he can show that he had no access to the wife applies in this case. This the husband had failed to prove. The wife had claimed that when she left the matrimonial home she was already pregnant. On the question whether the grant of interim maintenance under the HMA would be a bar to the grant of maintenance under the Cr PC the court held:[23a]

> The order of maintenance granted pendente lite under section 24 of the Hindu Marriage Act by its very nature lasts during the pendency of the main proceedings before the court. Such a grant of interim maintenance cannot be a ground for rejecting a petition filed under section 125 of the Cr PC for maintenance. However, if passing of an order granting maintenance under section 24 of the Hindu Marriage Act calls for any alteration of the quantum of maintenance allowed under section 125 of Cr PC or justifies its cancellation during the period of pendency of the main proceedings before the family court it is for the petitioner to approach the court under section 127 of the Cr PC for alteration in the maintenance ordered under section 125 Cr PC.

IV CRIMINAL PROCEDURE CODE AND THE MUSLIM WOMEN'S (PROTECTION OF RIGHTS ON DIVORCE) ACT

Last year's liberal interpretation took a back seat and the courts strictly interpreted the provisions of the MWA. Muslim women were denied maintenance after being divorced by their husbands under Cr PC on the ground that the provisions of Cr PC would be applicable only where the option of its application was exercised by both the parties. The earlier rulings that the provisions of Cr PC are in addition to MWA and that a Muslim woman alone has the option of proceeding either under the MWA or the Cr PC were negativated by the courts.

23 2000 Cri LJ 333 (AP).
23a *Ibid.*

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In *Patnam Vahedullah Khan* v. *Ashia Khatoon*[24] a Muslim woman whose husband pronounced *talaq* approached the family court for maintenance under the Cr PC. The court granted her maintenance. The husband raised the plea that as he had never exercised the option to be governed by the secular enactment, the same were not available to the ex-wife. The Andhra Pradesh High Court accepted his contention and held that the family court which exercised its jurisdiction in the first place and granted maintenance to the wife was not competent to do so. It observed that the family court is competent to do so in all cases except in case of divorced Muslim women as since the coming into force of MWA, the Cr PC cannot be availed of by the Muslim women unless she and her husband exercise the option and choose to be governed by it."

In *Mir Abdul Raheman* v. *Nurjahan*[25] the case was filed by the wife for maintenance under section 125 Cr PC in 1979. In 1983 the magistrate granted in her favour maintenance of Rs 200/- per month. The husband filed a revision and the sessions judge reduced it to Rs. 80/- per month. As even this amount was not paid by the husband the wife filed for its execution. The husband denied his obligations to pay even this small sum of money claiming that as he had divorced her in customary manner in 1988, in view of the MWA the maintenance order passed in favour of wife should be cancelled. Wife was not paid even her *mahr* amount. The Orissa High Court held that the order was not to be cancelled as (1) it was passed prior to the passing of MWA and MWA was not retrospective in application; (2) husband did not plead that he has made all the customary payments at or after the *talaq* during the period of *iddat*; and (3) the position of law is clear that the petitioner(husband) is not protected by the provisions in the Act of 1986 to defeat the order of maintenance granted in favour of the opposite party (wife).

The case shows the plight of economically dependent Indian Muslim women. Despite the existence of beneficiary provisions on paper the case tells its own story. For payment of a princely sum of Rs. 80/- per month, the woman had to wait for a period of 20 years. The judge himself notes that she was not granted even the customary sum of *mahr*. The ways and means to avoid economic responsibility by men are too many and too convenient. Maintenance proceedings are taken into cognizance by courts only where the claimant is not in a position to maintain herself. In such a scenario, the provisions should be given maximum effect speedily and realistically. The amount granted and the time taken here shows the complete impracticality and an utter indifference to the reality by the judiciary.

V INDIAN DIVORCE ACT, 1869

Divorce by mutual consent and desertion as a ground for divorce under IDA

The co-existence of plurality of diverse family laws operative in India and dealing with same issues is a fact that often becomes an influencing factor while

24 2000 Cri LJ 2124 (AP).
25 2000 Cri LJ 1949 (Ori).

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pronouncing a judgement. Can the fact of modernization of matrimonial legislations of some of the communities have a bearing on the interpretation of analogous statutory provision of a different community? In the absence of a remedy under one specific statute, is the judiciary empowered to grant a remedy inspired by the other parallel enactments but not envisaged by the enactment that applies to the parties? Even a firm conviction on part of the judiciary that a remedy ought to be given in the given set of situation to the parties cannot permit them to go out of the Act within which the case has to be decided. In two cases the lower courts attempted this. Divorce by mutual consent and desertion of a spouse without reasonable excuse as a ground for divorce are available to a majority of Indians but not to the Christians governed by the IDA. Even if the parties decide that they are unable to live together they have no remedy to start a life afresh as the IDA does not permit them to obtain a decree of divorce by mutual consent. In *Rajesh Premchand Suryawanshi* v. *Ujwala Suryawanshi*,[26] the husband had filed a petition praying for a decree of divorce on grounds of wife's desertion. The wife appeared before the court through her attorney and filed a petition for interim maintenance but did not press for the same. She did not participate in the divorce proceedings and on the basis of unchallenged version of the husband the additional judge came to the conclusion that the wife had deserted the husband without any reasonable excuse and dissolved the marriage. The decree of divorce under the Act is not effective till it is confirmed by the high court. Even though the wife did not appear in the high court despite being served a notice to contest the petition for confirmation of the decree the court noted that a decree of divorce on grounds of desertion of the wife is unknown to IDA. The court said that though the judge of the lower court was aware of the fact that the IDA does not permit divorce on grounds of wife's desertion it deviated from the track and moved to a wrong destination. "He has committed a blatant error of law by reading grounds of desertion in Sec. 10 of the Divorce Act."[27]

Similarly, in *Elizabeth* v. *Abraham*,[28] the parties after obtaining a decree of dissolution of marriage on the basis of a compromise from the lower court applied for its confirmation. The high court rejected the same on the ground that such divorce is not permissible under the Act, though it is permissible under the other parallel enactments dealing with other religious communities.

Pregnancy of wife at the time of marriage

The Act recognizes nullity of marriage and certain specific grounds have been enumerated under section 19 to that effect. The section also provides that the high court has the jurisdiction to make a decree of nullity on the ground that the consent of the petitioner to the marriage was obtained by force or fraud. Neither premarital pregnancy nor pregnancy at the time of the marriage have been enumerated as grounds for obtaining a decree of nullity. However, it cannot

26 AIR 2000 Bom 369.
27 *Id.* at p. 372.
28 AIR 2000 Bom 276.

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be doubted that pregnancy of the wife at the time of marriage by a person other than the husband and without his knowledge, would amount to fraud. Thus, in *M.J. Jommon* v. *Mercy John*,[29] where owing to such pregnancy the wife gave birth to a full time baby after 168 days of their marriage, it was held to be a case of fraud and the husband was granted a decree of nullity.

VI DOWRY PROHIBITION ACT, AND THE INDIAN PENAL CODE, 1860

Dowry and dowry seekers continue to prey on the young newly wedded wives. The perpetrators are often acquitted by the courts for either lack of proof or due to the fact that the judges cannot and would not accept the passing of money and presents from the bride's family to the bridegroom's family as serious and would treat it as acceptable and normal part of the customary practices prevalent in their community.

In *Sarwan Kumar* v. *State of Himachal Pradesh*,[30] the wife died within three years of her marriage to the husband. Her death was due to hanging. The husband absconded soon after her death and could be arrested only after one year. The mother of the deceased had deposed that her daughter had confided in her about the beatings administered to her by the husband. As the death was within seven years of her marriage and an unnatural one, and it was also in evidence that she was tortured before her death, the trial court insisted that the husband should prove his innocence. The main defence of the husband was that she had committed suicide due to her unhappiness with his financial position as her own parents were comparatively well off. On the question of whether the husband had abetted the suicide by the wife the lower court convicted him on the ground that before her death she was treated cruelly by the husband and this was sufficient to attract the application of section 498A. On appeal, the high court accepted the defence of the husband in totality and acquitted him. They also observed that the lower courts had wrongly insisted that the accused should have proved his innocence. In the opinion of the high court it was the burden of the prosecution to prove the guilt of the accused beyond reasonable doubt. The chief reason with the court for not applying the presumption under section 113 of the Indian Evidence Act, 1872 was that there was no proof that the wife complained about cruelty. It is ironic how, despite the presumption about the unnatural death of married women within seven years of her marriage, the courts still refuse to shift the burden of proof.

In *Elango* v. *State of Madras*,[31] a young girl of 21 years of age within a short span of eleven months of married life died an unnatural death. There was a demand for a gold watch by the husband. According to the judge the husband made the demand for giving cash and jewels to the daughter from her parents. The court noted that the sum of Rs 37000/- was made by the father of the bride

29 AIR 2000 Ker 239.
30 2000 Cri LJ 4002.
31 2000 Cri LJ 4343.

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to the bridegroom which the latter accepted. Though the draft was in the name of the wife it was put in the joint bank account of the husband and the wife opened immediately after marriage. The husband claimed that the wife committed suicide as she was frustrated owing to non consummation of marriage which was due to his fault. The facts presented a strange scenario. A frustrated wife and an impotent husband demanding gold watch, jewels and money, and accepting Rs 37000/- from the father-in-law. If he could admit that he was responsible for non consummation of marriage due to which the wife's frustration reached a point that she was compelled to put an end to her life, could any one justify the demand made by him to his father-in-law? It is shocking that the court noted with approval[32] that as far as Hindus are concerned whether they are rich or poor it is known practice prevailing in this state that for one full year commencing from the date of the marriage whenever an important Hindu festival occurs during that time the parents of the bride will always give the traditional and conventional presentations out of love and affection to the bride as well as to the groom. The judge noted and mentioned the three important functions as *pongal; aadi* and *deepawali*. He further noted that among Hindus presents continue to be given after marriage by the bride's parents to their daughter and her husband at the time of the birth of their first child. He thus said that jewels and money and the demands made by the husband has to be seen in this connection and background. The accused was therefore let off.

The judge failed to note that here there was no first child as the marriage was not even consummated as per the admission of the accused himself. Further, even if there is a practice of giving presents from the side of the bride's parents to the bridegroom on important festivals, these can be voluntarily given in a situation where the newly weds are living happily and not where the frustration in their own daughter is building up due to non consummation of marriage which frustrate the very purpose of marriage. Customary practices do not give a right to one party to demand valuables. It is exactly what dowry relates to. A man may give a substantial amount of money to his daughter out of love and affection as dowry, a customary practice to that effect also exists, but does it give rise to a right to the bridegroom for demanding it when it is not given? Certainly not, and if he does that he would be guilty of an offence under the Dowry Prohibition Act.

The facts of the present case squarely fall under this situation. If the father wanted to give presents to the daughter and his impotent son-in-law, he would be doing something which can be covered under the customary practice, but if he is unwilling and the son-in-law demands it, then even though it is on an important Hindu festival, it would be covered squarely under the definition of demand for dowry under the DPA. The heinous practice of dowry continues only due to existence of customary practices on important festivals. All these occasions, namely, the marriage itself, betrothal, childbirth, *deepawali, pongal* etc. have no modern day sanctity as far as presents are concerned but are occasions which

32 *Id.* at p. 4350.

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can be used by the bridegroom's family to indulge in extortion of money and valuable items from the bride's parents as of right. The DPA makes a demand made on any of these occasions an offence under the Act, which is explicit by reading the definition of the word "dowry" under the Act. Dowry has been defined as any property or valuable security given or agreed to be given before, at the time or at any time subsequent to the marriage in consideration of marriage." The term subsequent to marriage covers presents given on festivals and at the time of childbirth which the judge dismisses erroneously as customary practices. It is a matter of deep regret that instead of denouncing such practices the members of the judiciary recognize them and allow the culprits to go scot-free under the garb of prevalence of these practices. It is clear that the loss of the life of a woman carries no meaning to the courts which actually help the accused in eliminating her. It is precisely for this reason that evil of dowry continues to exist.

In *Ajit Singh* v. *State of Himachal Pradesh*,[33] within seven months of the marriage the wife died under mysterious circumstances and her dead body was found in the jungle. The prosecution was able to prove that the wife was treated cruelly by her husband as well as her in laws. As her marriage was a love marriage her in-laws used to call her unchaste, "badmash" and a woman of bad character. The court also accepted the fact that the husband suspected his wife of having an affair with another man and thereby harassed and tortured her. She did not want to live with her in-laws as she was ill-treated and thus wanted to live with her parents. However, her own parents sent her back to her in-laws house. It was on one of such occasions that her dead body was found. The husband claimed that she committed suicide as she was being sent to his house against her wishes. The sentence was reduced as the case was going on for a period of five years. As her own parents forced her to go back to the husband's house which she did not want to do the court said, "It must have added to her already filled in cup of frustration. This in my view is a mitigating circumstance justifying lesser punishment to the accused persons."[34]

In *G.A. Mohamed Moideen* v. *State*[35] the wife died due to hanging and the husband took the plea that she committed suicide The accused husband was found guilty by the trial court and sentenced to seven years imprisonment. His sentence was confirmed by the high court. In the revision petition filed by the accused in the Madras High Court he had stated that his wife wanted him to set up a separate family. The father of the deceased had stated, which was also proved, that the husband had demanded Rs. 50000/- from the father-in-law for taking a shop in the municipal area. The non payment of this amount had led to the torture of the wife and her death. The court in the revision explored the cross examination and came to the conclusion that as the father of the wife also wanted the daughter to set up a separate family, the demand of money for leasing a shop was not so grave that it would be included as dowry demand. For

33 2000 Cri LJ 2370 (HP).
34 *Id.* at p. 2375.
35 2000 Cri LJ 4355 (Mad).

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the court to connect these two things was not correct. To come to the conclusion that if the husband and wife want to set up a separate family the father of the wife would necessarily be responsible for setting up the shop for his son-in-law is wrong. It does not and would not be the responsibility of the father-in-law. Businessmen have various options available to raise money for the purpose of setting up shops or opening new ventures, and a demand by the son-in-law would not cease to be a demand if the purpose is to set up a shop. It is not different from any other demand. The Act does not specify categories or purposes of demands made by the in-laws of the bride from her father. Even a demand to deck their daughter-in-law in costly ornaments and fine clothes would be a demand within the meaning of the DPA if the father-in-law is unwilling to do so. This is yet another case that shows how the attempted enrichments by the husbands at the cost of their father-in-law's purse are treated by the courts as acceptable. The husband here was acquitted of all charges.

State by Rural Police v. *Siddaraju*[36] is another case that highlights the plight of married women. Extremely vulnerable at the hands of the unscrupulous husbands, who think it their legitimate right to practice polygamy and torture their wives, these women are left with no option but to end their lives. It also speaks volumes about the parents of the daughters, who do not ensure economic independence of their daughters; make them a burden and even when the daughter comes back to them seeking shelter and protection, insist on her going back to the same husband who tortured her. The husband married another woman within two years of his marriage to the first wife in a temple and brought the second wife in the same house. The first wife was extensively tortured mentally and physically by the second wife and also by the husband's parents. She was denied food and was compelled to take shelter at her parent's house. A *panchayat* was held and at the assurance given by the husband the wife was again sent back to the husband's house. Within ten days she died. The husband claimed that she had committed suicide. He also contended that he was not responsible for her death as she had left the house on her own accord and had come back on her own. The very fact that she had come back showed that she had condoned the act of the husband. The court did not accept the contention and he was convicted of abetting the suicide committed by the wife.

In *State* v. *K. Sridhar*,[37] the wife died an unnatural death within seven years of her marriage. The parents alleged cruelty soon before the death due to non payment of demands made by the husband. In the lower court the husband was acquitted. He took the defence that the birth of the first child and a subsequent abortion had taken a very heavy toll on the deceased, she was physically in a very low condition which in turn had affected her mind and that in this state of depression she committed suicide. The prosecution was able to prove dowry demands and also that the husband had dumped the wife at one point of time with her parents. The court stated: "We agree with the state public prosecutor that there are overtones of subsequent demands and that there are some incidents

36 2000 Cri LJ 4220 (Kant).
37 2000 Cri LJ 328 (Kant).

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such as leaving the girl at her parents place and the like which are relied on by the prosecution as incidents of cruelty of serious nature.....What we find on a very minute evaluation of the record is that a review of the incident would undoubtedly disclose some level of unhappiness to the deceased, but in order to establish the criminal offence under either or both of the charges the incidence, gravity and the volume of the cruelty would have to be much higher. All that we can hold is that this material comes dangerously close, but that in its totality, it is not good enough to sustain a conviction under either of the two charges."[37a]

It is amazing that the court needed a higher degree of gravity of cruelty. Nothing can be more humiliating and insulting for a wife than her husband dumping her at her parents place and taking her back when her parents are able to quench his hunger for more money. This was despite the fact that she bore him a child and suffered an abortion. It makes a woman a mere chattel to be used, to be exploited, to be used as a channel for extracting more money from her parents and then to be dumped when he no longer needs her. That she was in a weak state of health was admitted by the husband himself. What were his duties here? If indeed she committed suicide who else but the husband was responsible for it. What more gravity the judge wanted? Except that he himself is seen attempting to save the husband for throwing the wife into the jaws of death. The judgement shows utter indifference and a typical derogatory patriarchal mindset from which the judiciary cannot liberate themselves.

In *Nandlal* v. *State of Madhya Pradesh*,[38] married for just six months, the wife died an unnatural death. Husband claimed that she after a heated exchange poured kerosene over her body and immolated herself. She later died of 90 per cent burns in the hospital. The husband was acquitted of all charges as the case of the prosecution that the husband had called his first wife and had given beatings to the second wife was not believed by the court. In the absence of establishing cruelty soon before the death, the judiciary did not shift the burden of proof and insisted on the prosecution to prove the case beyond reasonable doubt.

Documentary proof of the demands made by the husband are sufficient to prove his guilt. Here again,[39] the wife died under mysterious circumstances. Her body was found at a lonely spot and bore the marks of burns on her private parts and of a rope around her neck. The prosecution was able to prove the torture of the wife by the husband for insufficient dowry with the help of letter written by the husband to his father-in-law and other evidence. He was convicted of the charges under sections 304B and 498A.

Misuse of section 498A

The highhanded behaviour of the in-laws and the breakup of the marriage has another side. Lodging of cases with the "Crime Against Women Cell" may

37a *Id.* at 328-29.

38 2000 Cri LJ 794 (MP).

39 *Rajeshwar Prashad* v. *State of Bihar,* 2000 Cri LJ 727 (Pat).

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not all be genuine. Matrimonial discords unconnected with dowry demands or dowry related harassment are often given the colour of dowry by the wives to get even with their husbands. In *Ch Narender Reddy* v. *State of Andhra Pradesh*,[40] the wife was suffering from throat cancer and the husband who desired to marry again no longer wanted to live with her. On this point there was tension between them which was apparent. The wife was the niece of the husband as was the custom under the community to which they belonged. Unhappy with the developments the wife filed a case under section 498A, against the husband for torturing her for not bringing sufficient dowry and cruelty. The charges were found by the court to be baseless and were rejected.

Section 498A whether retrospective

In *Amrish Kumar Agarwal* v. *State of Uttar Pradesh*,[41] the question before the court was whether an offence committed by the husband before the coming into force of section 498A can be tried as against him by the state under this section. The court held that it cannot be done as section 498A, unless the legislature says so, cannot be given a retrospective application. The harassment for insufficient dowry took place in 1982-83 and section 498A was introduced later. The case was remanded to the trial court to try an offence if made out against the accused under any other section.

VII FAMILY COURTS ACT, 1984

Right of representation by counsel of their choice

The Family Courts Act was passed with the basic objective of providing speedy justice in family matters in a less formal atmosphere without the rigid technical procedure. It envisaged that family disputes are not litigations where the parties and their counsels engage in winning or defeating a legal action but parties, lawyers, social workers and social welfare officers are engaged in finding a solution to their problem in a friendly and understanding atmosphere. The Act provides for exclusion of lawyers yet, at the same time court is empowered to take the help of a legal expert, as *amicus curiae*, if it thinks it necessary in the interests of justice. Thus, it is clear that the general right of representation is not available to the parties unless the court on its own thinks as necessary such assistance. Can this opinion of the court be framed at the instance of one of the party's wishes? Can one party to the proceeding make and be given a permission to be represented by a counsel of his choice with an express objection coming from the other party on the same date without there being any indication from the court that it considers it necessary to do so in the interests of justice? Can the court go ahead and make an order for representation of both the parties by the counsels of their own choices, in a case where one of the parties had not even asked for it, but had raised an express objection to the contrary?

40 2000 Cri LJ 4068 (AP).
41 2000 Cri LJ 1324 (UP).
42 *Gian Chand* v. *Sudha*, AIR 2000 P&H 208.

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In *Kailash Bhansali* v. *Surendra Kumar*,[42] the husband filed an application for divorce before the family court which was dismissed by it. The wife then filed a petition praying for a decree of restitution of conjugal rights against him and that was allowed. Instead of complying with the decree, the husband filed a second petition for divorce on the ground that it is the wife who failed to comply with the decree and so he should be granted a divorce. A date was fixed for recording of evidence. The husband prayed for filing a rejoinder, and the case kept on being adjourned from time to time. After six months the husband filed an application in the court that he wanted to be represented by a counsel of his choice to which the wife objected. Though the wife never prayed for legal assistance for herself an order was passed by the family court, granting permission to not only him, but also to the wife. The wife preferred an appeal to the high court against this order. The high court took a very serious note of the error committed by the family court. As the very purpose of the family courts is to give speedy justice, the court noted with concern that due to the delaying tactics adopted by the husband who was well educated and financially very well off, to harass the wife, even after 12 years no amicable solution has been reached. They felt that the judge only facilitated the respondent husband to prolong the case pending before him so that the destitute wife may continue to suffer.

Though section 13 empowers the court to take the aid of a legal expert as *amicus curiae*, the necessity should be on part of the court and not that of the parties. Otherwise there would be no difference between an ordinary litigation and proceedings under the family court. The court observed: "The judge passed the impugned order...which is not only against the law but against the human conscience. Family courts are established for the purpose of speedy justice to the deserted wife and not for this type of harassment. If the Family Courts pass such orders then it will shake the confidence of the litigating public and they will not come to the courts for justice and that will be the saddest day for this institution."[43]

Holding that the judge had committed an error of law, they set aside the order and directed the court to proceed and decide the case on merits.

The court also felt that it was a fit case in which exemplary punishment should be awarded as the petitioner wife was made to suffer by the husband for all this time only because he was very well off and well settled in life. Therefore, while allowing petition the husband was directed to pay a special cost of Rs. 10,000/- to the wife within one month from the date of the order.

VIII GUARDIAN AND WARDS ACT, 1890

Wishes of minor to be taken into account

The welfare of the child in deciding the custody petition is of paramount importance, more so, if he is nearing the age of majority. On being questioned by the judge where a boy aged 17 years expresses his desire to be with the

43 AIR 2000 Raj 390.

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mother and makes it clear that he did not want to go with the father the fact of remarriage of mother would be irrelevant.[44] Also forcing him to go with the father would be harsh treatment to him as after one year on attaining majority he cannot be so compelled.

Status of third party in custody petition

One of the most unfortunate aspects of the breakup of marriage is the tussle of the parents over the custodial and visiting rights of the child. In such a scenario, can a third person intervene where both the parents are living? Does a minor child has a fundamental right to live with the person of his choice and can the maternal grand father file a petition to that effect in the high court? Can the mother deny to the father, the right to meet the child after initially agreeing to do so? In *Akash* v. *State of Andhra Pradesh*,[45] the parents obtained a decree for divorce from the family court at Secunderabad. The same court granted to the mother the custody of their son. The mother was directed to bring the child to the father during holidays, *Onam*, Christmas and summer vacations failing which the order of custody could be modified. She failed to comply with the directions. The husband filed a petition for modification of the order and arrest of the wife for contempt of the court order. The wife appeared before the court, tendered an unconditional apology and explained the circumstances for not bringing the child to the father. Her own father was hospitalized and the child aged nine years could not be send alone to the house of the father. The family court accepted the apology and directed her to comply with the orders in future. The maternal grandfather filed a writ petition in the high court at Andhra Pradesh claiming that the child was afraid of the company of the father and being nine years old his wishes should be kept in mind and he should not be forced to go to meet him. Further, as the distance between the place of the residence of the father and the mother was around 1400 kilometers, the mother would be put to a lot of inconvenience in taking the child to the father. The court held that since the guardians of the child are alive the maternal grandfather had no *locus standi* to present the petition. On the question of inconvenience to the mother the court held that she never raised this question herself in the court. On the other hand she had given an undertaking to the court that she would take the child to meet the father. The court felt that the mother was trying to flout the order of the family court in this manner and deny to the father the visiting rights which it cannot allow.

Custody orders not final

The order relating to custody of children are by the very nature not final but are interlocutory in nature and subject to modification in future upon proof of change of circumstances requiring change of custody. It is almost a settled law that in custody petitions, it is not the right of the parents or grandparents but the welfare of the child that dominates and influences the decisions of the court.

44 *Id.* at p. 392.
45 AIR 2000 AP 261.

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Would the fact of bequeathing their property in favour of the grandchild though subject to the condition that the child comes and lives with them an indication of deep affection and love for the grandchild, sufficient enough to grant them the custody? The Supreme Court in *Jai Prakash Khadria* v. *Shyam Sunder Agarwalla*,[46] saw two grandfathers fighting bitter litigation to secure the custody of their grandson. The father of a one-year-old child died. The paternal grandfather filed a petition for appointment as guardian and custodian of the grandson and sought an *ex parte* injunction against the mother restraining her from giving the child in adoption to the maternal grandfather. A day after the petition was filed the mother of the child gave him in adoption to her father. The family court appointed the paternal grandfather as the guardian and the maternal grandfather was asked to hand over the child. The high court reaffirmed the decision. On appeal the Supreme Court also granted the guardianship and the custody rights to the paternal grandfather apparently influenced by two considerations. One, that during the time when the child was with the paternal grandfather they were over fondling him but when he was with the maternal grandfather he was left alone with the servants. Secondly, the paternal grandfather had revoked his will executed earlier in favour of his daughters and had executed a fresh will in favour of the child. The will, however, was subject to the condition that he comes and lives with them. The order was passed for three years so that there is no interruption with the child's studies.

The case shows the tug of war over the custody of a male child. The court had observed: "Another reason may be to have a male member in the family as both grandparents have only daughters, the only male member, being father of Ankur (the child) having died."[46a]

For the court to be influenced by the factum of revocation of will is surprising. The court noted that both the parties were very affluent and had utmost love for the child. Therefore, it is apparent that the child did not suffer financially at the house of the maternal grandfather. Even otherwise, a will is always revocable and cannot be a yardstick for measuring the welfare of the child. The fact that the mother had remarried and the second husband had two children from his pervious marriage also led the court to come to the conclusion that it indicates her settlement in her new life. However, the court failed to note that under the Hindu Adoptions and Maintenance Act, 1956, the mother of the child is competent to give it in adoption in case of the demise of the father.[47] She is not under any obligation to consult anybody nor is required to take the consent or permission of the paternal grandparents. Once the child is adopted, then the adoptive father becomes the natural guardian of the child unless he is judicially disqualified, which was not the situation in the present case. The court would not be competent to restrain the mother from giving the child in adoption as that would amount to infringing an express right that she has been given under a statute. When the natural guardian of the child (biological or adoptive) is alive and is judicially

46 AIR 2000 SC 2172.

46a *Id.* at 2173.

47 See s. 9, the Hindu Adoption and Maintenance Act, 1956.

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competent and willing to look after the child nobody else can be appointed as the guardian. Adoption is the sole right of the parents, and the argument that if the child was with somebody else he would be financially more secure is not tenable. Though the court can look into cases of misuse of adoption where the child is put to serious disadvantage, the present case did not pose such a scenario. The mother had contended here that she had already given the child in adoption to her father, and he alone is the lawful guardian of the child. However, the court refrained from commenting on even the validity of the adoption. The case shows the superiority of rights of paternal relations over the mother and her wishes.

IX MUSLIM LAW

Registration of marriage

Under Muslim law there is no mandatory requirement for registration of marriages performed under the classical law. However, if the community for the sake of better proof decides to evolve certain formalities for its registration, would the formalities in course of time take the character of a custom which is enforceable and could give rise to a cause of action in favour of the party who wanted to have the marriage registered but was prevented form doing so? The members of *Pertapatnam Pallivasal* had developed it as a custom to have the marriage of willing persons to be registered. In *M. Jainon* v. *M. Ammanulla Khan*,[48] the parties belonged to the Muslim community and were members of the *Periapatnam Jamath*. The plaintiff had arranged for the marriage of his daughter and according to the custom which was evolved, the marriage register was to be brought at the house of the plaintiff. He had paid the requisite fees for registration of the marriage of his daughter. The secretary in whose custody the marriage register was kept failed to bring the register at the appropriate time and this caused him considerable shame and humiliation before his friends and relatives. He suffered mental agony and was hospitalised for treatment. He claimed damages from the secretary alleging that his deliberate act of not bringing the register at the appointed place at the appropriate time was a cause for humiliation to him in the community and therefore he was entitled to damages and compensation. The main defence raised by the opposite party was that this is neither a civil nor a legal right which can be enforced. The question before the court was in the absence of any legal provision with respect to mandatory registration of marriages, the claim for damages is based on a mere customary right or a contractual right? The court held that it assumed the character of a customary right and not a mere contractual right. Therefore, it cannot be said that there is neither a civil nor a legal right which is enforceable. The allegation that the defendant failed to respond to the demand for registration and thereby violated the customary right is a sufficient cause of action. Therefore, the suit for recovery of damages on grounds of violation of customary right and causing mental anguish and medical expenses would be maintainable. The court allowed his claim and directed the defendant to pay damages to him.

48 AIR 2000 Mad 381.

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X SPECIAL MARRIAGE ACT, 1954

Virginity of wife as proof of impotency of the husband

Mere fact that the wife is virgin in itself would not be a conclusive proof of the husband's impotency and she has to lead other evidence as well.[49] The wife filed a petition praying for a decree of nullity under section 24(ii) and for divorce under section 27 (1) (d) of the Special Marriage Act. She contended that the husband was impotent at the time of the marriage and continued to be so at the time of presentation of the petition. The husband contested her claim but did not deny the non consummation of marriage. He, however, claimed that non consummation was due to her behaviour as she did not want to conceive and offered to undergo a medical examination to prove his competence for marital intercourse. The court held that the initial onus lies upon the wife to show that the marriage was not consummated because of sexual impotency of the husband and such impotency continued till the institution of the proceedings. If such onus is discharged by the petitioner wife the burden of proof that the husband was not impotent both at the time of marriage and till before the institution of the aforesaid proceedings and the marriage was not consummated because of the unwillingness of the wife will lie upon the respondent husband. Thus, the court held that it could not be said that sexual impotency of the husband could only be proved upon the virginity of the wife at the trial because that would be a secondary and /or alternative approach for the purposes of determination of the sexual impotency of the husband. Such evidence will clinch the issue where there is no evidence as to the sexual potency of the husband and no pleading by the husband that for non-consummation of the marriage the wife was responsible. The revision petition was thus dismissed.

The reasoning of the court is difficult to accept. In sensitive and private matters like determining the impotency of the parties it is difficult, rather impossible, to get direct or straight proof. The court has to come to a conclusion after taking all the surrounding circumstances into account. In the present case the husband had not denied non-consummation of marriage, which in itself indicates that something must be wrong with one of the parties. Consummation of the marriage is so basic in nature that it usually takes place soon after marriage. The wife gave her own reasoning for non-consummation that the husband was impotent. The argument of the husband poses certain difficulties. He merely said that the marriage was not consummated as the wife did not want to conceive and not that she did not want consummation. Many couples do agree not to have children soon after marriage but that does not mean that they do not indulge in marital intercourse after taking either contraceptives or other precautions. In such cases the wife cannot be a virgin. Secondly, the husband offering to undergo medical examination at the trial, itself poses a technical problem. What needs to be proved for the purposes of section 24, is his impotency at the time of marriage and at the time of the institution of proceedings, and not his impotency at the time of the active trial as that would be subsequent to the institution of

49 *Bhaswati Sarkar* v. *Angshuman Sarkar*, AIR 2000 Cal 210.

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proceedings. Therefore, both of his arguments cannot be accepted. To insist on some independent proof in such a situation thus appears to be incorrect and rather impossible.

XI INDIAN SUCCESSION ACT, 1925

Execution of will and proof

The genuineness of the will can be challenged if it is shown that the testator was not in a sound disposition of mind at the time of his death. However, where the testatrix had no ailment till her death; was physically and mentally fit and was looking after her matters personally; the will was executed in presence of the sub-registrar, or registered at his office and testimony of the witness was in consonance with regard to execution, attestation, and registration of the will, the mere fact that a doctor had not been examined[50] or was not called while executing the will[51] cannot cause aspersions on the genuineness of the will. Thus, where the testator had executed the will of his own volition and without any pressure and he also had the right and authority to execute will as coparcenor to the extent of his share in the suit properties, the will was executed bequeathing properties mentioned in the will to the applicant who was his handicapped unemployed unmarried daughter and the testator himself had gone with his son to give instructions to the lawyer for the drafting of the will, it showed that the execution of the will was done with sound disposition of mind and after understanding the full content of the will. There was no defect in the attestation and no suspicious circumstance present to doubt the execution of the will in favour of the applicant. It was held that the applicant was entitled to get probate.[52]

Grant of probate

On an application for issue of letters of administration under section 278, can and should the probate court go into the question as to whether the testator in fact had a title to the property that he had bequeathed? The will was executed properly by the testator, who had the capacity and was in a sound disposing state of mind.[53] The will was attested by two attesting witnesses and the question was about the issue of letters of administration. Thus, an inquiry as to whether the testator had title to the properties bequeathed under the will, by the probate court was held as not proper and the court was bound to issue the letters of administration. In yet another case it was held that the pendency of the suit for partition is no bar to the grant of probate or letters of administration.[54]

Construction of will

The whole object of construing a will is to find out the testator's intentions

50 *Thakur Dass Virmani* v. *Raj Minocha*, AIR 2000 Del 234.
51 *Arjan Dev Mitra* v. *Sada Nand*, AIR 2000 Del 236.
52 *Naliniben L. Patel* v. *Heirs of Jasodaben C. Patel*, AIR 2000 Guj 327.
53 *C.C. Kuruvila* v. *Sosamma*, AIR 2000 Ker 241.
54 *Thakur Dass Virmani* v. *Raj Minocha*, AIR 2000 Del 234.

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so as to see that his properties are disposed of in the way he wished. The primary duty of the court while construing a will is to ascertain the intention of the testator when the instrument was created.[55] All the surrounding circumstances may be looked at which existed at the time when the testator made his will to discover his intention. According to the will the testator had bequeathed his properties in favour of his granddaughter and had excluded his own daughter as she was highly irresponsible and extravagant. He sought to create a trust in favour of his granddaughters and excluded his daughter from his properties. This showed that the intention of the testator was to exclude her daughter from claiming his properties and her claim was negativated.

Where the will has two contradictory clauses which cannot be given effect to at the same time, which one would prevail? A division bench of S.B. Majmudar and S. Jagannadha Rao JJ. held[56] that where there are two clauses in the will, which are irreconcilable, and cannot possibly stand together, the last shall prevail. In the earlier part of the will the testator had stated that his daughter shall be the heir/owner and the title holder of his entire remaining movable and immovable property but in the later part he had stated clearly that on his death the brothers of the testator shall be the heirs of the property. Of the two inconsistent clauses, the court held the latter part of the will would operate and make his daughter only a limited estate owner in the property bequeathed to her.

Place of abode or residence

The application for obtaining succession certificates has to be filed at the court of competent jurisdiction which according to section 371, is the place of abode of the deceased. In a case where the testator had a home in one place, worked at a different place and died at a third place, what would be the appropriate court of jurisdiction? The Allahabad High Court was confronted with this question in *Rakhi* v. *Ist Additional District Judge, Firozabad.*[57] Here the deceased was a resident of Firozabad and was posted at Allahabad. He went to Kanpur for medical treatment and died there. The application for grant of succession certificates was filed at the courts at Firozabad. The deceased had a transferable post and lived at different places during his employment; but had a fixed place at Firozabad, though he died at a different place where he had gone for treatment. Therefore, the place of his death cannot be said to be his place of abode or ordinary place of residence. The objection was not raised during the preliminary stages but was raised for the first time during argument and, therefore, was not to be entertained by the court. The application for grant of succession certificates was not accompanied by the court fees. It was held that it is not mandatory that the court fees should be paid at the time of filing of application for the grant of succession certificates. The same can be deposited even at the time of its grant and that would not make the application invalid. Lack of territorial jurisdiction, it was held, is an irregularity and not an illegality.

55 *Darius Jehangir* v. *Lyla Minoo Ghasvalla*, AIR 2000 Bom 372.
56 *Balwant Kaur* v. *Chanan Singh*, AIR 2000 SC 1908.
57 AIR 2000 All 166.

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Grant of succession certificates and rule of res judicata

On an application for grant of succession certificate made under section 372, the decision for granting the same would not operate as *res judicata*, and would, therefore, not bar any party to the said proceedings from raising the same issue in a subsequent suit.[58]

Sub-section 3 of section 373 of the Succession Act, which deals with the procedure for grant of certificate reveals two things, first adjudication for grant of certificate is a summary proceedings and secondly, if the question of law and fact are intricate or difficult, it could still grant the said certificate based on applicant's *prima-facie* title. In other words, the grant of certificate under it is only a determination of *prima-facie* title. This as a necessary corollary confirms that it is not a final decision between the parties. So it cannot be construed that mere grant of such certificate or a decision in such proceedings would constitute to be a decision on an issue finally decided between the parties. Therefore, the principle of *res judicata* cannot be made applicable. The use of the word "good faith" in section 381 also reinforces that decision in these proceedings are not final.

XII CONCLUSION

The year 2000 saw the Supreme Court putting an end to the exploitation of the multiplicity of personal laws by unscrupulous persons to give legitimacy to their illicit and illegal relationship contracted through devious means. The courts also continued the liberalisation of rules relating to strict proof of marriage in matters of maintenance and went to the extent of holding that even a second wife of a Hindu man is entitled to claim maintenance from him under the Criminal Procedure Code. Though the pronouncement that the second marriage of a Hindu man solemnised during the lifetime of his first wife is voidable was in complete contrast to the legal provisions and therefore incorrect. On the other hand, the high courts corrected the error of law committed by the lower courts in granting divorce to Christian couples under the Indian Divorce Act, under non existing provisions. Muslim women's claim for maintenance under Cr PC was negativated by the courts on the ground of absence of option filed jointly by both the parties to this effect. The high court also re-emphasized that the very purpose of enacting family courts would be frustrated if the parties are allowed as of right, representation by counsels of their choice in absence of any opinion of the court that it is necessary in the interests of justice. Our social ideologies with the preference for a male child were responsible for the intense struggle in all the custody petitions. As usual the child to be fought over was a male child. Even the courts seemed to be swayed by the patriarchal setup as they chose to sideline the right of the mother to give her child in adoption and gave the custody of the child to the paternal grandfather. The death of a number of women continued on the altar of dowry with the rate of acquittal very high. A curious pattern emerged. In almost all cases where the wife died an unnatural

58 *Madhavi Amma Bhawani Amma* v. *Kunjkutty Pillai Meenakshi Pillai* AIR 2000 SC 2301.

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death within a short span of marriage, the husbands took the plea that she had committed suicide, which in most of the cases was accepted by the courts. It is amazing and worth exploring whether Indian girls who are brought up with marriage as the ultimate goal in their life, and whose patience and tolerance is unmatched (though a lack of it is not to be treated as their drawback) become so suicidal in their habits as to put an end to their lives on grounds of having an abortion, general ill health, exchange of words, financial position of the husband, setting up of a shop, non consummation of marriage, bigamy of husband etc. It is ironic that the courts seem too eager to be befooled by these defences taken by the murderous husbands. Side by side with the lenient attitude of the courts towards dowry deaths is also an attempt by women to misuse the provisions of section 498A to take revenge on their husbands if something else goes wrong with the marriage. The courts very effectively thwart these attempts. Unfortunately, the idea of a woman trying to falsely implicate her husband has raised so much noise that it is casting a shadow on the way dowry cases are perceived by the courts.

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