Chapter 4

DIVORCE AND RESTITUTION UNDER HINDU LAW

INTRODUCTION

In the previous chapter we explored the general nature of marriage in the backdrop of statutory regulations and relevant judicial pronouncements. In this chapter we will see what happens when parties leave the company of each other or are not able to pull on as husband and wife after the marriage. Besides, we shall try to explain the concept of restitution of marital relationship between the estranged parties where due to some reason whether just or not, the marriage has become almost irreconciliable.It will be useful to understand as to why restitution of conjugal rights is granted? Or does it serve the purpose to sustain marital relationship.It shall be desirable to see the impending result of dissolution of marital relation, or the question like; when is a marriage deemed to have come to an end and with what effect? We shall try to analyze the role of courts along with the statutory position in this respect. The difference between void and voidable marriage will be given to underline their impact on such matters like, status of children, maintenance during and after dissolution of marriage etc.

Marriage is necessarily the basis of social organization and the foundation of important legal rights and obligations. It confers important rights and entails corresponding obligations both on the husband and on the wife. An important obligation is “consortium” which not only means living together but implies a Union of fortunes. A fundamental principle of matrimonial law is that one spouse is entitled to the society and comfort of each other. Thus where a wife, without lawful cause, refuses to live with her husband, the husband is entitled to sue for restitution of conjugal rights and similarly the wife has the right to demand the fulfillment by the husband of his marital duties. The restitution of conjugal rights, in nutshell, means the restoration of marital rights between the spouses. When the court passes a decree of restitution of conjugal rights, it implies that the guilty party is ordered to live with the aggrieved

party.

Section 9 of the Hindu Marriage Act, 1955 deals with "Restitution of conjugal Rights". It reads as under:

(I) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation: where a question arises whether there has been reasonable cause for withdrawal from the society the burden of proving reasonable *excuse* shall be on the person who has withdrawn from the society.

CONSTITUTIONAL VALIDITY OF SECTION 9

There has been a lot controversy regarding the constitutional validity of section 9 of the Act, for the reason that it gives unbridled powers to the husband as against the wife in terms of matrimonial relief, especially the right to enforce restitution of conjugal rights. The provision for restitution of conjugal rights has been provided to preserve the marriage as far as possible by enabling the court to intervene and enjoin upon the withdrawing spouse to join the other. The desirability and constitutional *vires* of this provision as noted above, has been a subject of debate ever since the decision of the Andhra Pradesh High Court in (*T.Sareetha v.T.Venkatta Subbaiah,[1])* declaring section 9 of the Hindu Marriage Act, 1955 as *ultra vires* Articles 14&21 of the constitution. The Delhi High Court on the other hand, declaring the provision as *intra vires* in a subsequent case, namely, *Harvinder Kaur v.Harmander Singh*[2]. The controversy was set at rest by the Supreme Court in *Smt.Saroj Rani v. Sudarshan Kumar Chaddha* [3] wherein it was held that there was nothing unconstitutional about the section. The court observed:

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[1] *AIR 1983 AP356*
[2] (AIR 1984 Del 66)
[3] (AIR 1984 SC 1562)

The right of the husband or the wife to the society of the other is not merely a creature of the statute...There are sufficient safeguards in Section 9 to prevent it from being a tyranny...the object of restitution decree is to bring about cohabitation between the estranged parties i.e. so that they can live together in the matrimonial home in amity...the remedy of restitution aims cohabitation and consortium and not merely sexual intercourse. The introduction of constitutional law in home is like introduction of a bull in a china shop.

The practical utility of the section, however, lays not so much in restoring the relationship after the decree-for that is rarely achieved-but the fact that its non-compliance provides a ground for seeking relief of divorce, which is popularly resorted to. An application for restitution of conjugal rights can be entertained only when the marriage between the parties is legal. When, however,a wife in her petition for restitution herself alleged that the husband has suppressed his earlier marriage which was subsisting, the court held that the petitioner's marriage being illegal, her application for restitution of conjugal rights was not maintainable(*Ranjana Kejriwal v.Vinod Kumar Kejriwal,*[4]).

Likewise in *Ranveer Sharma v. Neelam Sharma*[5], the husband filed a suit for restitution of conjugal rights. His application for ad interim injunction restraining the defendant from marrying any other person was rejected as even the factum of the marriage was not proved. The respondent had, in response to the writ of habeas corpus filed by the husband which was dismissed, denied that there was any marriage. In these circumstances, the court observed:

> *While it is true that stress should always be on preserving the institution of marriage...yet in a suit for restitution of conjugal rights when the factum of marriage itself is not established, even prima facie, there would be no occasion to grant any interim injunction of the nature as prayed for.*

In *Lalit Gurubaxani v.Usha Gurubaxani*[6],the husband's appeal against a decree of restitution passed in favour of the wife on the plea he was not given adequate opportunity to cross

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[4] *AIR 1997 Bom 380*
[5] (AIR 1998 MP 283)
[6] (AIR 1998 MP 175)

examine the witnesses was turned down. Though courts are by and large liberal in the matter but at the same time, they do not allow mischief or dilatory tactics to impede the course of justice as adopted by the husband. Thus, the approach of the courts *vis-a-vis* restitution of conjugal rights is that it must be granted unless there are legal grounds to refuse it. The importance of the relief by way of a decree of conjugal rights is that it, not only enables the aggrieved spouse to apply for maintenance but also entitles him/her to divorce under section 13(IA) which lays down: that either party to a marriage whether solemnised before or after the commencement of the Act, may obtain a decree of divorce on the ground that there has been no restitution of conjugal rights between them, for a period of two years or upwards after the passing of a decree for restitution of conjugal rights, in a proceeding to which they were parties. This remedy is not only constitutionally valid but also desirable from the point of view of public policy and public morality. It ought not, however, be misused and should not provide an opportunity or license to husbands to use coercion against their wedded wives or militate against the growing awakening of gender justice.

Objective of Section 9

A careful analysis of section 9 shows that the remedy of conjugal rights is available to Hindus subject to the following statutory requirements:

(a) the respondent must have withdrawn from the petitioner's society;

(b)The withdrawal must have been "without reasonable excuse";

©The court is satisfied about the truth of the statement made by the petitioner; and

(d)That there is no legal ground why the relief should not be granted

It would be desirable to discuss these objectives one by one.

a. WITHDRAWAL FROM SOCIETY

The word 'society's several meanings.However, for the purpose of marital relationship, it means, 'compares what constitutes unionship 'and 'consortium'. The statute does not define the term so the need for judicial interpretation has always been there. Thus, withdrawal from society does not mean only mere withdrawing from the company of the other but from

conjugal relationship as well.

The important element of such withdrawal from the society of one another is that essentially they ought to be husband and wife and should be legally entitled to the society of one another. The right of restitution of conjugal right presupposes a valid marriage. Once a valid marriage is proved, the petition is maintainable though parties might not have co-habitude at all.

b. Presumption of marriage

Where the parties live together and cohabit for a long period and have children, and the relationship is recognized by friends and relatives as of husband and wife, there is presumption in favour of a valid marriage. This view was endorsed by the Madhya Pradesh High Court in *Virendra Singh Pal v. Kashiba*[7]. In another case, namely *C.M.Karthiyayani Amma v.P.T.Veettil Narayanan Nair*[8], an interesting situation was found as here, the parties were married and divorced and subsequent to divorce, were living together and cohabiting as husband and wife. Though there was no indication of a formal remarriage ceremony between them, all other evidence like ration card stating names as husband and wife, and those of their children, were held as evidence of marriage. The husband's suit for declaration that there was no marriage relationship and the defendant had no status of a wife was dismissed. Sometimes despite marriage, cohabitation between the husband and wife does not take place, what is the legal position of that marriage? Does it remain intact or does it get automatically rescinded? Or does it need formal declaration from the court? All these questions are relevant for the present discussion.

c. Non-resumption of cohabitation

Non-resumption of cohabitation after a decree of judicial separation or restitution of conjugal rights is a ground for a divorce under section 13(I-A) of the Hindu Marriages Act, 1955.The court, however, is not bound to grant divorce on mere proof of non-cohabitation for the

[7] (AIR 1998 MP 324)
[8] (1998 AIHC, 31 Ker)

stipulated period. Section 23 of the Act provides for many safeguards against the unruly misuse of the right to get divorce and one of the important ground for refusing the relief under this section, is that no party to the suit is taking an undue advantage of this right. Consequently relief can be granted only if the conditions mentioned therein (section 23) are satisfied. In this context, the apex court had to deal with an interesting case of *Hirachand Srinivas Managoankar v. Sunanda*[9], wherein it was held that non-payment of maintenance despite the court order, and continuing to live in adultery even after a decree of judicial separation obtained by the wife on the ground of husband's adultery, amounted to wrongs on the part of the husband so as to disentitle him to the relief. The court clarified that the object of sub-section (I-A) of section 13 was to enlarge the right of the parties to apply for divorce and that in no way makes it compulsive on the part of the court to grant the relief merely on proof that there was no cohabitation for the requisite period. The relief could be granted only if the condition mentioned in section 23(I)(a) are satisfied, not otherwise. The following observations of the court are note- worthy:

> Once cause of action for getting decree of divorce under section 13(I-A) arises it does not crystallize into a right which the court is bound to concede. This impression is based on misrepresentation of the provision of section 13(IA)...The section, fairly read, only enables either party to a marriage tie to file an application for dissolution of the marriage by a decree of divorce on any of the grounds stated there under. The section does not provide that once an applicant makes an application alleging fulfillment of one of the conditions specified therein the court has no alternative but to grant a decree of divorce. Such an interpretation of the section will run counter to the provisions of section 23(I)(a) and (b).

d. **Wife's refusing to quit job-not cruelty**

The question "whether the wife's refusal to give up job at the instance of the husband amounts to her withdrawal from the society of the husband's has been raised in many cases.

[9] (AIR 2001 SC 1285)

In some cases it has been held that it amounts to withdrawal while the recent judicial trend is that "it does not amount to withdrawal". The Rajasthan High Court has in a recent case (*R.Prakash v. Sneh Lata,*[10]) expressly emphasized the concept of equality of spouses. It was a case of wife refusing to leave her job on the demand of her husband .The husband had filed a divorce petition on the ground that refusal of wife to leave her job, amounted to cruelty. The husband could not satisfy the court regarding his own behaviour vis-a-vis his wife and child. The court held that it was he rather than the wife who was guilty of cruelty and so could not be entitled to a divorce.

Before the Marriage Laws (Amendment) Act, 1976, section 9 did not contain the explanation now appended to it. Instead, it had sub-section (2) Saying nothing shall be pleaded in answer to a petition for restitution of conjugal rights, which shall not be a ground for judicial separation, or for nullity of marriage or for divorce.

Thus while, on one hand, the section spoke of the general and rather wide term "reasonable excuses a defense against a claim for restitution of conjugal rights, on the other hand it categorically restricted the scope of what could be pleaded in answer to such a claim. In several cases the courts were called upon to resolve this inherent conflict found within the language of section 9. Most of the High court's Punjab, Allahabad, Madhya Pradesh, Calcutta, Delhi, Madras and Rajasthan held that "the aforementioned statutory caveat (i.e., section 9) did not control the scope of "reasonable excuse" referred to in main clause of the section. However, the Andhra Pradesh and Mysore High courts held that "reasonable excuse" in section 9(1) is controlled by the caveat in section 9 (2). Happily, section 9(2) has been repealed by the Marriage Laws (Amendment) Act, 1976 and controversy set at rest forever, under the new version of the section 9, now in force.

WHAT CONSTITUTES REASONABLE EXCUSE

The scope of "reasonable excuse "is not defined or curtailed by any specific legislative provision, and; the burden of proof regarding the existence of a "reasonable excuse "is

[10] AIR 2001 269

definitely placed on the respondent. The judicial pronouncement of the Allahabad High Court in *Jagdish Lal v. Shyama Madan* [11] still holds good to underline the scope of the term 'reasonable excuse'. The court observed:

> *What would be reasonable excuse cannot be reduced to formulae and would vary with time and circumstances and will have to be determined by the court in each individual case in the light of features peculiar to it. Reasonable excuse cannot, therefore, be equated with 'legal ground 'and the court cannot grant a decree for restitution of conjugal rights if there is reasonable excuse for the husband or the wife for withdrawing from the society of the other, even though a ground for judicial separation or for nullity or for divorce has not been made out.*

Thus, the question of an excuse being reasonable or not depends on the facts and circumstances of the case and no strait jacket formula can be spelled out. What may sometimes appear to be a reasonable ground may not always be true. Let us try to point out such cases so as to understand the problem in a more vivid spectrum.

Mental Disorder

Mental disorder of a spouse gives a ground for divorce to the other party. The courts, however, are very cautious in accepting such pleas because of the emotional and mental effect on the non-applicant and the fear reaching consequences on his/her future life. Therefore, the husband's petition for divorce on grounds of mental disorder and schizophrenia were dismissed in *J.Sudhakara Shenoy v. Vrinda Shenoy* [12] and *Sudhir Singhal v. Neeta Singhal* [13] .In the former, the allegations against the wife comprised of such conduct as, wife drinking the entire milk on nuptial night without offering to husband, refusing to touch him, refusing to take food, habit of drinking water with turmeric powder, taking bath twice, habit of applying castor oil on hair,etc..These habits, according to the court, cannot be said to be as a result of any mental disorder. Moreover, it was 13 years after the marriage that the husband

[11] (AIR 1966 All 150)
[12] (AIR 2001 Kant 1)
[13] (AIR 2001 Del 116)

realized that the wife was suffering from mental disorder. Similarly, in another case the evidence of the doctor stating that the wife was under his treatment for four months, with a certificate given by him after over two years that she was suffering from obsessive compulsive neurosis 'without stating any line of treatment nor any prescription or other evidence on record ,was held to be not sufficient to establish mental disorder.

In *T.Hari Kumar Naidu v. Prameela*[14], however, where the husband alleged mental disorder and dangerous behaviour of the wife towards him and the children and the wife did not cooperate with the committee of doctors set up to examine her, the court drew an adverse inference and a decree in favour of the husband was granted.

Desertion

When divorce is sought on the ground of desertion, the *factum and animus* of desertion by the respondent have to be proved. In *Om Prakash v.Madhu*[15] the wife had to stay away from the husband as he refused to allow her to come because he wanted to complete his studies. It was held that there was no desertion on the part of the wife. The husband's contention that the fact that they have been living separately for 16 years constituted the *factum* and the wife's refusal to receive notices sent for her returning constituted *animus*, were rejected. In certain cases the ground of desertion may be a valid excuse for seeking dissolution of marriage or a decree for judicial separation by either of the parties to the marriage. But it is not always necessary that the allegation of desertion may be justified .The courts have to take an objective view of the facts and circumstances before granting any relief on that ground. In *Santosh Kumari v. Shiv Prakash Sharma* [16] and *Sharikant v. Saroj*[17], the husband's petition for divorce on ground of desertion by the wife was dismissed as the ground was not established. In the former, the statutory period of two years had not elapsed since the alleged offence, and in the latter, the wife was forced to live separately on ground of the misconduct

[14] (AIR 2001 AP 46)
[15] (AIR 1997 Raj 214)
[16] (AIR 2001 Del 376)
[17] (AIR 2001 MP 94)

of the husband and his family members.

Cruelty

The frequent use of cruelty for dissolution of marriage is an accepted reality. It has many dimensions like, social, economic, religious, cultural, legal and matrimonial, which has underlined its significance. Here it will be confined to the last dimensions. Thus, the term cruelty as a matrimonial offence though not defined by the Act is expansive enough to include a wide variety of acts, conduct and behaviour. In *P.K. Vijayappan Nair v.J.Ammini Amma*[18], a widower with three children remarried and the wife never liked his showing affection to these children. She herself misbehaved with them; filed false civil and criminal cases against them all and also attempted to commit suicide. On these facts the court held that cruelty was established. Reversing the lower court order refusing divorce to the husband, the Kerala High Court observed that after the 1976 amendment it was not essential for the petitioner to prove that cruelty inflicted on him/her was of such nature as would be harmful or injurious for the petitioner to stay with the respondent; it would be enough if cruelty is of such type which would satisfy the conscience of the court that the relationship had deteriorated to such an extent that it had become impossible to live together without mental agony.

The Rajasthan High court in *Satya Narayan v. Mamta* [19] wherein the husband never liked his wife right from the beginning, made dowry demands, led adulterous life and ultimately contracted marriage with another woman , held the husband to have treated his wife with cruelty entitling her to relief by way of divorce.

In *S.Vijaylaxmi v.S.Bheemreddy* [20] the wife along with her brother and some goondas abused her husband and threatened to remove him from service. Apprehending physical harm the husband lodged police complaint and obtained anticipatory bail. The wife also filed criminal cases against him as a result of which he was arrested and remanded to judicial custody and because of the arrest he was removed from service. Besides, she was, allegedly, arrogant

[18] (AIR 1997 Ker 170)
[19] (AIR 1997 Raj.118)
[20] (AIR 1998AP296)

and adamant, did not know household work, always taunted the husband that he was a petty employee whereas she was rich. The above facts in the opinion of, Calcutta High Court established cruelty on the part of the wife and divorce was granted. In this case, namely *Anil Kumar Benerjee v.Sefali Banerjee*[21],the court made a strong plea for dissolving broken marriages and observed that parties should not be ordered to stay together in such situations.

Condoned cruelty

Lack of pleadings and proof to establish the ground alleged for matrimonial relief disentitles petitioner to the relief's also where cruelty is condoned, it cannot be pleaded as a ground, as was held by Calcutta High Court in *Tapan Kumar v. Jyotsna*[22], where the wife filed criminal cases and maintenance suit against her husband. However, there was a compromise and the parties lived together for over a year. In the husband's petition for divorce on ground of cruelty it was held that he could not take the plea of cruelty committed before the compromise because such cruelty, if any, stood condoned. The case, however, was found fit for grant of a decree of judicial separation under section 13A of the Act.

The following have been accepted by the court as "reasonable excuse "in the context of restitution of conjugal rights; and these decisions are still valid;

(i) Husband's failure (despite his general potency) to have sex with the wife.

(ii) Presence of another wife of the respondent husband.

(iii) Cruelty on the part of the petitioner.

(iv) False allegation of unchastely by the husband.

(v) Wife subjected to all sorts of mental torture rebukes, scolding and taunts by her in-laws.

(vi) Husband forcing an educated Brahmin wife to eat meat and drink liquor.

The following have, in the past, been refused by the courts as excuses for withdrawal by one spouse from the other's society; and some of these decisions now need reconsideration in

[21] (AIR 1997 Cal 6)
[22] (AIR 1997 Cal 134)

view of 1976 amendment of section 9.

(I) Imputation of unchastely not amounting to cruelty

(ii) Attempt by the husband to have unnatural sex with the wife.

(iii) Wife's plea that the husband had no earnings.

(iv) Wife dislikes for the husband.

(v) Husband's inability or failure to provide separates residence to his Hindu wife (for their exclusive use), so long as husband's family house (where his parents or other relatives also live) does not create circumstances "grave enough to invert wife's right to consortium with her husband". (*Hardeep v. Daleep,)*[23]

(vi) Husband indulging in an adulterous life.

(vii) Where it had become "practically impossible "for the parties to live together.

EFFECTS OF MUTUAL AGREEMENT TO LIVE SEPARATELY

As regards mutual agreement between the parties (Pre-marriage or post-marriage), in several cases the courts have held that ït does not constitute reasonable excuse"and restitution of conjugal rights may be granted despite such an agreement. In *Pothuraju v. Radha,* [24], the court held that ïf an agreement is based on no reasonable ground, to enforce it may be opposed to public policy". Consequently a pre-marriage agreement under which the husband agreed to live in the house of wife's father was not treated a valid defence against the husband's petition for restitution. However in *A.E. Thirumal v. Rajaram*, [25] the court held that "a bona fide agreement to live separately could be a valid defense to a petitioner for Restitution".

IRRETRIEVABLE BREAKDOWN OF MARRIAGE

The concept of sanctity of marriage is giving way to workability and practicality of a harmonious relationship. The purpose of a marriage is to give happiness to the parties and peace and harmony to all concerned. When this purpose is lost and the cumulative effect of

[23] *A.I.R.1976 P&H 284)*
[24] A.I.R. 1965 A.P.407
[25] A.I.R.1968 Mad. 201

the situation indicates that it is impossible for the parties to live together happily, the courts are today, more inclined to give meaningful relief to the parties rather than impel them to live together.

In four cases (*Chetan Dass v. Kamla Devi,*[26]*; Sanghamitra Singh v. Kalash Chandra Singh,*[27]*; Gajendra v. Madhu Mati,*[28]*; and Krishna Banerjee v. Bhanu Bikesh Bandhopadhayan,* [29]*,* during the survey period, breakdown of the marriage was pleaded in support of divorce claim. While the apex court in *Chetan Dass* refused the relief, divorce on ground of irretrievable breakdown of the marriage was granted by the high court in the other three cases. In all these cases, courts expressed their concern for a healthy society of which marriage and family are the foundation. The judgments were based keeping in view the cumulative effects of the facts of each case.

In *Chetan Dass* which was a husband's petition for divorce on ground of wife's desertion, the wife in her written statement alleged husband's adultery. The husband's allegation of objectionable behaviour of the wife consisted of a "meek plea "that the wife was dissatisfied with the living conditions at the husband's place and so she wanted him to live with her at her parents' house. It was also pleaded that the marriage had irretrievably broken down. The court found the wife's allegations of husband's adultery to be true. In such circumstances, the court held that right of divorce could not be granted merely on ground that the marriage had broken down and the husband who committed the wrong viz. Leading an adulterous life could not be given advantage of his own wrong on the ground of wife's alleged desertion that was still prepared to join him if he mended his ways. The court observed:

> Institution of marriage occupies an important place and role in society. Therefore it is not appropriate to apply any submission of "irretrievably broken marriage as a straight jacket formula for grant of relief of divorce. This aspect has to be considered in the

[26] *AIR 2001 SC 1709*
[27] *AIR 2001 Ori 151*
[28] *AIR 2001 MP 299*
[29] *AIR 2001 Cal 154)*

background of the facts and circumstances of the case.

In *Sanghamitra Singh,* a divorce decree passed by the family court at the behest of the husband on ground of desertion was set aside as the court found that even though the wife was staying away from the husband because of her job, there was no intention to snap the matrimonial tie.

Offence of bigamy and initiation of complaint by the second wife

In 1955, i.e., 57 years back, legislature pronounced monogamy as the basic rule for all Hindus subject to the provisions of the Hindu Marriage Act, 1955; brought the commission of bigamy under section 494 IPC, making it a criminal offence yet diluted considerably the intense seriousness of this crime by putting it in a different bracket from the general crimes. It was put under the heading offences against marriage. The lack of seriousness in tackling the menace of bigamy can be judged by the fact that the affected party here is the first wife and the offence is not against the society as such but only against her. Is she chooses voluntarily to or is even forced not to take any such action against the husband, he cannot be prosecuted because despite the fact that the other persons such as her relations, or even a president of a social or a women's organization are competent to lodge an FIR on her behalf, it is always on behalf of the first wife and if she does not agree to prosecute the husband, nobody else is empowered to take even this initial step. Societal perception towards commission of this crime is, therefore, predictably not only lenient but sometimes even shocking. Bigamous men are not seen as criminals, not even law breakers, but are often visualized as "macho" hinting that their actions are worth applaud and not reprinted. Political parties riding on the Indian culture and traditions woo, bigamous silver screen personalities, giving them tickets to fight elections or nominate them to the sacred parliament, where they take part in the law making process. Adopting double standards, these law breakers make laws riding on their economic and populist success, throwing caution to winds and shredding rule of law to pieces making them toothless tigers. It sends a clear message that here is a crime which even though within public knowledge would go largely unpunished if one is able to subjugate the first wife or

convince her emotionally or through some other means not to take any action. The cause of action, therefore, arises only in favour of the first wife and nobody else. Of late even in those cases where married men enter a second wedlock through deception keeping in dark the second wife of their marital status, on the discovery of fraud, the second wife is incompetent to lodge an FIR against him and prosecute him. An additional trauma for her would be her inability to file a case of matrimonial violence under section 498 A of IPC, since the second marriage would be void and she would not take the status of a wife and the protection available to a wife from domestic violence under the IPC would be denied to her. In this regard, important issues, such as can the second wife who was deceived into marrying a married man, file an FIR against him; can she also lodge a complaint against him under section 498 A, arose in a case that came before the apex court. Here the petition (*A Subhash Babu v. State of AP*[30]*,*) was filed by a Hindu woman that H had approached her for marriage and had made a representation that his wife had died leaving behind two children who were studying and living in hostel, while the fact was that the first wife was alive. In the court of the first judicial magistrate, the case was registered under sections 494, 495, 498 A and 420 as the woman had also alleged mental torture and harassment relating to dowry. The husband contended that a second wife cannot file a complaint under sections 494 and 495, or under 498 A as she is neither the aggrieved party in the former case nor a legally wedded wife in the later case. The high court noted that the offence punishable under section 494 as amended by the state of Andhra Pradesh was made cognizable and though there was no corresponding amendment to section 198 of the Cr PC the investigating agency was entitled to investigate; police was competent to file the charge sheet and the magistrate could take cognizance of the said offence on report filed by the police. The court concluded that for the offence punishable under sections 417, 420, 494 and 495 this was in accordance with the law but as the victim was the second wife, the second marriage being void the offence under section 498 A cannot be made out.

[30] AIR 2011 SC 3031

The husband's primary contention was that the magistrate is incompetent to take cognizance of the offences under sections 494 and 495 on the basis of the police report because even though the amended state legislation made the offence cognizable, the legislation enacted by the parliament in respect of section 198 of the Cr PC remained the same and in the event of any repugnancy between the two legislations, the one brought in by the parliament would prevail. According to him, the high court also failed to take note of the fact that it is only a legally wedded wife or anyone on her behalf who can make a complaint to the magistrate for the offence under sections 494 and 495 and here it was the second wife who does not have the status of a legally wedded wife who had filed a complaint with the police. The prosecution on the other hand contended that since in the state of Andhra Pradesh, due to the amendment these offences have become cognizable, the aggrieved person acquired the competency to lodge an FIR and the magistrate can take action on the basis of such FIR. The court explored the substantive content of both sections 494 and 495 and noted that the solemnization of marriage with a woman when the first marriage was subsisting and that too keeping her in dark about it, brings not only an element of dismay due to fraud but attachment of serious legal disabilities upon her as well, such as incapability to claim maintenance even when there is inhuman treatment, or physical or mental cruelty; ineligibilities to claim inheritance, outrageous and absurd social stigma. It shatters her ambition to lead a comfortable life and brings untold misery on her by her own kith and kin as also the society at large. The court the proceeded to explore the legislative intent for enacting sections 494 and 495 in the Code and observed that though these sections, law introduced monogamy which is essentially a voluntary union of life of one man with one woman to the exclusion of all others and abolished polygamy and hypergamy, which is not so recent past had brought innumerable miseries for women and had been one of the major reasons for her subordinate status. Section 494 was intended to achieve a laudable objective of monogamy, but this is possible only by expanding the meaning of the phrase "aggrieved person". For a variety of reasons the first wife may not choose to file a complaint against her husband e.g., when she

is assured of reunion by her husband, when he assures her that he would snap ties with the second woman etc, but no filling of the complaint does not mean that the offence of bigamy is wiped out and monogamy sought to be achieved by means of section 494 merely remains in the statute book. Having regard to the prevailing practices in the society sought to be curbed through section 494, there is no manner of doubt that the complainant should be an aggrieved person. Section 198(1) © of the Cr PC amongst other things provides that where a person aggrieved by an offence under sections 494 or 495 IPC is the wife, complaint on her behalf may also be filed by her father, mother, sister, son, daughter etc or with the leave of the court by any person related to her by blood, marriage or adoption. The court said:

The expression “aggrieved person” denotes elastic and an elusive concept and cannot be confined within a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of complainant’s interest and the nature and extent of the prejudice or injury suffered by the complainant. Section 494 does not restrict the right of filling complaint to the first wife and there is no reason to read the said section in a restricted manner as is suggested by the appellant’s counsel.

The court further said that section 494 does not say that the complaint for commission of the offence under this section can be filed only by the wife living and not by the woman with whom subsequent marriage takes place during the life time of the first wife. As here the man concealed the first marriage from the complainant, therefore, she becomes an aggrieved woman and a complaint at her instance is maintainable. Under section 495, the offence is an aggravated form of bigamy due to concealment of former marriage. A married man who by passing himself off as unmarried induces an innocent woman to become as she thinks his wife, but in reality his mistress commits one of the grossest form of frauds known to law and, therefore, severe punishment is provided. Therefore, the wife with whom the second marriage is performed after concealment of the former marriage would also be entitled to lodge

complaint for commission of offence under section 495 as she would be an aggrieved person within the meaning of section 198 Cr PC.

The court also came down heavily on the high court for quashing the proceedings pending before the magistrate under section 498 A on the ground that since the marriage of the woman with the accused was void, she was not his wife and the issue of dowry related harassment would not arise. Such reasoning according to the court, was quite contrary to law. The court said that a person who enters into marital arrangement cannot be allowed to take shelter behind the smoke screen of contention that since there was no valid marriage the question of dowry does not arise as such legalistic niceties would destroy the purpose of the provisions. Such hair splitting approach would encourage harassment to a woman over demand of money. If such restricted meaning is given it would not further the legislative intent rather on the contrary it would be against the concern shown by the legislature for avoiding harassment to a woman over demand of money in relation to the marriage. Legislation has not defined the term husband but the term is wide enough and would include a man who gets into a second marriage or a void marriage with another woman. The court held that a woman with whom the second marriage is solemnized by suppressing the fact of a former marriage would be entitled to maintain a complaint against the husband under sections 494, 495 and 498 A of the IPC.

Adultery as a ground for divorce and the plea for the DNA test on the child

For a matrimonial offence that usually takes place secretly, an in absence of the other spouse sometimes randomly and at other times in a planned manner, to bring in the direct proof is virtually next to impossible. With the advancement in scientific technologies a person having strong reasons to believe in the infidelity of the spouse leading to, in his perception fathering somebody else's child would normally be a nightmarish trauma that can now be authenticated puror by conforming it. In the past the courts have always adopted a protectionist attitude towards ordering or subjecting a party to the DNA test for fear of what they term as "bastardising" an innocent child. Therefore, unless and until the husband convinces the court

of non access to the wife at the time of possible conception of the child, the court would not order the child to undergo a DNA test. If he fails to convince non access, the court would apply presumption of paternity under section 112 of Indian Evidence Act. In a case before the Madras High Court (*Muniappan v. Ponni,*[31]) the husband, a contraction labourer at Bangalore, filed a petition praying for a decree of divorce under section 13 (i-a); 13 (1)(i) and (1) (i-b). Pending this petition he also filed an application under section 112 of the Indian Evidence Act, praying to the court to direct the blood test to be conducted upon the second son of the wife to find out its biological father as he suspected his paternity. The wife was residing at her parents place in Madepalli village all along and as he was working at Bangalore he had not visited her at the time of possible conception of the child, or any time near it as such he suspected that the wife was having an affair with another person and was continuing the same. The wife disputed the claims of the husband and contended that it is a settled position that DNA tests cannot be ordered as routine in all the cases; as she was a married woman, the presumption of paternity cannot be disputed an order of DNA test would amount to a violation of her rights of privacy and that the husband's sole objective in disputing the paternity of the child was to tarnish her image. The husband on the other hand contended, firstly, that in exceptional cases and his was one such exceptional case, a DNA test can be ordered and secondly as per the requirements of section 112 of the Indian Evidence Act, he had established non-access and made out a *prima facie* case.

The high court observed that a well settled principle in this connection is that a matrimonial court has the power to order a person to undergo a medical test and passing such an order by the court would not be in violation of the right to personal liberty under article 21 of the Constitution, but the court should exercise such power if the applicant has a strong *prima-facie* case and there is sufficient material before the court. If despite the court's order the respondent refuses to submit himself/herself to medical examination, the court will be entitled to draw an adverse interference against him/her. It quoted some important earlier judicial

[31] 2011 MLR 524 Mad.

pronouncement (*Kamti Devi v. Poshi Ram*[32]:) wherein it was held that conclusiveness of the presumption under section 112 of the Indian Evidence Act cannot be rebutted by the DNA test and proof of non-access to each other is the only way to rebut that presumption. The apex court in the past (*Gautam Kundu v. State of West Bengal,*[33]) had issued specific directions in this connection that were as follows:

i) That courts in India cannot order blood tests as a matter of course;

ii) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for having blood tests cannot be entertained;

iii) There must be strong prima facie case in that the husband must establish non access in order to dispel the presumption arising under section 112 of the Indian Evidence Act;

iv) the court must carefully examine as to what would be the consequences of ordering blood test, whether it will have the effect of branding a child as a bastard and the mother an unchaste woman; and

v) No one can be compelled to give sample of blood for analysis.

In the present case the court held that the husband here was successful in proving *prima facie* case of non access and that there was no harm in ordering of the DNA test and the same would not be violative of the constitutional rights of privacy guaranteed to the wife as an individual.

Though the pronouncement was appropriate in the light of the facts and circumstances of the case, but otherwise, the hesitation of the courts in ordering for a DNA test for fear of it having an adverse impact on the child, appears to be misplaced. Societal imposition of stigma and its adverse impact on the child is now an outdated concept. Present times recognize the right of a child to know who his real father is with the help of a DNA test and the same is being entertained by the courts in India. The child's first and intimate interaction is with the parents

[32] (2001) 5 SCC 311, 2002 MLR 28
[33] 1993 MLR 34: (1993) 3 SCC 418

and what is perhaps of utmost importance for the child is their undiluted love and affection. Where the father suspects the paternity of the child, and he has strong reasons to believe it but they are short of non access, it would be in the best interests of the child to have a conclusive determination of who his father is.

Purchase of divorce decree

Though the legislature has considerably liberalized obtaining divorce, the court has to be satisfied with respect to the genuineness of the grounds specified in the Act but it be obtained by a mere offer of payment of money to the unwilling spouse ? In the case decided by the Supreme Court in 2010, the marriage was solemnized in 1994; the parties lived together for only three months and then separated with the wife going back to her parents place. Three years later, the husband filed a petition in the court of law praying for a decree on grounds of her cruelty and desertion. Wife had filed cases under section 498A against the husband and his family members. Now she filed counter allegations of cruelty which the family court found as true but directed her to resume cohabitation under section 23A. the High Court in appeal reversed the order and passed the judgment based on the affidavit of the husband promising to pay her 10 lakh rupees as life maintenance in exchange of dissolution of marriage and withdrawal of criminal cases against him. However, the judgment was reversed by the apex court and upheld the decision of the family court on the ground that it amounts to purchase of divorce decree. This decision of the apex court it is submitted has provided a bad precedent by directing two unwilling partners to live together and that too for their whole life[34].

HINDU MARRIAGE ACT, 1955, Section 25 – Permanent alimony – Appellant-husband was ready and willing to pay lump sum amount by way of permanent alimony to respondent-wife – Respondent not willing to accept lump sum amount but expressed her willingness to live with appellant – Held: Respondent's desire to live with appellant at this stage and at this distance of time was not genuine – Suggestions made by respondent rejected. (Rishikeh Sharma Vs.

[34] (See for comments P.P. Saxena, ASI (2011) , Hindu Law vol XLVII at 492).

Saroj Sharma)[35]

Divorce by mutual consent and a charge of collusion

Divorce, unthinkable in the past and condemned and grudgingly permitted through statute in 1955, saw considerable liberalization in 1976, with introduction of divorce by mutual consent. This widening of essentially matrimonial fault/misconduct/disability based approach recognised mutually incompatible parties as otherwise mature individuals capable of drifting apart with minimum public bitterness bypassing the avoidable ugly showdown in contentious litigation. A practical reality though shows that strained matrimonial relations often give rise to a clash of egos and absence of communication in this exclusive intimate relationship, where no third party should usually intervene, but for a possible course of future action, prominence is gained by these third parties, (relations anddivorc friends) and voices and concerns of parties themselves are drowned completely in the diverse opinions bombarded on them from all sides. This furthers drift between the spouses killing any future communication possibilities. Thus, representation replaces direct interaction and in majority of cases where contentious litigation is presented before the courts praying for a decree of divorce, the spouses meeting is sprayed with hostility and absence of any communication amidst futile judicial conciliation attempts. Legal requirements, however, speak of mutual consent of parties and on paper; this prayer has to be signed by both spouses. Through rarely but possibility of the parties actually sitting together and planning their future course of action or amicable separation cannot be ruled out. However, whether it is through friends or relations or independent of them, legal requirements do bring them together and enjoin upon them to take a consensual and not a collusive step. Section 23 makes it clear that the courts are empowered to deny the remedy of divorce to a couple who collude with each other in order to get such a remedy. Collusion hints lack of existence of grounds enumerated in the statute, and perceived by the legislature as grave or serious enough to call for dissolution of matrimonial bond. It also indicates that merely on the desire of the parties or to suit their

[35] **2006 (8) SCJ 746**

convenience, marriage should not be broken. It reaffirms and reinforces the importance and sanctity of the institution of marriage in the Indian society. Therefore, where the situation appears that rather than existence of irreconcilable differences or matrimonial misconduct commission, the parties has deliberately decided in absence of any justifiable ground to further their nefarious designs, that would normally be unsustainable in law, the court would stop them and would deny them any relief. This year the court had to adjudicate on the difference between collusion and consensual action. The former is serious enough to warrant a rejection, while the later is advocated as the best form of effecting an amicable separation even by the judiciary. It is noteworthy, that divorce by mutual consent was introduced in 1976, while section 23 that discourages collusion, was put in the statute books right from the inception. It shows that with the passage of time, and altered perception of divorce, the separation is not as strictly frowned upon presently as in the past. This is precisely the reason why insistence on mandatory adjustment has been replaced by conciliation and upon its failure, a judicially approved dissolution. Here, (*Parma Jeet Kaur v. State of Uttarakhand,*[36]) post marriage, the spouses lived together for only sometime and then together filed a petition for divorce by mutual consent stating the required statutory requirements. They filed affidavits in support of the averments that the relations between them have sourced to such an extent that they cannot live together. Strangely enough the trial court dismissed the petition stating that the parties are in collusion and as per section 23 of the HMA not entitled to a relief. The matter was then taken in appeal to the Uttarakhand High Court, where the primary issue was whether a conflict exists between sections 23 (1) (c) and 13 B. Section 23 (1) (c) cautions the court to dismiss petition on ground of collusion other than in suits under section 11 (void marriages); section 13 B on the other hand enables parties to file a petition for divorce by mutual consent. This provision was inserted in the Act with effect from 18.05.1976. If petition under section 13 B is dismissed on grounds of collusion, the object of inserting the provision would be defeating as in every case the parties are required to file a joint petition with mutual

[36] AIR (2011) 9 Utr 5

consent. The court allowed the prayer for divorce and said that both sections 11 and 13 B are expressly exempted from the clutches of section 23 (1) (c) and held that the trial court had erred in law by holding that mutual consent amounts to collusion.

Waiver of one year mandatory time period

A one year mandatory separation is the primary requisite for presenting a prayer for mutual consent based divorce, but this is often viewed as unnecessary/lengthy by parties desirous of an instant dissolution. Result usually is an application for condoning/waiver of this waiting period despite the fact of its impermissibility owing to statutory provisions. Stray instances of judicial condonation in past though in exceptional cases raise the hopes of impatient spouses wanting immediate freedom from this unwanted marriage. Even after the first rejection at the family court level they don't hesitate in appealing to the higher courts, without realizing that the duration for the verdict for condonation would invariably outrun the statutory separation time period. This year again the court reiterated the mandatory requirement of section 13 B and held that one year minimum separation is mandatory and not directory and admits of no exception. The parties here (*Mohin Saili,*[37]) married in April 2010. The husband was working in a renowned food chain in Delhi and the wife was a flight attendant with Qatar Airways in Doha. Their stand was that right from the beginning of the marriage they realized that they were not suited to each other; stayed together for a very short time and without waiting for one year to expire, they presented a joint petition praying for a decree of divorce by mutual consent, that was dismissed by the family court in November 2010. The matter was then taken in appeal to the high court which also dismissed the waiver application holding that the waiting period of one year is not merely directory but is mandatory. The parties primarily relied on two earlier pronouncements namely, *Pooja Gupta v. Nil* 118 (2005) DLT 492 and *Tarun Kumar Vaish v. Meenakshi Vaish* (2005) (2) Cur CC 353 and the exception permitted under section 14 of the Act. Section 14 provides:

(1) Notwithstanding anything contained in this Act, it shall not be competent for any court to

[37] AIR 2011 Delhi 65

entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of presentation of the petition one year has elapsed since the date of marriage.

Provided that the court may upon application made to it in accordance with such rules as may be made by the high court in that behalf allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage or may dismiss the petition without prejudice to any petition to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

In *Pooja Gupta,* the judiciary had opined that the legislative intent behind the amendment to section 14 proviso was expeditious disposal of divorce cases by way of mutual consent and had observed that as long as the court was satisfied that an essential reason for exemption for filling a divorce by mutual consent prior to expiry of one year after the marriage is that, the prayer for dissolution is not under coercion/intimidation or undue influence and there are no chances of reconciliation; the parties have fully understood the impact and effect of divorce by mutual consent and the continuance of such a marriage is bound to cause undue hardship to the spouses, they can dispense away with the one year requirement. The other relevant considerations which may be considered for granting the exemption from the passage of one year before filing a petition for divorce by mutual consent are, the maturity and the comprehension of the spouses, absence of coercion/intimidation/undue influence; the duration of marriage sought to be dissolved, absence of any possibility of reconciliation, lack of frivolity, lack of misrepresentation or concealment, and the age of the spouses and the deleterious effect of the continuance of a sterile marriage on the prospects of remarriage of

the parties.

The present court differed from both the abovementioned cases and explaining the distinction between section 14 and section 13 B observed that section 14 is applicable to those cases where the petition commences under section 13 of the Hindu Marriage Act, 1955, but section 13 B stands on a totally different platform. The former provides for the time frame for the presentation of the petition and does not lay down an ingredient for granting of divorce. The bar under it was initially for a period of 3 years till 1976 but was then reduced to one year. Section 13 B was introduced in 1976, and provided for one year separation before the petition could be presented in the court. The nutshell effect of cumulative provision is that while under section 14 the legislature in itself makes room for its dilution by providing the leniency in exceptional circumstances, there is no parallel provision under section 13 B. It requires mandatory separation of one year before the petition can be presented. The waiting period of 6-18 months interregnum is intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this translational period one of the parties may have a second thought and change the mind not to proceed with the petition. Thus the period of one year as living separately in section 13 B (1) is a part of substantive law for seeking divorce by mutual consent and not a procedural formality that can be done away with. Therefore, the condition of living separately for one year is not directory but mandatory and the plain meaning and requirement of law stated under these provisions should be satisfied before the court gives any relief. Hence it cannot be permissible to mould the requirement of a provision and that too only on the ground of the convenience of the parties. The proviso to section 14 that provides for the presentation of petition even before the lapse of one year cannot be read into the provision of section 13 B and both are independent of each other. Hence the legislative mandate of one year separation under section 13 B cannot be waived off as it is a prerequisite and cannot be given any different interpretation to the contrary that would defeat the very intent of the legislation.

Waiver of six months period as between the two motions/petitions

According to the provisions of section 13 B of the Hindu Marriage Act, for a petition praying for a decree of divorce by mutual consent after the first joint petition the parties have to wait for a period of six months but not later than 18 months before they file a second motion reaffirming their desire to obtain divorce. On the issue of waiver of the six months intervening petition the court relaxed and waived it off in a case from *Uttarakhand.* Here, (*Samardeep Singh v. Randeep Kaur,*[38]) the parties married in 2009, lived together for a period of fifteen days without consummating the marriage and filed a petition praying for a decree of divorce after demonstrating a separation of one year. After this petition, both of them filed an application for waiver of the six months waiting period before they could file the second motion. The trial court rejected their prayer as not maintainable in law but the high court held that the waiting period can be waived, primarily influenced by the fact that the negotiations of the second marriage of the wife were being held up on account of the delay in obtaining the decree of divorce. The wife had already accepted rupees 4.5 lakhs as alimony or settlement from the husband. The court explored decisions of several high courts (*Abhay Chowhan v. Rachna Singh,*[39]; *Roopa Reddy v. Prabhakar Reddy*,[40]; *Omprakash v. K Nalini*,[41]; *Dhirran Harilal Garasia v. N. Mansu*, [42]and *Dhanjit Vadra v. Beena Vadra*,[43]) in the past and held that section 13 B (2) is merely directory in nature and the decree of divorce can be passed even before expiry of waiting period of six months by waiving the period if the circumstances so require. The matter was remanded back to the family court to proceed without any further delay. The Uttarakhand High Court here deviated from the clear provisions of section 13 B twisting its requirements completely. Legal provisions should not be bent to suit the convenience of the parties to hop out of the marriage so as to hop in into another alliance

[38] AIR 2011 Utr 22, as per Prafulla Pant J
[39] AIR 2006 Del 18
[40] AIR 1994 Karn 12
[41] AIR 1986 AP 167
[42] AIR 1988 Guj 159
[43] AIR 1990 Del 146

quickly. 15 days cohabitation, one year separation; then demonstration of impatience and demanding for judiciary waiver of a statutory provision under which they wanted dissolution and the court amazingly acceding to such request etc. appears as perplexing as the audacious demand in itself. Six months is not an awfully long time and its wait was in conformity with the statute. There is no hint anywhere in the Hindu Marriage Act, 1955, to show any kind of relaxation in the procedure to be followed under section 13 B. Judiciary should implement the clear legislative provision and desist from creating uncertainties on flimsy grounds. It is undeniable that it is desirable to adopt a humane rather than a technical approach in sensitive matters that concern people intimately, but the law enabling parties to culminate their marriage should be adhered to seriously. Bending rules shows a casual approach unsuited to the Indian judiciary and sends a wrong signal. It must be avoided lest deviation becomes norms with scope for further openings as appears from the verdict of the Uttarakhand High Court.

Consent of the parties at the second motion

The third requirement of section 13 B is presenting a joint petition at the second motion after a wait of six months. Thus a petition for divorce by mutual consent requires involvement of the parties at the two important stages, first at the time of moving the joint petition itself and then after a mandatory wait of six months. In majority of cases, it is a practical reality that the parties after filing of the first joint petition would enter into agreement with respect to settlement of the property which may be acted upon as between them, but till the second motion actually culminates into pronouncement of a divorce decree, the subsistence of the marriage cannot be disputed. It is not the agreement and acting upon it that may have any bearing on the subsistence of or culmination of martial relations, as a marriage would come to an end only by a decree of the court and nothing short of it. Failure to bring in the second motion would result in continuation of the status of the husband and wife despite the fact of their separate habitation and acting upon the settlement of property/money in contemplation of divorce. Where the first joint petition has been filed, settlement entered and acted upon, six

months have passed and the parties had every intention to present the second motion reaffirming their desire to obtain a judicial finality of the dissolution of their marriage, but before they could do so, one of the parties dies, then the first joint petition would become infructous. The fact that during the period of six to eighteen months neither party has withdrawn or resiled from it is immaterial. A settlement that might have been arrived at amongst parties during their lifetime in separate proceedings cannot have bearing for an order being brought into existence[44].

In *Hitesh Bhatnagar v. Deepa Bhatnagar*,[45] the issue was whether the consent given at the time of the first motion continues *ipso facto* to the second motion as well or has to be expressly given post six months, a second time? Here the parties married in 1994, were blessed with a daughter in 1995 and separated from each other in 2000 due to temperamental differences and in 2001, filed a petition praying for a decree of divorce by mutual consent. Before the grant of divorce at the time of the second motion, the wife withdrew her consent. The District Judge, Gurgaon, dismissed the petition though the husband insisted on divorce. The high court dismissed it in 2006 and the husband came in appeal before the Supreme Court. The main issue before the court was, whether the consent once given can be withdrawn and secondly, can the court grant divorce even if one party withdraws the consent?

The wife maintained that at the time of filing of the initial petition she gave her consent under duress and mental stress. She never wanted divorce and was even at this stage ready to live with him as his wife. The husband claimed that as between the two motions there was a settlement that he would pay to her a sum of rupees three and a half lakhs of which one and a half lakhs have already been paid and he was ready to pay the rest as well. He was also ready to take care of the child and ensure her future. He further contended that since they are living separately for the last eleven years, the marriage should be taken to have been broken

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[44] (*Chikkamuniyappa v. Ramanarasamma*, AIR 2011 (NOC) 42 (Karn))

[45] AIR 2011 SC 1637

down irretrievably and hence should be dissolved. The court held that the most important consideration is that the consent of both the parties should be free and voluntarily given and unless the court is completely satisfied it would not pronounce divorce. The court distinguished the present case from *Anil Jain v. Maya Jain*, [46] and held that there the wife had taken the money but was firmly against living with him, but in the present case she wanted to live with him and protect her marriage for the sake of the child. It further said that it would be travesty of justice to dissolve the marriage as having broken down as one of the parties was keen to continue it. Though there was bitterness amongst the parties and they were not able to resolve their differences; had not lived together for the past about eleven years, the court hoped that they would give this union another chance if not for themselves but for the future of their daughter. The court concluded by quoting the great poet George Eliot:

> What greater thing is there for two human souls than to feel that they are joined for life- to strengthen each other in all labour, to rest on each other in all sorrow, to minister to each other in silent, unspeakable memories at the moment of the last parting?

The facts here were in fact similar to the case that the court distinguished it from. As per the settlement terms the wife had already accepted part of the money and was living separately from him for the past eleven years. In *Anil Jain's* case the wife openly demonstrated her determination not to live with the husband but here it could be correctly inferred from the length of the separation, despite the fact that she outwardly maintained her willingness to protect the marriage. That there was a mismatch between her statement and her conduct can well be gauged by the fact that if the parties genuinely desire a reunion they can do it themselves and the possibility or permissibility of it is not dependent upon the judiciary giving a direction only to the erring party. If she wanted to protect her marriage for the sake of her child but without living with him there was no use in protecting this empty shell. The child would not be in a position to secure the love and affection of the father where the parents are physically separate. If it is apparent that the separation time period is lengthy with no hope of

[46] AIR 2010 SC 222

its end, it should be a natural and logical conclusion leading to the death of the marriage. Though the court's hesitation in relaxing the requirements of section 13 B can be well understood and appreciated past deviation set an unhealthy trend and perceived situational similarities further encourage parties into expecting a zone of belief and judicial relief.

Conversion of contentious litigation into a mutual consent petition

Matrimonial problems need a solution that is provided by the legislature in form of either conciliation or a formal separation. In majority of cases post matrimonial turbulence, the scope for sitting together and finding a mature solution is inconceivable due to hurt egos, and mutual mistrust also laden with a desire to get on to each other. Thus a contentious litigation is presented where not only the consent of the other is not required to be taken but the desire to drag the other party to the court also appears dominant. Accosted with the harsh reality of actual involvement with the adversarial litigative system in India is enough to bring the egoistic parties to their senses, and thus during the trial it is not uncommon for them to bury their differences and take a realistic and practical look to their present and a possible future course of action. The courts as courts of equity, justice and good conscience and with a practical approach to this human behaviour often come to their succor. In a case from Gujarat, (*Uday Narendrabhai Bhatt v. Shivangi Narendrabhai Shastri,*[47]) the husband after the strained matrimonial relations, went to the court with a prayer of divorce by the wife on the ground of non-discharging of the matrimonial duties. The wife did appear through her counsel but her later both decided to file the application for putting an end to their marriage with mutual consent without making any allegation against each other. They thus presented an application before the court for conversion of their contentious divorce petition into that of mutual consent under section 13 B, but the same was refused by the family court on the ground that the court lacks competency to do so. The parties presented an appeal with the same request to the high court. Their original petition was presented to the court in 2009 and it was almost two years that the matter had already reached the court. The wife categorically

[47] AIR 2011 Guj 156

stated that she did not want to live with the husband and that there was no life left in this marriage. She contended that the court is always empowered to convert a contentious litigation into that of mutual consent based petition if the remedy asked for it is the same and both the parties agree to it. The court noted that the parties were living separately from each other since 2008, all efforts for reconciliation had failed and both of them had agreed to put an end to their marriage with mutual consent. It also observed that ordinarily such petitions are not filed in the high court but the proper forum for this would be the lower courts and if the matter has reached the high court with such a prayer, it usually would refer the matter back to the lower court with appropriate directions but in exceptional cases the court may itself order for dissolution of marriage by a decree of divorce by mutual consent on a joint application filed by the parties. The parties specifically pleaded that the matter should not be sent back to the lower court as if after relegation to the lower court, they have to file the mutual consent petition afresh, it would mean additional litigation expenses; secondly, the court would not dispense away with the waiting period of six months and thirdly, that it was only a difference in the form while the substantive content or the prayer is for an identical relief. The complete file of the parties was before the high court and, therefore, it was only a matter of hyper technicality to refer the matter back to the trial court. In the present case the court said that judicial approach should be to avoid putting the parties to unnecessary inconvenience or subjecting them to heavy expenses of litigation. Where the file was before the court and when the provisions of the section 13 B (2) are not imperative, the court said it failed to see, what useful purpose would be served in sending the parties to the trial court for getting the marriage dissolved by a decree of divorce by mutual consent. This approach, the court felt can be adopted in cases where an abrupt/hasty decision is taken by the parties to put an end to their marriage but not where there is no scope of any rethinking of the course of action. In the present case the court said, there was no chance of a reunion, the husband had come with the draft of permanent alimony along with the terms of settlement that was also accepted by the wife. The parties were living apart from each other for a period of more than two years,

and a relegation to the lower court for getting their marriage dissolved by mutual consent would consume further time. Thus taking into account the totality of the facts, divorce was pronounced without referring the matter to the lower court.

In another case from Bombay, (*Prakash Alumal Kalandri v. Jahnavi Prakash Kalandri,*[48]) the parties married in 1993, had two children from this marriage and then separated in 2006. The wife presented a prayer for divorce on the ground of husband's cruelty, but pursuant to counseling, during the pendency of the petition they decided to go for divorce by mutual consent. Accordingly, the consent terms were executed and signed by both the parties and then they jointly filed an application for conversion of this petition into a joint petition for divorce by mutual consent. As per the consent terms, the husband agreed that the custody of both the children would be with the wife and she on the other hand agreed to give access of both the children to him during weekends and vacations including temporary custody. Husband also agreed to pay Rs. 5000/- as maintenance to children but the wife waived her maintenance rights, alimony and *stridhan* and withdrew all civil and criminal proceedings that she had filed against him. After filing and agreeing to these conditions in the consent terms, the husband withdrew his consent on the ground that the wife had failed to provide him access to the children. He contended that as consent of both the parties at both the motions is relevant so divorce cannot be granted if he withdraws his consent. The family court held that in this unique scenario, the husband cannot be allowed to withdraw his consent, rather divorce by mutual consent is inevitable on the basis of consent terms. The matter then went to the high court which held thus:

If the petition is filed simpliciter under section 13 B of the Act for divorce by mutual consent, the court must satisfy itself that the consent given by the parties continues till the date of granting a decree for divorce. Even if one of the parties unilaterally withdraws his/her consent, the court does not get jurisdiction to grant a decree of divorce by mutual consent in view of section 13 B. However, the situation would be different if the parties in the first instance resort

[48] AIR 2011 Bom 119

to petition for relief under section 9/13 of the Act and during the pendency of such petition they decide to invite decree for divorce by mutual consent.

On the basis of an agreed arrangement if the parties were to execute "consent terms" and then file a formal application to convert the pending contentious petition to be treated as having been filed under section 13 B of the Act for grant of decree of divorce by mutual consent, then in latter proceedings before the decree is passed, one party cannot be allowed to unilaterally withdraw the consent if the other party has already acted upon the consent terms either wholly or in part to his/her detriment i.e., the court will have to be satisfied that there is sufficient good and just cause for allowing the party to withdraw the consent lest, it results in permitting the party to approbate or reprobate; and that the other party would not suffer prejudice which is irreversible due to withdrawal of the consent. If these twin requirements are not satisfied, the court should be loath to entertain the prayer to allow the party to unilaterally withdraw his/her consent.

The petition under section 13 B, therefore, stands on a completely different pedestal as the procedure is well defined and is in the nature of a self contained code whereas if the petition is under section 13 the rules of section 23 would apply. The impact of the pronouncement is that where the petition is filed under section 13 B, all the requirements specified therein would have to be adhered to strictly, but if the petition is initiated under section 13 as a contentious litigation and then converted into one by mutual consent with the permission of the court, upon execution of consent terms and acting upon it, divorce is inevitable. It is a sound approach as efforts of the court must always be directed towards amicable separation if reunion becomes impossible.

In another case from Bombay, (*Rakesh Harsukhbai Parekh v. State of Maharashtra,*[49]) the parties married in 2005 and started living apart from each other a year later. The husband filed a suit under section 13 praying for divorce on the ground of his wife's cruelty a year later. The reconciliation attempts were undertaken and the parties settled their disputes and

[49] AIR 2011 Bom 34

withdrew allegation against each other and filed consent terms with respect to grant of divorce; for withdrawal of the allegations and grant of lump sum alimony to the wife. Thereafter, they made a joint application for waiver of the six months period for acting upon the consent terms and obtaining divorce by mutual consent. Their application was rejected on the ground that the period cannot be waived of and the petition has to be adjourned for six months. The parties filed a writ in the high court and the court while allowing it held that section 13 B was enacted to allow the parties to file petitions for divorce by mutual consent upon the grounds stated therein. The waiting period enables them to reconsider their decision to dissolve their marriage. If a petition under section 13 has remained on the file of the court for as long as three years as in this case, the parties require no respite period to reconsider their decision to dissolve a broken marriage in which various allegations based upon the grounds under section 13 have been made and later withdrawn upon seeing reasons. In addition, the court pointed out that the family court is enjoyed, to consider the alternative mode of reconciliation between the parties which if successful would enable a reunion and if a failure, would pave way for an amicable settlement. If that is followed the parties would settle their disputes and withdraw the allegations and if in the meanwhile a period of six months has transpired, the statutory period of respite is availed of by the parties. Consequently, the literal interpretation of section 13 B (2) would not be required in such cases. Any other interpretation, the court said would mean punishing the parties who attempt a settlement of their disputes. As they had gone through the process of divorce in the court for more than six months, during the pendency of the petition and only modified their views upon settlement of the disputes, hence such a petition though for divorce by mutual consent would be allowed. The writ petition was allowed and the case was remanded back to the family court for necessary action under section 13 B.

J&K HINDU MARRIAGE ACT, 1980

We saw in our previous chapter how the local Act came to be passed and what does it generally contain. Let us proceed with some more details in this part of the chapter. The J&K

High Court in *Smt.Lajya Devi v. Smt.Kamala Devi* [50] had to decide the validity of a custom. In this case marriage was solemnized in violation of section 5(I) read with section 11 of the JK Hindu Marriage Act,1980 and the question was whether the invalidity of marriage can be raised after the death of one of the parties to the marriage ? The court while affirming that a third person aggrieved by such marriage can be allowed to raise such objection even after the death of the parties, observed: The essential attributes of a valid custom are, therefore, that it should be ancient, reasonable, must have continued or observed without interruption, and must be certain of its nature and the person to whom it is alleged to effect, besides being uniform and obligatory. It should not be immoral or opposed to public policy. The English rule that "A custom in order that it may be legal and binding must have been used so long that the memory of a man can run, cannot be applied to Indian conditions as was held by the Supreme Court in *Gokal Chand v.Parveen Kumar*[51] .In this case Act No IV of 1980 was enacted after the repeal of Act No VIII of 1955 on 14-04-1980. Section 36 of the new Act provided that the repeal of the Act shall not affect the validity, effect or consequences of anything done or suffered to be done under the old Act, any application or liability already incurred before the commencement of the new Act and legal proceedings or remedy in respect of any privilege, application, liability and such legal proceedings or remedy which may be instituted continued or enforced under the new Act. Section 3 of the new Act disallowed the marriage during the life time of the first wife, so the marriage being void cannot be saved by custom when such custom is of recent origin. The marriage being void cannot create a legal status of husband and wife .In another case namely, *K.Radha Krishnan Nayyar v. Shrimati Radha* [52] *the* J&K High Court held that the territorial jurisdiction of the Sate Act is, however, applicable to all the Hindus, Buddhists<Jains and Sikhs who have been specified in section 2 of the Act irrespective of their residence of domicile. Thus section 21 of the Act is applicable to persons specified in section 2 of the state Act whose marriage is solemnized

[50] *1992JKLR 124*
[51] (AIR 1952 SC 231).
[52] *j&K LR 1992 at 456*

within the State of Jammu and Kashmir irrespective of their domicile. It further made it clear that persons governed by the State Act at the time of marriage and whose marriage was solemnised within state can seek relief only in the state courts and not in any other court under the Central Act unless both the parties have settled and become domicile of place to which State Act is not applicable but central Act applies. The High Court, however, did not declare a marriage null and void in the case of *Ashok v. Sunita*[53]*, as* the parties continued to live as husband and wife and their continued living as husband and wife does not give any scope to the presumption that her pregnancy was doubtful. The court asked the parties for reconciliation rather than for renunciation of marital relationship.

Conclusion

The Hindu marriage Act has been in operation for more than four decades now and has served well to regulate the matrimonial jurisprudence in India, as well as, in the state of Jammu and Kashmir though under different enactments because of their common base. The multiplicity of matrimonial cases indicate the growing consciousness of the people about their rights but this upsurge in such cases reveal that money and market has shaken the foundation of our familial ties. The religious sanctity is paving way for commercialization of family relations which is not a good thing for our society as a whole.

[53] *2002 SLJ 533*

Chapter 1

Introduction

1. What is Hindu Law?

Hindu law in its current usage refers to the system of personal laws (i.e., marriage, adoption, inheritance) applied to Hindus, especially in India.[1] The substance of Hindu law implemented by the British was derived from early translations of Sanskrit texts known as Dharmaśāstra, the treatises (*śāstra*) on religious and legal duty (*dharma*). The British, however, mistook the Dharmaśāstra as codes of law and failed to recognize that these Sanskrit texts were not used as statements of positive law until they chose to do so. Rather, Dharmaśāstra contains what may be called jurisprudence, i.e., a theoretical reflection upon practical law, but not a statement of the law of the land as such[2] . The Classical Sanskrit term for "law" is dharma. This is "law" in the historical sense (of course predating the modern division of religious from secular law), as such including aspects such as ritual purification, personal hygiene regimens, and modes of dress, in addition to court procedures, contract law, inheritance, and other more familiarly "legal" issues. As in other religious traditions based on orthopraxy (rather than testimony of faith; see e.g. Halakha Sharia), the modern attempts to separate religious practice from secular law has been criticized by traditionalists (orthodox Hinduism)[3]. According to Rocher, the British Raj implemented a distinction between the religious and legal rules found in Dharmaśāstra and thereby separated *dharma* into the English categories of law and religion for the purposes of

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[1] See, for example, Herbert Cowell's definition of Hindu law in *The Hindu Law: Being a Treatise on the Law Administered Exclusively to Hindus by the British Courts in India* (Calcutta, Thacker, Spink and Co.: 1871),6

[2] see: Richard W. Lariviere, "Justices and Paṇḍitas: Some Ironies in Contemporary Readings of the Hindu Legal Past," in *Journal of Asian Studies* 48 (1989), pp. 757–769, and Ludo Rocher, "Law Books in an Oral Culture: The Indian Dharmaśāstras," *Proceedings of the American Philosophical Society* 137 (1993), pp. 254–267.

[3] K.V. Rangaswami Aiyangar, *Rājadharma* (Adyar: Adyar Library, 1941), 23; Robert Lingat, "Les Quatre Pieds du Procés," *Journal Asiatique* 250 (1962), 490–1; and Richard W. Lariviere, "Law and Religion in India," in *Law, Morality, and Religion: Global Perspectives*. ed. Alan Watson (Berkeley: University of California, 1996).

colonial administration.[4] However, a few scholars have argued that distinctions of law and religion, or something similar, are made in the Hindu legal texts themselves[5].

Law as understood by the Hindu is a branch of *Dharma.* Its ancient framework is the law of the Smritis. The Smritis are institutes which announce rules of *Dharma* and the classical definition of *Dharma* is: "*what* is followed by those learned in the Vedas and what is approved by the conscience of the virtuous who are exempt from hatred and inordinate affection." The Hindu law in its modern sense is not limited to the *Dharma or Shastras but* encompasses within its fold usage, customs, statutes, rules, regulations and enactments based on the law of land[6]. Whatever may be the source of Hindu law, it is no doubt, very important but what is more important is to know to whom does this law apply? Ordinarily everybody would guess that Hindu law is applicable to Hindus. However, it is not that simple, because the word Hindu is susceptible to different meanings and constructions in the modern Indian society. Now let us try to explain the word 'Hindu'. It is generally believed that the word 'Hindu 'came into vogue with the advent of Greeks who used to call the inhabitants of the Indus Valley as *Indoi.* Later, this designation was extended to include all persons who lived beyond the Indus valley. The word Hindu had at that time no religious attachment or basis. However, with the advent of Muslims in India, for making differentiation, the word Hindu came to be linked with members of a particular religion. Hindu law has come a long way from its traditional ritualistic jargon to new vistas of change and reformation. Nevertheless, the word Hindu remained susceptible to many interpretations, because of lack of any precise, cogent and comprehensive definition of the

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[4] Ludo Rocher, "Hindu Law and Religion: Where to draw the line?" in *Malik Ram Felicitation Volume*. ed. S.A.J. Zaidi (New Delhi, 1972), 190–1.

[5] J.D.M. Derrett, *Religion, Law, and the State in India* (London: Faber, 1968), 96; For a related distinction between religious and secular law in Dharmaśāstra, see Timothy Lubin, "Punishment and Expiation: Overlapping Domains in Brahmanical Law," *Indologica Taurinensia* 33 (2007): 93–122.

[6] Donald R. Davis, Jr., "On Ātmastuṣṭi as a Source of *Dharma*," *Journal of the American Oriental Society* 127:3 (2007), pp. 279–96. For contrary opinions that place great weight on the importance of *ātmastuṣṭi*, see Werner Menski, *Hindu Law: Beyond Tradition and Modernity* (Delhi: Oxford UP, 2003), p.126

term Hindu[7]. After independence the Govt. decided to codify the Hindu law, on the recommendations of the Hindu law Committee constituted in 1941, prior to independence[8]. The Govt. did introduce a comprehensive legislation in the form of Hindu code but it could not be passed due to the dissolution of the Constituent Assembly. However, the Hindu law was codified in piece meals during the golden era of Hindu jurisprudence i.e.1955-56. All these enactments made it clear that Hindu law would apply to Hindus by religion in its wider sense. The statutory definition of the word 'Hindu' was not confined to Hindu religion but was extended to include all those who were Buddhists, Jains, and Sikhs etc. The Supreme Court in a bid to explain the concept of Hindu by religion prescribed certain essentials in the celebrated case of *Shastri* v. *Muldas*[9], as under:

1. Acceptance of Vedas with reverence;
2. Recognition of fact that the means or ways to salvation are diverse; and
3. Realization of the truth that number of Gods to be worshiped is large.

However, there were persons who could hardly be called Hindus by religion, yet Hindu law applied to them and since Hindu law applied to them, they were called Hindus. Thus, a person who was not a Muslim, Christian, Parsi or a Jew, was regarded a Hindu, simply because Hindu law applied to him. In the post-independence enactments relating to Hindu law, like Hindu Marriage Act, 1955, Hindu Minority and Guardianship Act, 1956, Hindu Succession Act, 1956 etc., the term 'Hindu' came to be associated with a person to whom Hindu law applies.

But when we analyze the concept evolving thereof, it becomes abundantly clear that the definition of Hindu used is broad enough to include-

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[7] Domenico Francavilla, *The Roots of Hindu Jurisprudence: Sources of Dharma and Interpretation in Mīmāṃsā and Dharmaśāstra*. Corpus Iuris Sanscriticum. Vol. 7 (Torino: CESMEO, 2006), pp.165–76.
[8] Bannigan, John (3 December 1952). The Hindu Code Bill. Far Eastern Survey: American Institute of Pacific Relations, XX1, Retrieved 22 October 2008.
[9] (AIR 1966 SC 1119)

i. A Hindu in all its forms and developments including a Virashiva, Lingayat, follower of Brahma, Prathana or Arya Samajs;

ii. Buddhist, Jain or Sikh by religion, etc.

iii. A convert or a reconvert to Hindu religion

iv. A person brought up as a Hindu, Buddhist, Sikh or a Jain.

After analyzing the definition further, it becomes obvious that all the religions having their origin in the Indian soil are treated as Hindu religion. It was possibly this reason that prompted the drafters specifically to exclude Muslims, Christians, Parsis and Jews from the definition of the word Hindu. It may be of some interest to note here that practically all the sects and sub-sects of the Hindu religion are diametrically opposite in their very principles and practices claiming to form one religion. For instance, while the Hindus are idol worshipers, the Buddhist are averse to such practices; Arya Samajis believe in unity of God and do not approve of idol worship; Sikhs do not worship idols but owe allegiance to Guru Nanak, a staunch believer of monotheism.

All this shows that the process of religious co-relation was based on some expediency rather than religious assimilation. What Hindu law now stands for after this legislative exercise may be summed up in the words of Mulla as under:

i. At present Hindu law applies To Hindus by birth and to Hindus by religion, that is to say, to converts and re-converts to Hinduism,

ii. To illegitimate children where both parents are Hindus,

iii. To illegitimate children where the mother is a Hindu and the children are brought up as Hindus,

iv. To Brahmos, Arya samajists, Lingayats and to persons who may have deviated from orthodox standards of Hinduism in matters of diet and ceremonial observations and

v. to every other person who may be regarded as Hindu unless he can show some valid local, tribal or family custom to the contrary and

vi. To Jains, Sikhs and Buddhists.

In a sense, a Hindu remains always a Hindu, at least for the purposes of discharging his obligations under the Hindu law enactments in vogue. In *Vilayat Raj v. Sunita*[10], it has been held that the Act (Hindu Marriage Act, 1955) can apply even to a person who though a Hindu when the marriage was solemnized has ceased to be one, by thereafter changing his religion.

2. Sources of Hindu Law

2.1. Ancient Sources :

The ancient sources include :(i)Sruti (ii) Smriti (iii) digests and commentaries (iv) Customs.

a. Srutis (Vedas):

Śhruti is a Sanskrit term meaning "hearing, listening"), is the body of sacred texts comprising the central canon of Hinduism and is one of the three main sources of dharma. [11]These sacred works span much of the history of Hinduism, beginning with some of the earliest known Hindu texts and ending in the early modern period with the later Upanishads[12].This literature differs from other sources of Hindu Philosophy, particularly smriti or “remembered text”, because of the purely divine origin of śruti. This belief of divinity is particularly prominent within the Mimamsa tradition. The initial literature is traditionally believed to be a direct revelation of the “cosmic sound of truth” heard by ancient Rishis who then translated what was heard into something understandable by humans.[13] Sruti is the name given to four revealed books of Hindus,namely, Rig veda, Yajur veda,Saman veda and Atharva. Since these are considered to be the voice of God, so they are considered as gospel of God and worth recognition . these books provide for some basic norms of living and beliefs of co-existence.

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[10] (AIR1983 Del 351

[11] Clooney, Francis X. *Why the Veda Has No Author: Language as Ritual in Early Mīmāṃsā and Post-Modern Theology*Journal of the American Academy of Religion, Vol. 55, No. 4 (Winter, 1987). Pp 660

[12] Flood, Gavin. 1997. *An Introduction to Hinduism*. Cambridge U.P pp 39

[13] Jho, Chakradhar. 1987. *History and Sources of Law in Ancient India* Ashish Publishing House, pp.59

b. Smritis:

In literal sense the word 'smriti' stand for "what was remembered". Smriti is the name given to the recollections handed down by the sages of the commandments of God. The Hindu jurisprudence regards the Smritis,which are often designated as Dharamshastras,as constituting the foundation and an important source of law. The smriti texts evince profound and acute thinking of the sages and Smritkars(jurisconsults)responsible for them. It is, infact , Smritis which contain secular law on which the present Hindu law is based, though only in a rudimetory form. Smriti also denotes tradition in the sense that it portrays the traditions of the rules on dharma, especially those of lawful virtuous persons. This is understood by looking at traditional texts, such as the Ramayana, in which the traditions of the main characters portray a strict adherence to or observance of dharma (the same however need to be understood as experiences rather than binary haves or have-nots).[14]

Both Shruti and Smriti represent categories of texts that are used to encapsulate Hindu Philosophy. However, they each reflect a different kind of relationship that can be had with this material[15]. Śruti is considered solely of divine origin. Because of the divine origin, it is preserved as a whole, instead of verse by verse. Smriti on the other hand may include all the knowledge that has been derived and inculcated 'after' Śruti had already been received by the great seers or Rishis. In other words it is not 'divine' in origin, but was 'remembered' by later Rishis by transcendental means, and passed down though their followers. In some of the Smriti text itself, we are reminded of the divine nature of the Śruti texts, and are ever advised that in case of any conflict between the two, the Śruti will always overrule Smriti[16].

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[14] Davis, Jr. Donald R. Forthcoming. *The Spirit of Hindu Law*. Ch 1.

[15] Coburn, Thomas, B. *Scripture" in India: Towards a Typology of the Word in Hindu Life* Journal of the American Academy of Religion, Vol. 52, No. 3 (Sep., 1984), pp. 448.

[16] Brick, David. "Transforming Tradition into Texts: The Early Development of Smrti." ''Journal of Indian Philosophy'' 34.3 (2006): 287–302.

c. Digests and Commentaries:

The smritis emanated from different smritkars lead to divergence of opinion among the latter interpreters. There was ,thus, a need to reconcile these conflicting opinions of smritkars, so the emergence of commentators and digests. The commentaries called Nibandas did provide the appropriate interpretations,but influenced by the surrounding circumstances, included many prevaling customs and usages in its fold. The importance of commentaries and digests as a source of law has been acknowledged, time and again, by the judicial pronouncements right from the days of the Privy Council to the present supreme court of India. All the works on the Smritis are admitted to possess an independent authority. One Smriti occasionally quotes another, just as one judge might cite the opinion of another judge, but every part of the work is weighted equally and is regarded as the infallible truth. Later writers assumed that the Smritis constituted a single body of law, one part supplementing the other and every part capable of being reconciled with the other.[17]

Two digests were made under European influence. The *Vivadarnava Setu* was compiled at the request of Warren Hastings and is commonly known as Halhed's Gentoo Code. The *Vivada Bhangarnava* was compiled at the request of Sir William Jones by Jagannatha *Turkapunchanana* and translated by Mr. Colebrooke. It is commonly referred to as Jagannatha's or Colebrook's Digest. The Gentoo Code, in its English translation is "worthless" because Halhed translated it from Persian, not from Sanskrit. This was not the case for Colebrook's Digest[18] The digests and manuals that followed Halhed's contained more substance and covered more topics of Hindu law, simply because scholars acquired more knowledge over time. Sir Thomas Andrew Lumisden Strange was the first Chief Justice of the Supreme Court of Fort St. George (Madras) from 1801 to 1817. The first edition of Strange's "Elements of Hindu Law" was published in 1825.

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[17] Mayne, John Dawson. *A Treatise on Hindu Law and Usage*. Ch 2. pp. 26-27

[18] Ibid at 34.

Each section, when appropriate, defines the topic of Hindu law and includes several definitions that exist within the overarching topic and includes several leading cases that pertain to the topic of law. All of the Digests, Treatises and Manuals on Hindu law take a similar approach. Some go into greater detail in describing the topic of law and/or the specific cases that fell under that law. Each includes a table of contents and a lengthy list of cases for quick reference.[19]

d. Custom:

A custom is a rule(conduct or a regulation, whether imposed by authority or voluntarily adopted) which in a particular family or in a particular district has,from long usage obtained the force of law. Custom as a sorce of law has played an important role in the development of Hindu jurisprudence. Much of Hindu law is based on the recognised customs. Law, in the language of Manu, is grounded on immemorial custom and custom supersedes law. In order to modify the ordinary law of succession a custom had to be ancient and invariable and it had to clear and unambiguous evidence. The Privy Council maintained that "clear proof of usage will outweigh the written text of the law". Questions of usage arose in four different ways in India:

1. races to whom Hindu Law had never been applied
2. those who profess to follow the Hindu law generally, but who do not admit its theological developments
3. races who profess submission to it as a whole and
4. persons formerly bound by the Hindu Law but to whom it has become inapplicable.

When questions as to usage arose, the following were observed

1. any Hindu residing in a particular province of India was prima facie held to be subject to the particular doctrine of Hindu law recognized in the province, with the exception of migration

[19] Strange, Thomas Andrew. *A Manual of Hindu Law on the Basis of Sir Thomas Strange.*

2. when such an original variance of law was once established, it cannot be presumed that it continues[20]

According to Manu, “Immemorial custom is a trascendent (superior) law”. He further says that it is the duty of the king to decide a dispute according to principles drawn from local usages and sacred law. It is now well established that any condemnation of a custom in the smritis,express or implied, will not affect the validity of a custom. Customs may be classified as:

(a)local custom(prevailing in a locality only) ;

(b) Family custom(a custom applicable in a family from a distant past) , and

(c) caste or community custom(applicable to a particular caste,sect or tribe).

However,before custom qualifies to become a source of law, it has to fulfil some essential characterristics, as recognised in the present day context.i.e.

(i) it must be ancient;

(ii) it must be continous ;

(iii) it has to be certian ;

(iv) it has to be reasonable ;

(v) it has not to be immoral ;

(vi) it has not to be against law and public policy.

e. Case Law

Hindu law was codified by the British in multiple ways: translation, documentation, recognition of customary law, and implementation of various Acts. Legislation came to be the strongest source of law in India in so far as it held the highest jurisdiction when sources conflicted. Despite British efforts to avoid the inevitability of English law becoming the law of India, the inevitable proved stronger. Case law was a historically derived law based on the finding of precedent. It was flexible and, for good or for worse, subject to multiple

[20]. Aiyar, Nandivada R. Narasimha. The Principles Of Hindu Law, Introduction, i-iviii

interpretations by judges and lawyers. The following cases illustrate common legal practice of Hindu issues as facilitated by the British.[21]

3. Classical Hindu Law

There is little evidence for the practice of law in India prior to about the eighteenth century. In some regions, such as Maharashtra, a kind of hybrid Hindu and Islamic legal system was fashioned under the Maratha kings[22]. In other places, such as South India, temples were intimately involved in the administration of law[23].

Law during the classical period was highly based upon the teachings of the dharmaśāstra and the distinguished sources of dharma as dictated by those learned in the Vedas[24]. Although theologically law was primarily derived from Vedic knowledge, in actual practice, the community norms of particular social groups determined the actually rulings. Law was therefore highly decentralized and quite particular in nature towards specific groups[25].

What is almost completely lacking for classical and medieval India are the records of courts. In lieu of such records, other kinds of evidence for legal practice must be used to piece together an outline of Classical Hindu Law in practice. Such evidence includes prominently the numerous inscriptions from this period that record a variety of legal transactions, gifts, contracts, decrees, etc. associated with political rulers, temples, corporate groups and others. Many aspects of law were likely under the jurisdiction of castes or other corporate groups such as merchant guilds, military groups, traders, and religious orders.

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[21] Cohn, Bernard. *Colonialism and its Forms of Knowledge*. Ch 3. pp. 71

[22] Vithal Trimbak Gune, *The Judicial System of the Marathas*. Deccan College Dissertation Series. No. 12 (Poona: Deccan College Post-Graduate and Research Institute, 1953).

[23] Donald R. Davis, Jr., *The Boundaries of Hindu Law: Tradition, Custom, and Politics in Medieval Kerala*. Corpus Iuris Sanscriticum et Fontes Iuris Asiae Meridianae et Centralis. Vol. 5. Ed. Oscar Botto (Torino (Italy): CESMEO, 2004).

[24] Hacker, Paul. 2006. pp. 484

[25] Davis, Jr. Donald R. Ch. 1.

Beginning around the eighth century, Hindu legal traditions began to be imported into certain parts of Southeast Asia (Cambodia, Java, Bali, Malaysia, Thailand, and Burma) as part of a larger cultural influence mediated by trade and diplomatic relations. In each of these regions, Hindu law fused with local norms and practices, giving rise to legal texts (Āgamas such as the Kuṭāra-Mānawa in Java, and the Buddhist-influenced Dhammasattas/Dhammathats of Burma and Thailand) as well as legal records embodied (as in India) in stone and copper-plate inscriptions[26].

4. Modern Sources:

The modern sources of Hindu law include:

(i) Equity,justice and good conscience;

(ii) Precedent; and

(iii) legislation .

(i) Equity,justice and good conscience:

The basic meaning of equity is evenness, fairness, justice and the word is used as synonym for natural justice. The term is also used as contrasted with strict rule of law, acquitas as against strictum jus or rigor juris. The doctrine of justice, equity and good conscience meant, “in substance and in circumstances the rules of English law wherever applicable."[27]

As a source of law ,it ows its origin to the beginning of British administration of justice in India. British Government through its charters directed several high Courts in India to decide the cases in accordance with justice,equity and good conscience in absence of a law relating to a particular matter. Justice,equity and good conscience have been interpretaed to mean rules of english law on the analogous matter as modified to suit the Indian conditions and circumstances. Thus, we find that there is an area of Hindu law

[26] Creese. Helen. (2009). "Judicial processes and legal authority in pre-colonial Bali.

[27] See the concept and Application of the Doctrine explained in Varden Seth Ram v. Luckpathy 20

where the rules of hindu law and english law have been blended together,or where the rules of English law have been engrafted on the rules of Hindu law. The importance of these rules,as a source of Hindu law, has been duly acknowledged by our Supreme court in number of celeberated judments. It is now established that in absence of any rule of Hindu law,the courts have authority to decide the cases on the principles of justice, equity and good conscience, unless in doing so ,the decision would be repugnant to or inconsistent with any doctrine or theory of Hindu law.

In India the doctrine of 'justice, equity and good conscience' was introduced, for the first time, in the presidency of Bengal, in the year 1780.It was later transplanted in the mofussil of Bombay and Madras Presidencies. The doctrine was later on introduced in the other territories of India also.

The general idea behind this doctrine was that if on a particular point of dispute before the Court there was no express/parliamentary law, no Regulation and if it fell outside the heads for which Hindu and Mohammedan laws were prescribed, then the Court was to decide the matter according to 'justice, equity and good conscience.
It was applied by the courts only for few topics, viz., inheritance, marriage, caste, and other religious usages and institutions. It was introduced to cover gaps left in law.

(ii) Precedent:

The word 'precedent'has been derived from the word 'precede'meaning that which comes earlier. Legally, it means a previous judicial decision or proceeding which may serve as an example.Therefore, precedents are the cases decided by courts ,especially the superior courts to form an example for other courts to follow. We have borrowed this concept from British courts who generally followed the doctrine of *stare desis (*legal precedent), wherby all the courts in Britian were bound by the decision of the House of Lords. In the present day context we in India follow the decisions of the Supreme Court , treated as the law of the land, on the analogy of legal precedents. Since most of the Hindu law is now codified, so the decision rendered by the Supreme Court is binding on all the

people including the Hindus. Doctrine of precedent is recognized in Indian legal system also being a 'descendant' of the British legal system. The main principles of doctrine of precedent as applicable in India are:

a) All inferior and subordinate court is bound by the decision of the High court's to which they are subordinate.
b) In case there is a conflict between the decisions of two co-equal bench of the same high court, then the decision later in time should be followed. However, apex court observed in *Indo Swiss Time Ltd. vs. Umrao*[28] that the authority must be considered on the basis of rationale view and logic expressed therein and not merely on fortuitous circumstances.
c) Smallest bench of the High Court consists of single judge, division bench is of two judges and the bench consisted of more than two judges is called full bench. The decision of larger bench is binding on smaller as well as coordinate bench.

In the United States, which uses a common law system in its state courts and to a lesser extent in its federal courts, the Ninth Circuit Court of Appeals has stated: Stare decisis is the policy of the court to stand by precedent; the term is but an abbreviation of stare decisis et quieta non movere — "to stand by and adhere to decisions and not disturb what is settled." Consider the word "decisis."

The word means, literally and legally, the decision. Nor is the doctrine stare dictis; it is not "to stand by or keep to what was said." Nor is the doctrine stare rationibus decidendi — "to keep to the ratio decidendi of past cases." Rather, under the doctrine of stare decisis a case is important only for what it decides — for the "what," not for the "why," and not for the "how." Insofar as precedent is concerned, stare decisis is important only for the decision, for the detailed legal consequence following a detailed set of facts. In other words, stare decisis applies to the holding of a case, rather than to obiter dicta ("things said by the way"). As the

[28] A.I.R. 1981, P and H, 213(F.B.)

United States Supreme Court has put it: "dicta may be followed if sufficiently persuasive but are not binding."

(iii) Legislation:

The legislation means the law making by the Government. Legislation introduced some fundamental changes in Hindu law.it reformed and modified Hindu law. There are number of legislations regarding Hindus which have been churned out by the proactive and reformative efforts of the legislature. In the present day world the only known and direct source of Hindu law is the legislations passed by the Parliament every day .So Hindu law owes much to the legislative activism responsible for shaping its present form and making it relevant .

5. Modern Hindu law

Colonial Hindu law marks a large span of nearly two-hundred years, beginning in 1772 and ending in 1947. This time period can be split into two main phases. The first phase, starting in 1772 and ending in 1864, is marked with three main proponents that include the translations of the dharmasastras by the British scholar administrators, the use of court pandits to define laws and rules, and the rise of case law. The second phase, starting in 1864 and ending in 1947, is marked by the dismissal of court pandits, rise of the legislative processes, and a codified law system. With the formal independence of India from Britain in 1947, Anglo-Hindu law and the other major personal law system of the colonial period, the Anglo-Muhammadan law (Islamic law), came under the constitutional authority of the new nation. The new constitution was officially adopted by India in 1950 and had a primary focus on securing equality in the social, political, and economic realms[29]. Although there has been discussion that the Indian Constitution has a secular Hindu bias, an amendment to the

[29] Seshagiri Rao, K.L. (1997–1998). Practitioners of Hindu Law: Ancient and Modern. Fordham Law Review, 66, Retrieved 15 October 2008

constitution (42nd Amendment, 1976) formally inserted the word *secular* as a feature of the Indian republic[30].

In the early 1950s, contentious debates ensued over the so-called Hindu Code Bill, which had been offered in the Indian parliament, as a way to fix still unclear elements of the Anglo–Hindu law. Though a small minority suggested some kind of return to classical Hindu law, the real debate was over how to appropriate the Anglo–Hindu law. In the end, a series of four major pieces of legislation were passed in 1955–56 and these laws form the first point of reference for modern Hindu law: Hindu Marriage Act (1955), Hindu Succession Act (1956), Hindu Minority and Guardianship Act (1956), and Hindu Adoptions and Maintenance Act (1956). Criticism of the document is based on the belief that the laws in the Hindu Code bill should apply to all citizens regardless of religious affiliation[31]. Though these legislative moves purported to resolve still unclear parts of the Anglo-Hindu law, the case law and interpretive tradition of British judges and Indian judges in the British employ remained and remains crucial to the application of Modern Hindu Law.

There are no religious courts in India; rather all cases are adjudicated within the state district courts, presided over by state bureaucrats. However, there exist village tribunals, caste councils, and other bodies that try community members according to custom and religious law; however this is not adjudicated or enforced by the state. State judges have no formal religious legal training and are thus required to apply Hindu law in an abbreviated version. It is possible for a Hindu judge to preside over a Muslim couple's divorce, just as it is possible for a Christian to preside over the adoption case of a Hindu family. It is here where courts rely on the lawyers to argue the religious laws and advocate on behalf of their clients.

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[30] Singh, Pritam. 2005. "Hindu Bias in India's 'Secular' Constitution: probing flaws in the instruments of governance." *Third World Quarterly.* 26:6, 909–926.

[31] Bannigan, John (3 December 1952). The Hindu Code Bill. Far Eastern Survey: American Institute of Pacific Relations, XX1,

6. Warren Hastings model of Hindu law

Hastings was aware that British law was too technical, complicated and inappropriate for the conditions in India. In 1774, Hastings wrote to the Lord Chief Justice denying the idea that India was ruled by nothing more than "arbitrary wills, or uninstructed judgments, or their temporary rulers". Hastings was confident that the Hindus and other original inhabitants of India knew written laws, and in the case of the Hindus unchanged and ancient laws at that. For Hastings, Hindu law relied on an ancient constitution, and because the British were then sitting as judges in the civil courts passing judgments on real disputes, the British required access to it. The East India Company's district had to have a means of authoritatively establishing the content of Hindu law on all disputes concerning property, inheritance, marriage and caste and on all claims of debt, accounts, contracts, partnerships and demands of rent. Hastings persuaded eleven of the most respectable pandits in Bengal to compile a code from the shastric literature on Hindu law that could be translated into English. Unfortunately, at the time no European in Calcutta knew Sanskrit so the pandits' compilation first had to be translated into Persian and then into English. Chains of translations were quite common and negatively impacted the value of the original text. The translation, completed by N.B. Halhed, was published in 1776 as "A Code of Gentoo Laws"; or "Ordinations of the Pundits"[32]

7. Modern Hindu Law as given by the Judicial System

Among the most notable aspects of Modern Hindu Law as established by the Indian judges' jurisprudence is to be mentioned the permissibility of oral partition of Hindu Family Property. Mutation of land records in government offices can be made on the basis of such an oral partition[33]. Judicial precedent and English common law had a major impact on not only the

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[32] Cohn, Bernard. *Colonialism and its Forms of Knowledge*. Ch 3. pp. 66

[33] See Recent Civil Reports, year 2007, Volume No. 5, Page No. 694 – Judgment given by Bombay High Court – Aurangabad Bench – Case Title: Shekoji Bhimrao Vs. Motiram Maruti Maratha. – 2007[5] RCR[Civil] 694 [Bombay] [Aurangabad Bench].)

British administration of Hindu law, but the future of Hindu law in India. While the British attempted to be respectful and administer the proper religious laws to the Hindus, it couldn't help but incorporate aspects such as judicial precedent, which is a fundamental part of English common law. Over the course of time, a body of case law grew as the British administers more and more cases that pertained to Hindu law. The judicial decisions made on prior cases began to have a substantial effect on how judges viewed cases brought to the court. If the judge found a prior case (or cases) that was similar to the one he was currently adjudicating, he would likely use justify his ruling citing the prior case (or cases). The use of judicial precedent had substantial effect on Hindu law. Since the language of sacred texts was so inaccessible to English judges, many of the early case rulings may have not been correct. Many failed to understand the true nature of Hindu law and ruled in ways that they personally thought was to be the best. This goes against the idea that Brahmans and pandits, who through the deep and dedicated study of the sacred texts, were the only ones who could decipher the meaning in the context of each particular case

Chapter 2

SCHOOLS OF HINDU LAW

2.1. Introduction

Any discuusion on Hindu law is incomplete without an idea regarding the various schools it has come to be recognised.With the emergence of the era of commentaries and digests ,the various schools of Hindu law came into existence. However, none of these commentators were accepted uniformally or unanimously through the length and breadth of India. Their opinions were accepted in one part of India but at the same time rejected in other part of India. Such a conflict naturally gave rise to different schools of thought and eventually each of the schools of thought got its own label. The two major scools of thought that emerged and have a definite role to devise the Hindu law are: the Mitakshara school and the Dayabhaga school.Both these schools had their sub-schools and sub-sects representing essentially their particular philosophy of law. The Mitakshara school has the following sub-schools:

(i) Benares School;

(ii) Mithila school;

(iii) Maharashtra or Bombay School; and

(iv) Dravida or Madras School.

i. Mitakshara School.

This school owes its name to Vijnaneshwara's commentary on the Yajuavalkya smriti by the name of 'Mitakshara'.It prevails in whole of India except Bengal and Assam. In Bengal and Assam also the authority of the Mitakshara is supreme on all those matters on which the Dayabhaga is silent. It is considered to be conservative and orthodox school as compared to the Dayabhaga school, being more progressive in approach.The distinct feature of Mitakshara philosophy of law is its concept of succession by survivorship and community of ownership based on nearness of blood relationship.Its distinct concept of coparcenery etc.as compared to Dayabhaga.

ii. Dayabhaga School.

This school,owes its name to Jimutvahana's digest on leading smritis by the name of 'Dayabhaga'. It deals with partition and inheritance it prevails in Bengal and Assam.It recognises the principles of religious efficacy or spiritual benefit, as the basis of succession.The principle of religious efficacy or spiritual benefit means that one who confers more religious benefit on the deceased is entitled to inherit in preference to one conferring less spiritual benefits. The distinct feature of this schoolis that it only recognises the principle of inheritance which entiles to the members of their share in property after the death of the deceased and not before like the Mitakshara doctrine of "right by birth". It may be noted here that any differentiayion on account devolution of joint family property has become irrelevant because of the application of uniform law of succession in the shape of the Hindu Succession Act,1956.

After this preliminary discussion one come to understand that the legal institution prevalent have their religious or Dharmic origin and where the Hindu law has not been changed or modified by the legislative measures, it still continues to have nexus with the Dharam and the Shastras, unless they are openly against the public policy or the enacted law.

Broadly speaking, there are two main schools of Hindu law, namely:-

i. The Dayabhaga school, and

ii. The Mitakshara School.

The Mitakshara is a running commentary on the code of Yajnavalka. It has been written by an eleventh century jurist by the name of Vijnaneshwar , and prevails in all parts of India (except the province of West Bengal) and in Pakistan. The Dayabhaga School, which is followed mainly in Bengal, Bangladesh, is not a commentary or any particular code, but is a digest of all the codes. It has been written by Jimutavahana. It may also be noted that

the Mitakshara is the orthodox school, whereas the Dayabhaga is the reformist school of Hindu law.

The Dayabhaga is not divided into any sub-schools, However, the Mitakshara is sub-divided into four schools prevailing in different part of India, and these four sub-schools are as follows:-

a. The Banaras School, which prevails in northern and western India;

b. The Mithila School, which has most of its followers in Bihar

c. The Dravida or Madras School, which prevails in Southern India; and

d. The Maharashtra or Bombay School, which prevails in Western India.

The Mitakshara and the Dayabhaga School differed on important issues as regards the rules of inheritance. However, this branch of law is now codified by the Hindu succession Act, 1956, which has dissolved the differences between the two.

Today, the main divergence between the two refers to certain matters connected with the joint family system. Under the Mitakshara system, rights in the joint family properties are acquired by birth, and as a rule females have no right of succession to the family property, which passes by survivorship to the other male members of the family. Under the Dayabhaga system, rights in the joint family property are acquired by inheritance or by will, and the share of a deceased male member goes to his widow in default of a closed heir. Although it is the Dayabhaga schools that prevails in Bengal, the Mitakshara is also regarded there is being a very high authority on all question in respect whereof there is no express conflict between the two schools. Likewise, the Dayabhga is also referred to sometimes in a case governed by Mitakshara law, on points on which the letter is silent.

Case Ref: *Mahavir Prasad vs Rai Bahadar Singh*

Differences between Mitakshara School & Dayabhaga School

We know that the Mitakshara is anterior to Dayabhaga and it is a running commentary or the code of Yajnabalka written by Vijaneswara**.** The Dayabhga is the digest of all the codes while giving performance to the Code of Manu.

The two schools mainly differ or the following points:-

a. Inheritance
b. Devolution of Property
c. Joint Family Property
d. Factum Valet

Inheritance under the Mitakshara School—

i. The right of inheritance arises from propinquity.
ii. There are three classes of heirs—
    a. Sapinddas,
    b. Samanadakas
    c. Bandhu

So long there are gotraja sapindas or samanadakas, no bandhu or bhinn-gotra sapindas can generally inherit.

A large number of cognate (born of the same family- heirs are recognized in Mitakshara than Dayavhaga.

<u>Inheritance under Dayabhaga school</u>

i. The right of inheritance depends on spiritual efficacy.
ii. There are three classes of heirs—
    a. Sapindas
    b. Sakulyas
    c. Samanodaka

Both agnates and cognates come in the list of sapindas and inherit before sakulyas or samanodakas. Sapindas are those who can confer spiritual benefit on the deceased by offering pindas and include both agnates and cognates.

iii. Devolution of Property:

Under Mitakshara school property devolves in two ways—

i. Survivorship, and

ii. Succession.

Under Dayabhaga no living Hindu has got any heir; succession opens after his death. But survivorship is not recognized by death.

iv. Joint Family Property:

Joint family property under Mitakshara School

A son, born to one of the coparceners acquires an interest in the property from the moment of this birth and he cannot be ousted from such interest which he is alive.

i. The karta or manager has got a restricted right of transfer.

ii. Property devolves on the male survivors only.

Joint family property under Dayabhaga School:

Succession opens to a son only after the death of the father. A Dayabhga father is competent to make a testamentary disposition of the whole of property. A son has got no right to object to it. A son cannot claim partition during the lifetime of his father.

Succession once opens, share of each heir becomes fixed, and every member can alienate his share in any way he likes.

Property passes by inheritance only and may go to female heirs like widows, daughter etc.

v. **Factum Valet**:

It is recognized by Dayabhaga school to a greater extent than Mitakshara school. But factum valet is no defense when the act is immoral or against public policy or prohibited by any Act of Legislature or against express principles of Hindu law.

Effect of migration on the school of Hindu law

When a Hindu family migrates from one state to another, the law draws a presumption that it carries with it its personal law, i.e. the laws and customs prevailing in the state from which it came. The presumption can, however, be rebutted, by showing that such a family has adopted the law and usages of the new province where it has settled down. Thus for instance, where a Hindu family migrates, say from Maharashtra (where Mitakshara law prevails), to Bengal (where the Dayabhaga laws prevails), the presumption is that the family continuous to be governed by the Mitakshara law. This presumption is that the family has abandoned the law of the province of its origin (i.e. Mitakshara), and adopted the law of the province where it has settled. (i.e. Bengal).

The Hindu Succession Act is based on the vision provided by the two schools of thought

Due to the emergence of various commentaries on SMIRITI and SRUTI, different schools of thoughts arose. The commentary in one part of the country varied from the commentary in the other parts of the country.

Because Of These Differences Two Main Schools Emerged:

1). Mitakshara School 2). Dayabhaga School Of Legal Thoughts.

1. Mitakshara School

The Mitakshara School exists throughout India except in the State of Bengal and Assam.

The Yagna Valkya Smriti was commented on by Vigneshwara under the title Mitakshara.

The followers of Mitakshara are grouped together under the Mitakshara School.

Mitakshara school is based on the code of yagnavalkya commented by vigneshwara, a great thinker and a law maker from Gulbarga, Karnataka. The Inheritance is based on the principle or propinquity i.e. the nearest in blood relationship will get the property.

The school is followed throughout India except Bengal state. Sapinda relationship is of blood. The right to Hindu joint family property is by birth. So, a son immediately after birth gets a right to the property.

The system of devolution of property is by survivorship. The share of co-parcener in the joint family property is not definite or ascertainable, as their shares are fluctuating with births and deaths of the coparceners. The co-parcener has no absolute right to transfer his share in the joint family property, as his share is not definite or ascertainable.

A woman could never become a co-parcener. But, the amendment to Hindu Succession Act of 2005 empowered the women to become a co-parcener like a male in ancestral property. A major change enacted due to western influence.

The widow of a deceased co-parcener cannot enforce partition of her husband's share against his brothers.

<u>There are four Sub-Schools under the Mitakshara School:</u>

i. <u>Dravidian School of thought : (Madras school)</u>

It exists in South India. In the case of adoption by a widow it has a peculiar custom that the consent of the sapindas was necessary for a valid adoption. ('Sapindas' – blood relation) *Collector of Madura vs. Mootoo Ramalinga Sethupathy* (Ramnad case):

> The zaminder of Ramnad died without sons and in such a condition, the zamindari would have escheated to the Government, the widow Rani Parvatha vardhani made an adoption of a son, with the consent of the sapindas of her husband. But on the death of the widow, the Collector of Madhura notified that the Zamindari would escheat to the State. The adopted son brought a suit for declaration of the validity of the adoption.

It was a question whether a widow can make a valid adoption without her husband's consent but his sapinda's consent. The Privy Council, after tracing the evolution of the various Schools of Hindu law, held that Hindu law should be administered from clear proof of usage which will outweigh the written text of law. Based on the Smriti Chandrika and Prasara Madhviya, the Privy Council concluded that in the Dravida School, in the absence of authority from the husband, a widow may adopt a son with the assent of his kindred.

ii. <u>Maharashtra School: (Bombay School Of Thought)</u>

It exists in Bombay (Mumbai) , From the above four bases, there are two more bases. They are Vyavakara, Mayukha and Nimaya Sindhu. The Bombay school has got an entire work of religious and Civil laws.

iii. Banaras School of Thought:

It exists in Orissa and Bihar. This is a modified Mitakshara School.

iv. Mithila School Of Thought

It exists in Uttar Pradesh near the Jamuna river areas. Apart from the above schools, there are four more schools which are now existent today. They are Vyavakara, Mayukha Nimaya and Sindhu Schools.

i. DAYABHAGA SCHOOL OF THOUGHT

It exists in Bengal and Assam only. The Yagna Valkya smriti is commented on by Jimootavagana under the title Dayabhaga. It has no sub-school. it differs from Mistakshara School in many respects.

Dayabhaga School is based on the code of yagnavalkya commented by Jimutuvahana, Inheritance is based on the principle of spiritual benefit. It arises by pinda offering i.e. rice ball offering to deceased ancestors.

This school is followed in Bengal state only. Sapinda relation is by pinda offerings.

The right to Hindu joint family property is not by birth but only on the death of the father.

The system of devolution of property is by inheritance. The legal heirs (sons) have definite shares after the death of the father.

Each brother has ownership over a definite fraction of the joint family property and so can transfer his share.

The widow has a right to succeed to husband's share and enforce partition if there are no male descendants.

On the death of the husband the widow becomes a co-parcener with other brothers of the husband. She can enforce partition of her share.

The recent law commission`s recommendations, judgments by various courts, amendments and changes ratified by the parliament have death knell on the ancient Hindu law of succession. These anarchic laws which has western influence had adverse and unhealthy effects on the Hindu way of life and system, which was prevailing in this land from time immemorial, gradually developing itself with the development of the society. **[Pragati Ghosh]**

The Hindu scriptures were not uniformly interpreted by the Hindu scholars, and this gave rise to diverging opinions on the interpretation of particular texts. Colebrook, the learned European scholar of Hindu Law, spoke of this divergence as representing schools of Hindu Law. Thus, the Hindu jurists themselves never propounded any theory or doctrine dividing Hindu Law into various schools of thought, and it was the European writers on the subject who labeled the differences in interpretation as representing specific "schools", a term which has now gained currency in Hindu Law.

Jimutavahana:

Jimutavahana, who lived around the beginning of the twelfth century, was the founder of the Dayabhaga School. Very little is known about him, although there is sufficient evidence to indicate that he was an eminent Judge and a Minister of a King of Bengal.

Jimutavahana's doctrines on the law of inheritance and the joint family system were totally opposed to some basic rules of the Mitakshara School. Although he did not break away from any of the authoritative texts of the leading Smritikars, he did differ basically from the Mitakshara system, which favours a particular mode of devolution of joint family property at the time of the death of a coparcener. This can clearly be seen from the points of difference between a Mitakshara and a Dayabhaga coparcenary, discussed at length in Chapter III of the book.

In introducing certain radical innovations in a number of incidents of the joint family and rights of the members of such a family, Jimutavahana purported to base his theories on

certain precepts of Manu, which he felt were not properly comprehended by previous commentators. His theories show that his appeal is more to reason and stern logic, than to precepts or precedents, and his approach to most of the controversial questions is direct and forthright.

It is rather difficult to say as to when the advanced views of Jimutavahana began to be accepted as binding authority in Bengal, but it appears that his celebrated treatise, the Dayabhaga, soon commanded recognition and acceptance as the fountain-head for a number of commentators, the earliest of whom appears to be Srinath Acharya Chudamani.

As regards the origin of schools of Hindu Law, the following observations of the Privy Council are relevant: “The remoter sources of Hindu Law (i.e. the Smritis) are common to all the different schools. The process by which these schools have been developed seems to have been of this kind: Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text, and his authority, having been received in one and rejected in another part of India, schools with conflicting doctrines arose.”

Broadly speaking, there are two main schools of Hindu Law, the Mitakshara and the Dayabhaga. The Mitakshara (literally meaning “a concise work”) is a running commentary on the code of Yajnavalkya. It has been written by an eleventh century jurist by the name of Vijnaneshwar, and prevails in all parts of India, except in Bengal.

The Dayabhaga School, which is followed mainly in Bengal, is not a commentary on any particular code, but is a digest of all the codes. It has been written by Jimutavahana, who lived sometime in the twelfth century. It may also be noted that the Mitakshara is the orthodox school, whereas the Dayabhaga (or the Bengal school, as it is sometimes called) is the reformist school of Hindu Law.

It may be noted that the Dayabhaga is not divided into any sub- schools. However, the Mitakshara is sub-divided into four schools prevailing in different parts of India. These different schools have the same fundamental principles, but differ in matters of details, especially with reference to the topics of adoption and inheritance.

These four Mitakshara sub-schools are as follows:

(a) The Banaras School, which prevails in northern and northwestern India;

(b) The Mithila School, which has most of its followers in Bihar;

(c) The Dravida or Madras School, which prevails in southern India; and

(d) The Maharashtra or Bombay School, which prevails in western India.

The Mitakshara and the Dayabhaga Schools differed on important issues as regards the rules of inheritance. However, this branch of the law is now codified by the Hindu Succession Act, 1956, which has dissolved the differences between the two.

The main divergence between the two in matters connected with the joint family system has now been diluted further after the 2005 Amendment of the Hindu Succession Act, which has abolished the gender inequality which existed prior to the said Amendment,

Although it is the Dayabhaga School that prevails in Bengal, the Mitakshara is also regarded there is being a very high authority on all questions in respect whereof there is no express conflict between the two schools. Likewise, the Dayabhaga is also referred to sometimes in a case governed by Mitakshara law, on points on which the latter is silent. (Mahavir Prasad v. Rai Bahadur Sing, 18, Luck. 585)

Chapter 3

THE INSTITUTION OF MARRIAGE AMONG HINDUS

Institution of marriage has been the most cherished institutions among the Hindus. It is considered a sacramental union between a male and female indissoluble not only in this world but in the world hereafter. The wife was referred as *ardhangiri* (half of man), *grihani* (the lady of the house), *scchiva* (wise counselor), *Sakhi* (confident) and many such names making her the part and parcel of her husband. The husband was similarly referred by many names like, *pati* (protector), *bhartri* (supporter) and lord and master of his wife. Thus, the wife continued to adore and obey her husband, even if the husband was devoid of all virtues. Every Hindu, whether, male or female, had an obligation to marry according to the dictates of their scriptures. According To Manu, marriage amongst Hindu's is a religious obligation and both male as well as female is incomplete without performing marriage.

Nature and Scope

i. Classical View: -

The marriage amongst Hindu's in terms of classical approach is a pure religious and a sacramental affair. It is an eternal union between a male and a female not only here but also in the world here -after. According to *Dharamshastra,* every male is supposed to marry in order to beget a son for discharging debts of his ancestors, besides performing other religious duties. According to the classical approach, no marriage can be possible without performance of sacred rites and ceremonies. The concept of marriage being an eternal union, remarriage or the dissolution of marriage is unimaginable under the classical view. The institution of marriage has not undergone any radical change even after independence with respect to the religious connotation attached to it under the *Dharamshastras*.

ii. Legislative History of Marriage laws in India.

Marriage, according to Hindu law, is a holy *sanskar* (sacrament) and not a contract unlike Muslim law. The maxim "*conjunctic martitet peminae eet de nature"*means that to keep

husband and wife together is the law of nature and the maxim "*viret unor consentor in lege una pensona"* means that husband and wife are considered one in law. *Kanyadan* (formal donation of the bride by her father) and *saptapadi* (circumambulating of holy fire by the bride and the groom) have basic importance in Hindu marriages. Eight forms of marriage were described, four of which were *dharmya* (regular) forms and the rest were *adharmya* (irregular) form. The choice of life-partner was limited only to one's own *dharma* (religion) and *jati* (caste) only. Polygamy was permitted in Hindu society but not polyandry. Legislation of laws relating to Hindu marriage began from the year 1829 when *sati* was abolished by law and declared an offence at the instance of Raja ram Mohan Roy.

In 1856, Hindu Widow's Remarriage Act legalized the marriage of Hindu widows. In 1860, Indian Penal Code prohibited polygamy. In 1866 Native Converts Marriage Dissolution Act facilitated divorce for Hindus accepting Christian faith. In 1909 the Anand Marriage Act legalized the marriage ceremony common among the Sikhs called Anand.In 1923 by an amendment of the Special Marriage Act inter-religious civil marriages between Hindus, Buddhists, Sikhs and Jains were legalized. In 1929 Child Marriage Restraint Act was passed. In 1947 the Hindu Code as drafted by Rau of the Constituent Assembly of India on 9th April, 1948.The Select Committee submitted its report and revised Bill on 29th August, 1948 but the Bill could not be passed before the dissolution of the Provisional Parliament. The earlier bill was considerably revised and the Hindu Marriage Bill was introduced in the Parliament.

HINDU MARRIAGE ACT, 1955

The Act made significant improvement and reformation in the institution of marriage in order to make it in tune with the equitable concept of marriage brought in by the advent of Islam and Christianity. The Act was a great leaf ahead in the direction of rationalization of marital status of men and women and free will of both the parties to the marriage. The Act provides for various matrimonial reliefs- like divorce, annulment, judicial separation and restitution of conjugal rights-on specified grounds. The most commonly sought matrimonial relief is

divorce and the most commonly used grounds for the relief is cruelty and desertion. The Act also provides for reliefs, which are ancillary to the main reliefs. These are maintenance-*pendente lite* and permanent-child custody and disposal of joint matrimonial properties. There are also provisions providing for procedural safeguards to ensure that no party is victimized or made to suffer. However, before filing any petition under the Act, the parties and the courts have to ensure that the applicability of the Act to the case is not barred by any of its provisions.

The Act treats marriage as a contractual union between a male and female, which is dissoluble in its nature. Thus, the consent and mental condition of the parties which had no role, prior to this Act, plays an important role in the formation of marriage contract. It recognizes the circumstances under which a marriage can be treated as void and voidable, thus consequently making it a dissoluble tie. In brief, the sacramental character of Hindu marriage is no more ostensibly in existence. It is for all purposes now a contractual relationship between the husband and wife which is dissoluble judicially either on the guilt of either party or through mutual consent. The typical example of modern Hindu marriage can be gauged by the remarkable observation of the Rajasthan High Court wherein the wife refused to leave the service in order to obey her marital partner, in *R.Prakash v. Sneh Lata*[1], the court observed:

> *The orthodox concept of the Hindu wife is that she is expected to be dharampatni, ardhangini, bharya or anugamini, the literal meaning is that she has to follow the husband. This orthodox concept of wife and expectation from her to subject herself to husband's wishes has undergone a revolutionary change with education and high literacy in women and with recognition of equal right in the Constitution and abolition of sex distinction in all walks of life. She is a partner in marriage with equal status and equal rights with the husband.*

[1] (AIR 2001 Raj.269)

The Act which came into force on 18th May, 1955, amends and codifies the law relating to marriages among Hindus. This Act extends to the whole of India except the state of Jammu and Kashmir. In the state of Jammu and Kashmir the local Act, known as J&K Hindu Marriage Act, 1955, is in operation. The two Acts are not diametrically different from each other and are almost identical with only difference of their areas of operation. The central Act applies not only to Hindus domiciled and residing in India but also to domiciled Hindus, residing outside its territory. Thus the Act governs a Hindu domiciled in Kanpur, though residing in Kashmir or in any foreign country. However, it does not apply to a Hindu of Jammu and Kashmir who is, otherwise, governed by the local Hindu Marriages Act .1955.

The Act is having an overriding effect and any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act, shall cease to have effect which is/are inconsistent with the provisions of this Act. According to section 4 of the Act, any other Act in force which is inconsistent with this Act shall have no applicability unless saved under this Act. However, in case there is no prohibition under the Act, such action or practice shall continue to be practiced as usual without any bar if it is not against public policy and public morality.

Thus, the matters regarding which provision has been made in the Act are no more governed by old Hindu law. However, the Matters regarding which no provision has been made in the Act and which are not inconsistent therewith will continue to be governed by the old Hindu Law in force immediately before the commencement of the Act .

CONDITIONS FOR A HINDU MARRIAGE

Section 5 of the Act provides that a marriage may be solemnized between any two Hindus, if the following conditions are fulfilled:

i. Neither party having a living spouse.

Under the Hindu Marriages Act, 1955, marriage is neither polygamy nor polyandry. The special feature of this Act is the provision of monogamy instead of polygamy, so any marriage solemnized after the commencement of the Act is absolutely null and void, if it

contravened any condition stipulated therein, including the condition of monogamy. Neither a Hindu male nor a female can marry during the life time of his first wife or her first husband. A person should be a bachelor or virgin, widower or widow or divorced at the time of marriage.

A marriage under this Act can be solemnized when both the parties are Hindus. Thus when a wife files a petition for nullity admitting that at the time of marriage her husband was a Christian and contrary to the promise he made, he did not convert himself to Hinduism, it was held that in view of the provisions of section 2 which requires that both the parties should be Hindus, the Act is not applicable to the parties. These observations were made by the Bombay High Court in *Neeta Kirti Desai v. Bino Samuel George*[2], which pertained to the application of the Hindu Marriage Act, in a case where both the parties were not Hindus but only one party (wife) was Hindu and not the husband.

A marriage which contravenes any condition laid down under the Act, shall be liable to be declared null and void in terms of section 11 of the Hindu Marriages Act,1955, on the petition presented to the court by any party thereto, even if the parties have lived together as husband and wife and have even children born thereto. A person who marries in violation of this condition i.e. monogamy, is liable for the offence of bigamy which is punishable under sections 494 and 495 of the Indian Penal code, 1860.The Madras High court has held in *Manjula v.Mani*[3] held that though bigamy is a matrimonial wrong entitling a wife to relief and also offence under the provisions of the Indian Penal Code, 1860, yet, a bigamous marriage is not easy to prove because of the requirement of proof of compliance of essential ceremonies. The fact that the bigamous marriage is performed surreptitiously without strictly observing all the ceremonies makes it all the more difficult to prove.Thus,the denial of husband of second marriage performed without some ceremonies did not absolve him from liability for the offence of bigamy under Indian Penal Code,1860.

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[2] (AIR 1998 Bom 74)

[3] (Cri LJ 1476)

ii. Competence to contract marriage.

Under Hindu law as laid down by old texts and as administered before the commencement of this Act, a marriage of a lunatic or idiot was valid under the traditional Hindu law. After the commencement of the Hindu Marriages Act, 1955, section 5 cl (ii) (as originally enacted) provided for idiocy or lunacy at the time of marriage, as a legal disability for contracting a valid marriage. However, the courts took rather a narrow interpretation of the term 'lunacy or idiocy at the time of marriage' to lay down that any subsequent lunacy would not affect the validity of the marriage. It will be appropriate to quote the observation of Punjab and Haryana high court, delivered in *Munishwar Dutta Vashist v. Indra Kumari* [4] in this respect:

An attack of insanity where it amounts to *mania* or *schizophrenia, if* comes after marriage will not furnish a ground for annulling the marriage. What is momentous, therefore, is the mental condition at the time of marriage which is the crucial time for determining the question of annulment.

Keeping judicial decisions of above nature in mind, the entire law relating to mental capacity under the Act was modified in 1976 and replaced by the present provision; Clause (a)of sub-clause (1)of section 5 of the Act, speaks of unsoundness of mind but not every kind of unsoundness of mind. It is restricted to that type of unsoundness of mind as may, in law, render the potent incapable of giving a consent which law can recognize. Similarly cl. (b) indicates that the mental order should have lasted for some length of time. It does not, however, define the term mental order but simply says that the mental disorder must be either (i) of such a kind, or (ii) to such an extent, as to make the patient unfit for marriage and procreation of children.

Under this section, a decree of annulment may be granted if it is proved, *inter alia,* that the spouse was of unsound mind or was suffering from a mental disorder of such a kind or such an extent as to be unfit for marriage and procreation of children. Cancellation of marriage, however, is being a drastic relief, the onus of proof lies heavily on the petitioner to prove the

[4] (AIR 1963, 449)

case. In *R.Lakshmi Narayan v. Santhi*[5], the marriage was an arranged marriage where parties had met each other. After staying together for about 25 days, they parted company and sought relief seeking declaration that the marriage was void as the wife was suffering from chronic and incurable mental disorder and was not in fit mental state to lead married life. The allegations to substantiate the ground were, *inter alia,* that on the night of marriage the husband found her drowsy; she refused cohabitation; she said she had been suffering from mental disorder since childhood; she did not want to have any marriage relationship, and that she married under pressure from her parents. There was no allegation that she was incapable of giving valid consent to marriage owing to unsoundness of mind at the time of marriage. The court declined relief on the basic of these facts. A marriage sought to be annulled on the ground pleaded is not *per se* void but voidable and strict standard of proof is required with heavy burden on the party who approaches the court for annulment of a marriage already solemnized. According to the court, to draw an inference of mental disorder merely from the fact that there was no cohabitation for a short period of about a month is neither reasonable nor permissible. To brand a wife as unfit for marriage and procreation on account of mental disorder, it needs to be established that the aliment suffered by her is of such kind or such extent that it is impossible for her to lead a normal married life. The husband was held to have failed to establish a case for declaring the marriage null and void under section 12(1) (b) read with section 5(ii) of the Act.

Clause (c) of sub-section(I) of section 5 deals with recurrent attacks of insanity or epilepsy, as the ground for annulment of marriage, but again the terms insanity or epilepsy have not been defined. Whether a person has in fact been subject to recurrent attacks of insanity or epilepsy will have to be ascertained by the court with the aid of medical opinion and other cogent evidence.

In the state of Jammu and Kashmir, the Act was amended to incorporate the changes brought in the year1980 to make it in tune with the Central Act, as for as ,the question of

[5] (AIR 2001 SC 2110)

recurrent epilepsy or insanity is concerned. It also got incorporated some other changes in the local Act to rationalize the same.

iii. Age of Majority of the parties.

The Hindu Marriage Act being a post independence statute passed in the background of equality, gender justice and reformation, had to, pave for, such policy and procedure eliminating thereby, all types of unjust rituals, irrational practices and ill founded dogmas. The social evil of child marriage being largely prevalent, had to be eradicated as a sequel to these reformations. In 1929, an attempt was made to prescribe 15 as the maximum age for girls and 18 for the boys. However, in 1976 this condition was modified and marriage age was raised to 18 and 21 respectively.

Though the Act prescribes a minimum age as one of the conditions for a marriage (under section 5(iii) the bridegroom should have complete the age of 21 years and the bridge, the age of 18 at the time of marriage), marriage in breach of this provision is neither void nor voidable. It is only punishable under section 18 of the Act and under the Child Marriage Restraint Act, 1929 as amended in 1978. In three cases namely (*V. Mallikarjunaiah v. H.C. Gowramma*[6]*, Gajar Naran Bhura v. Kanbi Kunverbai Partab*[7]*, Harvinder Kaur v. Gursewak Singh*[8]*,*the issue of legal status of a non-age marriage was discussed.

In *V.Mallikarjunaha* the husband sought declaration of marriage as void on the ground that he had not completed the age of 21 at the time of marriage (he was 20 years, 1 month and 12 days old). The issue whether such marriage was valid, void or voidable was discussed at great length. The trail judge dismissed the husband's petition as it held that there was no cause of action. In appeal, the arguments raised on behalf of the husband were that section 11, which provides the grounds for void marriage, should be read with section 5 and any marriage in breach of conditions laid down in section 5 should be declared as null and void. It was further contended that the law should not be so interpreted as to defeat its provisions.

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[6] *AIR 1997 Kant. 77*
[7] *AIR 1997 Guj. 187*
[8] *1998 AIHC 1013)*

On the other hand, for the wife it was contended that the legislature specially excluded section 5 (iii) from the purview of section 11 (void marriage), section 12 (voidable marriage) and section 13 (grounds for divorce) and this exclusion was neither by accident nor by oversight, but deliberate. After detailed arguments, the court came to the conclusion that the law does seek to discourage marriage of underage boys and girls but not to the extent of making them void or voidable. The socio cultural conditions of the society and the consequences of invalidating such marriage, on the girls specially were highlighted by the court. It observed:

> Having regard to the strata in which such marriages were likely to take place the legislature was cautious of the fact that such provision should not have the result of rendering a large number of girls or young women virtually unmarried or destitution. The only security that a girl or woman in such a situation is entitled to is within the framework of the marriage and if that marriage can be loosely undone or if it is not recognised by the law, it would result in disastrous social consequences which is the only reason why this section was specifically excluded from sections 11 to 12 of the Act. Though such exclusion does not give a license for underage marriages since they are punishable under section 18 of the Act, the court suggested that in view of the rampancy of the practice, there is a need to provide for harsher penalties, particularly for those responsible for this.

In *Gajara Narain Bhura,* the husband sought to defeat the wife's application for maintenance on the ground that the marriage was in violation of the age requirement prescribed by the Act and hence void. The trial court dismissed the wife's claim but the lower appellate court granted her maintenance. In second appeal, the Gujarat High Court held that child marriage by itself is not invalid nor a nullity unless there has been fraud or force in the solemnization of such marriage, in which case provisions of section 12 (i)(c)of the Act would be attracted.

Similarly, in *Harwinder Kaur,* the wife filed an application for maintenance under section 125 of the Cr.P.C. The husband alleged that the marriage had been solemnized when the

parties were infants and so the same being void he was under no liability to maintain her. The court held that such marriage was not void but only punishable.Refernce was made to *Lila Gupta v.Laxmi Narain*[9], wherein the apex Court had observed that every marriage solemnized in contravention of one or other condition prescribed for valid marriage was not void.

iv. Degrees of Prohibited Relationship

Hindu Marriage Act, 1955 has, more or less, retained the traditional cob-web of *gotra relationship* as degrees of prohibited relationships. Thus, the Act clearly provides that any two persons who are major and not within the prohibited degrees of relationship enumerated under section 3 of the Act, shall be eligible for contracting a valid marriage. It may not be, out of place, to make it clear that person/s mean the 'Hindu' as defined under the Act. Now the question arises as to what does the term "degrees of prohibited relationship" mean? Section 3(g) of the Act lays down that: Two persons are said to be within the 'degrees of prohibited relationship:-

(i) if one is a lineal ascendant of the other; or

(ii) if one was the wife or husband of a lineal ascendant or descendant of the other; or

(iii) if one was the wife of the brother or of the father's or mother's brother or of the grand-father's or grandmother's brother of the other, ;

(iv) If the two are brother and sister, uncle and niece, aunt and nephew, or children of sister and brother or of two brothers or of two sisters.

The above prohibited relations include relationship through blood and adoption. Blood relationship includes all of its three kinds, namely full, half and uterine. It also includes illegitimate blood relation relationship. Any marriage solemnized after the commencement of Hindu Marriage Act,1955 shall be null and void if it contravenes the condition regarding "prohibited degrees". A person who procures a marriage of himself or herself in

[9] (AIR 1978 SC 1351)

contravention of this condition shall be punishable with simple imprisonment which may extend to one month, with fine or with both. However, if a custom permits a marriage between two persons within the degrees of prohibited relationship, then such a marriage is valid. For instance, among the jats of Punjab marriage with brother's widow and in south India marriage with one's sister's daughter are recognised by custom. Such marriages are valid under modern Hindu law also.

M.Govindaraju v. K.Munisami Gounder[10], is a significant judgment of the Supreme Court which recognised caste custom to determine the validity of a marriage and legitimacy of a child born out of a relationship. This was a case by the petitioner who was denied his share in the joint Hindu family property owned by his father on the ground that when he was begotten, there was no valid marriage subsisting between his mother and father. The facts of the case, briefly stated, are thus. The parties belonged to the *shudra* caste that is governed by their customs for purposes of marriage and divorce. The wife walked out of the marriage which was irreversible as neither of them approached each other for reconciliation. She started living with another man and a child was born from that relationship. Paternity of the child was acknowledged and he was treated as the son of his father. The Madras High Court, however, branded him as an illegitimate child of his parents and so not entitled to claim partition of joint family property. On appeal the Supreme Court pointed out that the high court overlooked the caste factor which was very significant in such cases. Under the customs of the caste to which the parties belonged if a woman is turned out or leaves the house and are not brought back as wife it is treated as divorce and the spouses are free to rearrange their life with another partner. In this case since there was no reconciliation with the first husband and the woman entered into relationship with another man the divorce was held complete and the subsequent marriage valid.

[10] (AIR 1997 SC 10)

v. *Spinda relationship.*

Another important condition for a valid marriage is that the parties should not be spindas of each other, unless permitted under custom or usage governing the parties. The term *'spinda'* is a derivative of the word *'pinda'* which means the same. There is a divergence of opinion between two main schools of Hindu law regarding the real meaning of the term "*spinda*". According to Mitakshara law spinda means of the same blood so any one who is having common blood shall be treated to be a spinda. As against this Dayabhaga law treats spinda as an offering made to ancestors and thereby demonstrate nearness to their ancestors by performing *pinda dhaan.*While as Mitakshara jurists have limited the spinda relationship up to 7th degree on the fathers' side and 5th degree on mother's side. The Dayabhaga law recognizes only 6 ancestors on father's side and four on the mother's side, constituting the spindas. The Hindu Marriages Act has made suitable changes in the classical approach by limiting the spinda relationship by two degrees on either side.

Section 3(f) defines "spinda relationship' as under:

(i) Spinda relationship with reference to any person extends as far as the third generation(inclusive)in the line of ascent through the mother, and fifth(inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned who is to be counted as the first generation.

(ii) Two persons are said to be spindas of each other if one is a lineal ascendant of the other within the limits of sapinda relationship, or if they have a common lineal ascendant that is within the limits of sapinda relationship with reference to each of them.

Any marriage solemnized after the commencement of Hindu MarriageAct,1955 shall be null and void if it contravenes the 'sapinda relationship" condition and any person who procures a marriage of himself or herself shall be punished with simple imprisonment which may extend to one month, or with fine or with both.

vi. Consent of Guardian of a minor.

Where the bride has not completed the age of eighteen years, the consent of her guardian has to be obtained, before the solemnization of the marriage. This provision has almost become redundant in view of the fact that after the enactment of the Child Marriage Restraint Act, no minor can be given in marriage without his or her consent and before attaining the age of majority stipulated thereunder.However, in J&K the amendment of 1978 on the analogy of the central Hindu Marriage Act 1955 has not been incorporated, so it continues to be dealt with under section 18(c) which lays down that guardianship for marriage is valid. It safeguards against the misuse of this provision for ulterior purposes by the guardian and provides for safeguards of annulment of marriage by the girl on this count.

vii. CEREMONIES FOR A HINDU MARRIAGE

Section 7 of the Hindu Marriage Act, 1955 provides:

(I) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(II) Where such rites and ceremonies include the *Saptapadi* i.e., taking of seven steps by the bridegroom and the bride jointly before the sacred fire, the marriage becomes complete and binding when the seventh step is taken.

The Act makes it obligatory for the parties to solemnize their marriage. The word 'may' give an option, only regarding the kind of ceremony with which the marriage is to be solemnized. The courts have all along taken the view that necessary ceremonies as applicable to the parties ought to be performed to validate a marriage. In *Laxman Singh v. Keshar Bai*[11], it was observed that necessary ceremonies, shastric or customary, whichever are prevalent on the side of bride or bridegroom, must be performed, otherwise marriage will not be valid.

But the ceremonies which are against public policy are not to be treated as binding. The Andhra Pradesh High Court had to deal with such ceremony like *'Kanyadan* 'in view of its avowed effect. Kanyadan -the giving away of a girl in charity-is seemingly a derogatory

[11] (AIR 1966 MP)

concept conveying that a girl is a chattel which can be given away and received as a charity. It has unfortunately become a part of our vocabulary and an important component of a Hindu marriage. However, with the legal ban on child marriages and the requirement that the girl should be a major at the time of marriage, the concept of giving she away by the parents or guardians is fading out. In *Shanta Devi v. Ramlal Agarwal*[12], the mother along with her parents performed the marriage of her adult daughter. The father filed an objection stating that as the natural guardian he alone had the legal right to perform the ceremonies of marriage including the *Kanyadan* ceremony. He sought a declaration to that effect and also a permanent injunction restraining the mother and her parents from performing any ceremony in connection with the marriage of other adult daughters. Dismissing the petition the court held that '*Kanyadan*' is not an essential ceremony for a valid marriage and in any case the enactment of the Child Marriage Restraint (Amendments) Act, 1978 the very concept of giving her in marriage is abolished.

viii. REGISTRATION OF MARRIAGE

Section 8 of the Act provides for registration of marriage for the purpose of facilitating the proof of Hindu Marriages. The Act empowers the state government to make rules for registration of marriage. However, only a Hindu marriage performed under the provisions of the Act can be registered under the Act. In *P.Ramesh Kumar v. Secretary, Kannapuram Grama Panchayat*[13], the issue was whether the concerned marriage was a Hindu marriage or not. A Hindu petitioner who married in India a Buddhist Japanese lady having Japanese citizenship applied for a marriage certificate. On the local authority refusing to give the certificate, the petitioner approach the high court for issuance of directions to the local authority for giving the certificate under the Act coupled with Kerala Registration of Hindu Marriage Rules, 1957. The court, however, refused to issue the same by holding that the Act would apply to a Hindu outside the territory of India only if he is a Hindu domiciled in the

[12] (AIR 1998 AP286)
[13] (AIR 1998 Ker 95)

territory of India. A Buddhist is a Hindu under the Act, no doubt, but the Buddhist Japanese lady having Japanese citizenship was not *domiciled* in the territory of India and hence the marriage could not be treated to be a Hindu marriage.

Child marriages: Issues of validity and guardianship

For a country where not till recently arranged child marriage was a rule and their continuation is visible even presently, despite legislative and social activists efforts to curb it, a daunting task awaits the judiciary to adjudge their validity, which is further complicated where the adjudication is required in cases of elopement followed by marriage of minors without parental consent or in their ignorance/ disapproval. A sharp contrast in parental as also the societal behaviour is glaringly apparent in such cases. An arranged child marriage sought to be annulled by the parties require tremendous efforts more specifically by the female party as in practical socio-economic scenario, a firm decision at this age would not only be uncommon but rather unique as it would put both her in-laws and her parents as also the society on loggerheads with her. The intense hostility confronted by the girl and lack of support from virtually all the fronts is enough to subdue her spirit and force her into subjugation, as it is an extremely difficult task to fight everyone alone notwithstanding the fact that the marriage may be to her manifest disadvantage.

In cases of elopements in ignorance of parental knowledge or in defiance to their wishes the reaction is again of extreme hostility from all corners of the society but the togetherness of the couple and the support in their mutual fear can give them rare courage. Tender ages are faced with the stark reality that the actual reaction of the nurturers parallels the villains and the parents who would normally rush to their children's aid even if they sneeze, now would be after them with a desire to throttle them. While both become extremely vulnerable the boy faces an additional trauma of being branded a criminal with serious charges of rape and kidnapping slapped against him, if the girl's parents come to know of their cohabitation with mutual consent. An uncertainty of the validity of this union remains an added complication, parents crying nullity and spouses claiming its legality. The Supreme Court adjudicated

upon the validity of such a union. Here, *Jitender Kumar Sharma v. State*[14] H aged a little under 18 years and 16 years old W got married according to Hindu rites and ceremonies without informing her family members in 2010. W's family was strongly opposed to this marriage or her maintaining any connection with H. W apprehended a threat to her and her husband's life due to intense opposition of her father, paternal grandfather and paternal uncle. Her elopement, predictably, was followed by a swift lodging of an FIR by her father at the police station who later also added charges under section 376 against the son-in-law, after coming to know that they were living together as husband and wife. Two days post marriage a letter was received at the police station written by W, that she had married H voluntarily; that no case be registered against him at the behest of her parents. However, both H and W were apprehended from their hideout; were produced before the court, which sent H to Juvenile home, and handed over W, to her parents, but she escaped and went to her in-laws house who welcomed her as their daughter-in-law. A second missing report resulted in a prompt action by the police, as they "recovered" her from her in-laws's house, sent her to a women's home, only to be taken away by her parents forcibly despite the fact that she gave in writing that she went to the in-laws house voluntarily. In June 2010, the husband was released from juvenile home and 8 days later W's mother again approached the police station about her kidnapping by H. W again wrote letters to the authorities about her marriage, her going with H on her own with free consent and her apprehensions about her safety and her life at the hands of her father, uncle and her grandfather. When produced in the court, she firmly stated that she wanted to live with H, and did not want to go to her parents' home and when the court could not send her to her parent's home without her consent, she was again sent to *Nirmal Chhayya*. Her parents contended that as she was a child, her marriage to H was void in light of section 5 (iii) of Hindu Marriage Act, 1955 (HMA) as also the Prohibition of Child Marriages Act, 2006 (PCMA). Thus the court had two issues to adjudicate upon: first the validity of her marriage and second, since she was a minor,

[14] 2011 MLR 144 (SC)

appointment of her guardian? Incidental to the second issue was the question; what if she does not accept the custody decision of the court? If she was a minor but of an age when she could express her intelligent preference; would a forced custody order, amount to violation of her fundamental rights to life and liberty under article 21 of the Constitution of India? With respect to the status of the marriage, the court held in favour of its validity under the Hindu Marriage Act, 1955. It quoted with approval earlier judicial pronouncements (*Kalyani Chaudhary v. State of UP*[15]; *Simran Kaur v. State of HP* [16]; *Ravi Kumar v. State,* [17] and *Manish Singh v. Government of NCT, Delhi,*[18]) and said:

> Under Hindu law there are essentially two kinds of marriages, void and voidable. Under section 11, child marriage is not there, and under section 12 the marriage of a minor simpliciter is not voidable but can be declared void under certain circumstances.

The court observed that the validity of marriage is primarily to be determined with respect to the personal law of the parties and thus for Hindus, it would be in context of the Hindu Marriage Act, 1955, where it is valid as a marriage in contravention of the section 5 (iii) and is not *ipso facto* void but could be void if any circumstances enumerated in section 12 of PCMA apply. PCMA, irrespective of personal laws makes every child marriage voidable at the option of the child party to the marriage, but only the child can file a petition for its annulment and nobody else. PCMA makes a special provision for void marriages under certain specific circumstances but does not render all child marriages void. It also introduced the concept of a voidable child marriage, the flip side of which clearly indicates that all child marriages are not void, for one cannot make something voidable which is already void or invalid. Judicial conclusion was therefore in favour of the validity of this marriage.

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[15] 1978 CrLJ 1003
[16] 1998 (2) Crimes 168
[17] 124 (2005) DLT 1
[18] AIR 2006 Delhi 37

With respect to the second issue, i.e., the custody of a minor married girl, the court opined that even though she had clearly and flatly refused to go with her parents, yet, she cannot be kept in *Nirmal Chhayya* till she attained majority. Exploring the considerations necessary to be considered while appointing a guardian under the Guardians and Wards Act, 1890, it concluded that two things were apparent, namely, first that a guardian is not to be appointed or declared of the person of a minor married female whose husband is not in the opinion of the court unfit to be the guardian of her person and secondly, a minor is incompetent to act as a guardian of any minor except to his own wife. Further, in appointing a guardian for the minor the paramount consideration would be given to the welfare of minor and if the minor is old enough to voice her opinion or intelligent preference, that has to be given due consideration. The court directed the release of the minor from the home and to be sent to the husband saying that she was free to live with him and ordered the quashing of all FIRs filed against him by the girl's parents. It also quoted with the approval its earlier observations as follows:

> Before we conclude, we would like to point out that the expression "child marriage" is a compendious one. It includes not only those marriages where parents force their children and particularly their daughters to get married at very young ages, but also those marriages which are contracted by the minor or minors themselves without the consent of their parents. Are both these kinds of marriages to be treated alike? The former kind is clearly a scourge as it shuts out the development of children and is an affront to their individualities, personalities, dignity and, most of all, life and liberty….

The court declared the present marriage as valid and accorded the custody of the girl to her husband holding that even though a minor cannot be a guardian, he can be so for his minor wife. The court observed that the old and evil practices of parents forcing their minor children into matrimony subsist along with the modern day problem of children falling in love and getting married on their own. The latter may have been occasioned by aping the west or the effect of movies or because of the independence that the children enjoy in the

modern era. Whatever is the reason, the reality must be accepted and the state must take measures to educate the youth that getting married early places a huge burden on their development. At the same time, when such marriages do occur, they may require a different treatment and hoped that the sooner the legislature examines these issues and comes out with a comprehensive and realistic solution, the better, or else courts will be flooded with *habeas corpus* petitions and judges would be left to deal with broken hearts, weeping daughters, devastated parents and petrified young husbands running for their lives chased by serious criminal cases, when their sin is that they fell in love.

As per the 205th Report of the Law Commission of India, (February 2008) child marriages continue to be fairly widespread social evil in India and in a study carried out between the years 1998 to 1999 on women aged 15-19 it was found that 33% were currently married or in a union. In 2000 the UN population division recorded that 9.5% of boys and 35.7% of girls aged between 15-19 were married. The need to root out these unhealthy practices from our social fabric is mandatory, but the court is not oblivious to the fact of a burgeoning of case of missing daughters and married daughters detained by their parents that is a serious societal problem having civil and criminal consequences. There is distinction between the problem of child marriages as traditionally understood and child marriages are the mould of teenage marriages. India is both a modern and a tradition bound nation at the same time, yet in cases of marriages of minors all by themselves, both tradition and modernity are thrown to winds and only a desire to finish both the life and the marriage remains uppermost in the minds of the parents. More than the voluntary marriage of minors, it is an arranged minor marriage that is dangerous and a blot on our nation, and the sooner it is wiped out, the better it would be.

Offence of bigamy and initiation of complaint by the second wife

In 1955, i.e., 57 years back, legislature pronounced monogamy as the basic rule for all Hindus subject to the provisions of the Hindu Marriage Act, 1955; brought the commission of bigamy under section 494 IPC, making it a criminal offence yet diluted considerably the

intense seriousness of this crime by putting it in a different bracket from the general crimes. It was put under the heading offences against marriage. The lack of seriousness in tackling the menace of bigamy can be judged by the fact that the affected party here is the first wife and the offence is not against the society as such but only against her. Is she chooses voluntarily to or is even forced not to take any such action against the husband, he cannot be prosecuted because despite the fact that the other persons such as her relations, or even a president of a social or a women's organization are competent to lodge an FIR on her behalf, it is always on behalf of the first wife and if she does not agree to prosecute the husband, nobody else is empowered to take even this initial step. Societal perception towards commission of this crime is, therefore, predictably not only lenient but sometimes even shocking. Bigamous men are not seen as criminals, not even law breakers, but are often visualized as "macho" hinting that their actions are worth applaud and not reprinted. Political parties riding on the Indian culture and traditions woo, bigamous silver screen personalities, giving them tickets to fight elections or nominate them to the sacred parliament, where they take part in the law making process. Adopting double standards, these law breakers make laws riding on their economic and populist success, throwing caution to winds and shredding rule of law to pieces making them toothless tigers. It sends a clear message that here is a crime which even though within public knowledge would go largely unpunished if one is able to subjugate the first wife or convince her emotionally or through some other means not to take any action. The cause of action, therefore, arises only in favour of the first wife and nobody else. Of late even in those cases where married men enter a second wedlock through deception keeping in dark the second wife of their marital status, on the discovery of fraud, the second wife is incompetent to lodge an FIR against him and prosecute him. An additional trauma for her would be her inability to file a case of matrimonial violence under section 498 A of IPC, since the second marriage would be void and she would not take the status of a wife and the protection available to a wife from domestic violence under the IPC would be denied to her. In this regard, important

issues, such as can the second wife who was deceived into marrying a married man, file an FIR against him; can she also lodge a complaint against him under section 498 A, arose in a case that came before the apex court. Here the petition (*A Subhash Babu v. State of AP,*[19]) was filed by a Hindu woman that H had approached her for marriage and had made a representation that his wife had died leaving behind two children who were studying and living in hostel, while the fact was that the first wife was alive. In the court of the first judicial magistrate, the case was registered under sections 494, 495, 498 A and 420 as the woman had also alleged mental torture and harassment relating to dowry. The husband contended that a second wife cannot file a complaint under sections 494 and 495, or under 498 A as she is neither the aggrieved party in the former case nor a legally wedded wife in the later case. The high court noted that the offence punishable under section 494 as amended by the state of Andhra Pradesh was made cognizable and though there was no corresponding amendment to section 198 of the Cr PC the investigating agency was entitled to investigate; police was competent to file the charge sheet and the magistrate could take cognizance of the said offence on report filed by the police. The court concluded that for the offence punishable under sections 417, 420, 494 and 495 this was in accordance with the law but as the victim was the second wife, the second marriage being void the offence under section 498 A cannot be made out.

The husband's primary contention was that the magistrate is incompetent to take cognizance of the offences under sections 494 and 495 on the basis of the police report because even though the amended state legislation made the offence cognizable, the legislation enacted by the parliament in respect of section 198 of the CrPC remained the same and in the event of any repugnancy between the two legislations, the one brought in by the parliament would prevail. According to him, the high court also failed to take note of the fact that it is only a legally wedded wife or anyone on her behalf who can make a complaint to the magistrate for the offence under sections 494 and 495 and here it was the

[19] AIR 2011 SC 3031

second wife who does not have the status of a legally wedded wife who had filed a complaint with the police. The prosecution on the other hand contended that since in the state of Andhra Pradesh, due to the amendment these offences have become cognizable, the aggrieved person acquired the competency to lodge an FIR and the magistrate can take action on the basis of such FIR. The court explored the substantive content of both sections 494 and 495 and noted that the solemnization of marriage with a woman when the first marriage was subsisting and that too keeping her in dark about it, brings not only an element of dismay due to fraud but attachment of serious legal disabilities upon her as well, such as incapability to claim maintenance even when there is inhuman treatment, or physical or mental cruelty; ineligibilities to claim inheritance, outrageous and absurd social stigma. It shatters her ambition to lead a comfortable life and brings untold misery on her by her own kith and kin as also the society at large. The court the proceeded to explore the legislative intent for enacting sections 494 and 495 in the Code and observed that though these sections, law introduced monogamy which is essentially a voluntary union of life of one man with one woman to the exclusion of all others and abolished polygamy and hypergamy, which is not so recent past had brought innumerable miseries for women and had been one of the major reasons for her subordinate status. Section 494 was intended to achieve a laudable objective of monogamy, but this is possible only by expanding the meaning of the phrase “aggrieved person”. For a variety of reasons the first wife may not choose to file a complaint against her husband e.g., when she is assured of reunion by her husband, when he assures her that he would snap ties with the second woman etc, but no filling of the complaint does not mean that the offence of bigamy is wiped out and monogamy sought to be achieved by means of section 494 merely remains in the statute book. Having regard to the prevailing practices in the society sought to be curbed through section 494, there is no manner of doubt that the complainant should be an aggrieved person. Section 198(1) © of the Cr PC amongst other things provides that where a person aggrieved by an offence under sections 494 or 495 IPC is the wife, complaint on her behalf

may also be filed by her father, mother, sister, son, daughter etc or with the leave of the court by any person related to her by blood, marriage or adoption. The court said:

> The expression "aggrieved person" denotes elastic and an elusive concept and cannot be confined within a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of complainant's interest and the nature and extent of the prejudice or injury suffered by the complainant. Section 494 does not restrict the right of filling complaint to the first wife and there is no reason to read the said section in a restricted manner as is suggested by the appellant's counsel.

The court further said that section 494 does not say that the complaint for commission of the offence under this section can be filed only by the wife living and not by the woman with whom subsequent marriage takes place during the life time of the first wife. As here the man concealed the first marriage from the complainant, therefore, she becomes an aggrieved woman and a complaint at her instance is maintainable. Under section 495, the offence is an aggravated form of bigamy due to concealment of former marriage. A married man who by passing himself off as unmarried induces an innocent woman to become as she thinks his wife, but in reality his mistress commits one of the grossest form of frauds known to law and, therefore, severe punishment is provided. Therefore, the wife with whom the second marriage is performed after concealment of the former marriage would also be entitled to lodge complaint for commission of offence under section 495 as she would be an aggrieved person within the meaning of section 198 Cr PC.

The court also came down heavily on the high court for quashing the proceedings pending before the magistrate under section 498 A on the ground that since the marriage of the woman with the accused was void, she was not his wife and the issue of dowry related harassment would not arise. Such reasoning according to the court, was quite contrarary to law. The court said that a person who enters into marital arrangement cannot be allowed to

take shelter behind the smoke screen of contention that since there was no valid marriage the question of dowry does not arise as such legalistic niceties would destroy the purpose of the provisions. Such hair splitting approach would encourage harassment to a woman over demand of money. If such restricted meaning is given it would not further the legislative intent rather on the contrary it would be against the concern shown by the legislature for avoiding harassment to a woman over demand of money in relation to the marriage. Legislation has not defined the term husband but the term is wide enough and would include a man who gets into a second marriage or a void marriage with another woman. The court held that a woman with whom the second marriage is solemnized by suppressing the fact of a former marriage would be entitled to maintain a complaint against the husband under sections 494, 495 and 498 A of the IPC.

Conclusion

Hindu Law has a long history which essentially originated in the Vedic background. Due to the efforts of jurisconsults diverse schools of Hindu law came into existence. The Hindu jurisprudence has given due emphasis on religion, custom and rituals prevailing as law. The *Mitakshara* school of thought is mostly prevalent throughout India. Marriage is one of the important institutions which have come to stay as the consensual consortium between the husband and the wife. No marriage can be valid unless it fulfils certain conditions of marriage like age, blood relationship, spinda relationship and some other forms of validating marriage.