Malhotra & Malhotra Associates
International Lawyers

ANIL MALHOTRA
LL.B. (PUNJAB), LL.M. (LONDON)

RANJIT MALHOTRA
LL.B. (PUNJAB), LL.M. (LONDON)

ADVOCATES
SUPREME COURT OF INDIA
PUNJAB & HARYANA HIGH COURT

BUNGALOW 584, SECTOR 16-D
CHANDIGARH-160 015 INDIA

TELEPHONE: 91-172-2542026
91-172-2771443
91-172-2542443

FACSIMILE: 91-172-2545443
E-mail: anilmalhotra1960@gmail.com
malhotraranjitindia@rediffmail.com

THE INTERNATIONAL SURVEY OF FAMILY LAW

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- INDIA CHAPTERS –

By Anil Malhotra and Ranjit Malhotra

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INDIA

SOME PERSPECTIVES ON INDIAN FAMILY LAW

Anil Malhotra[*] *and Ranjit Malhotra*[**]

The present India chapter analyses three areas of Indian family law: validity of marriages in the context of unmarried cohabitation under Hindu law; recent developments in international child abduction law; and the law of guardianship and inter-country adoption in India. The reason for focus on these select branches of law is because these areas are of immense interest to an international legal readership given the large size of the Indian population residing overseas.

I HINDU LAW OF MARRIAGE

The principal law of marriage and divorce relating to Hindus is contained in the Hindu Marriage Act 1955 (hereafter HMA 1955), which came into force on 18 May 1955. The HMA 1955 also governs validity of marriages of those Indian spouses who are permanently resident overseas. It is an Act to amend and codify the law relating to marriage among Hindus. After outlining the main provisions of the HMA 1955 they will be discussed in appropriate detail.

A Main provisions of the HMA 1955

Section 1 states the territorial application of the HMA 1955. In terms of section 2, the Act is applicable only to Hindus. Section 5 of the HMA 1955 stipulates the conditions for a valid Hindu marriage. Essential ceremonies for a Hindu marriage are laid down in section 7 of the Act. Registration of marriages is dealt with in section 8 of the Act. Sections 9 and 10 of the Act provide for restitution of conjugal rights and judicial separation.

Nullity of marriage and divorce are dealt with in detail in Chapter IV of the HMA 1955. The grounds for divorce are detailed in section 13 of the Act. Divorce by mutual consent is recognised under section 13-B of the Act.

The issue of jurisdiction and the procedure for obtaining divorce is provided in Chapter V of this Act. Provisions for maintenance pendente lite and permanent alimony are made in sections 24 and 25 of the Act, respectively. It is important to mention that section 29(2) of the Act recognises dissolution of marriage by

* Advocate at the Punjab and Haryana High Court and the Supreme Court of India, New Delhi. Formerly part-time lecturer at the Faculty of Laws, Punjab University, Chandigarh.

** Advocate at the Punjab and Haryana High Court and Supreme Court of India. Regional representative for India of the migration and nationality law committee of the International Bar Association.

custom, pleaded by parties to the marriage. The main provisions of the HMA 1955 are discussed below.

B Extent and jurisdiction of the HMA 1955

Section 1 of the HMA 1955 states that the Act extends to the whole of India, except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories. In effect, the Act has extra-territorial application, because a Hindu carries with him the personal law of marriage.

C Application of the HMA 1955

In terms of section 2 of the HMA 1955, Hindu law applies to the following three categories:

(a) any person who is a Hindu, Jain, Sikh or Buddhist by religion;
(b) any person who is born of Hindu parents; and
(c) any other person domiciled in the territories to which this act extends who is not a Muslim, Christian, Parsi or Jew.

The Calcutta High Court in *Prem Singh v Dulari Bai*,[1] while interpreting sections 1 and 2 of the HMA 1955 held in para 5 of the judgment at p 426:

> 'This section read with Section 2(1)(a)(b) makes it equally clear that as regards the intra-territorial operation of the Act it applies to all Hindus, Buddhists, Jains or Sikhs irrespective of the question whether they are domiciled in India or not. The provisions of Clause (c) of the same section contemplates extra-territorial operation in the sense that the persons domiciled in other territory to which this Act may extend, if governed by Hindu Law, even though, residing outside the territory, would come within the purview of this Act.'

The court further held that the question of domicile assumes importance only when the marriage between the parties is prohibited by the domestic rule or law of the land to which one of the parties to the marriage, a foreigner, may belong.

D Validity of marriages in the context of unmarried cohabitation under Hindu law

The specific area of focus in this analysis is situations where a Hindu couple, in the country of their origin, have been cohabiting as husband and wife without performance of any religious ceremonies and without the registration of the marriage and, subsequently, the male Indian spouse has migrated and married abroad.

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1 *All India Reporter* 1973, Calcutta 425.

Cohabitation in this context would mean that the couple have initially been living under one roof, with family approval and public recognition. Some sort of token customary ceremony may also have been performed of which there exists no evidence at all. They are not ceremonies as envisaged in section 7 of the HMA 1955.

This is a common phenomenon with a certain category of non-resident Indians residing overseas, especially in England, Canada and Australia. Quite often, the male migrant Hindu spouse gets married abroad with the prime agenda of securing overseas citizenship. Once this purpose has been achieved, the earlier Indian spouse and the children may very conveniently be dumped and deserted. In the event of any litigation during the process of acquiring overseas citizenship, foreign immigration and family lawyers are confronted with the problem of addressing the validity of the alleged initial marriage on the home soil. Problems also arise with regard to alimony payable to the previous deserted Indian spouse. Quite often the couple may have been living in a joint family before the husband migrated abroad. The bitter battle starts when the Indian spouse demands her share of the family property or from any agricultural land holdings or any other assets owned by the husband, as the case may be.

The core issue in such a situation is the legal status of the previous unmarried cohabitation in the country of origin of the male migrated spouse under the main Indian law of marriage, ie the HMA 1955. If this previous relationship is a valid marriage, then the male migrant Indian spouse is a bigamist. Bigamy is a criminal offence under the Indian Penal Code and invites very serious consequences. The marriage performed overseas, in such a situation, would then stand nullified under the HMA 1955. The end result is that the prospects of acquiring overseas citizenship will be devastated.

The current debate on this situation has been triggered on account of a recent decision of the Supreme Court of India in *Surjit Kaur v Gajra Singh*,[2] which has substantially altered and rather reversed the tide of earlier judicial dicta. The Supreme Court of India held therein that, even if the parties hold themselves out before society as husband and wife and society treats them as such, without the proof of proper ceremonies of marriage they could not be considered as husband and wife. Long cohabitation creates no presumption of a valid marriage in such a situation. This decision contemplates the situation where the marriage has not been registered in terms of section 8 of the HMA 1955. It is pertinent to mention that registration of marriages is not compulsory under the HMA 1955.

On the other hand, there is ample earlier case law, contrary to this recent ruling, giving explicit legal recognition to a presumption of a valid marriage in such circumstances. The reverse proposition is discussed in the subsequent portion of this chapter.

The validity of such a purported marriage, as described above, will be governed by the provisions of the HMA 1955 (Act XXV of 1955 as amended by the Act in force on 18 May 1955. No. 73 of 1956, 58 of 1960, 44 of 1964 and 68 of 1976).

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2 *All India Reporter* 1994 SC 135.

E Requirements of a valid Hindu marriage

The legal validity of such an alleged marriage has to be scrutinised in terms of sections 5 and 7 of the HMA 1955. Section 5 provides as follows:

> '5: Conditions for a Hindu Marriage – A marriage may be solemnised between any two Hindus, if the following conditions are fulfilled, namely:
>
> (i) neither party has a spouse living at the time of the marriage;
> (ii) at the time of the marriage, neither party –
> (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
> (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children: or
> (c) has been subject to recurrent attacks of insanity or epilepsy;
> (iii) the bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of the marriage;
> (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
> (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two …'

Section 7 deals with ceremonial aspects:

> '7. Ceremonies for a Hindu Marriage.
>
> (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.
> (2) Where such rites and ceremonies include the Saptapadi (that is, the 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.'

Where the requisite ceremonies of marriage as envisaged in section 7 of the HMA 1955 are not performed, nor any custom is invoked by the couple rendering the performance of such ceremonies unnecessary, neither of the spouses in such a situation can claim the status of marriage in terms of section 7 of the HMA 1955.

Some of the relevant case-law on sections 5 and 7 of the HMA 1955 coupled with the issue of bigamy is discussed below.

F Marriage registration under Hindu law not compulsory

Section 8 of the HMA 1955 deals with registration of marriages. The Act does not make the registration of marriages compulsory. This is primarily because Hindu marriages and most marriages in India have been always performed in public with wide publicity. Section 8(2) of the HMA 1955 provides that any State Government may make rules for compulsory registration of Hindu marriages. Furthermore, section 8(5) specifically lays down that failure to register a Hindu marriage shall in no way affect its validity. Even where compulsory registration of marriage is laid down under the rules, non registration does not affect the validity

of the marriage. It merely entails a nominal fine. Unlike the entry of marriage pursuant to the English Marriage Act 1949, mere registration under section 8 of the HMA 1955 will not *ipso facto* make the marriage valid.

G Proof of marriages solemnised outside England and Wales

In England, rule 10.14 of the Family Proceedings Rules 1991 (subject to certain exceptions) stipulates requirements to prove the validity of a marriage celebrated outside England and Wales. Rule 10.14 provides that the validity of such a marriage under the law of the country where it was celebrated may, in any family proceedings in which the existence and the validity of the marriage is not disputed, be proved by the evidence of one of the parties to the marriage and the furnishing of a document purporting to be a marriage certificate or a similar document issued under the law in force in that country. Additionally, the evidence of a local expert in law is necessary to prove that such a certificate would be accepted in the country of origin as prima facie evidence that a valid marriage has taken place.[3]

H Case-law analysis – validity of marriages

1 CASE-LAW NOT SUPPORTING A PRESUMPTION IN FAVOUR OF A VALID MARRIAGE

Coming to the recent Supreme Court of India decision in the matter of *Surjit Kaur v Garja Singh*,[4] the operative part of which is found in para 13 at p 137.

> 'Prima facie, the expression "whoever … marries" must mean "whoever … marries validly" or "whoever … marries and whose marriage is a valid one". If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife.'

Saptapadi, being an essential ceremony, establishes the fact of marriage. Saptapadi is the taking of seven steps by the bridegroom and the bride jointly before the sacred fire. Without proof of such a ceremony, the first 'marriage', does not exist and a case for bigamy cannot arise. This was the mandate of law laid down by the Supreme Court of India in *Smt. Laxmi Devi v Satya Narayan and Others*.[5]

Where the parties are governed by the customary law of marriage and divorce, there has to be a specific averment in support of the same. In the instant case it

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3 See: Rayden and Jackson's *Law and Practice in Divorce and Family Matters*, volume 1 (Butterworths, London, 1997) at pp 122 and 127.

4 *Supra*, note 2.

5 1994 (30) *Hindu Law Reporter* 449.

was also held that, where the parties to the marriage had not proved that they were governed by any custom under which the essential ceremonies stipulated in section 7 of the HMA 1955 were not required to be performed, the fact of marriage could not be established.

The High Court of Punjab and Haryana has held in the matter of *Ashok Kumar Chopra v Krishna Kumari*:[6]

> 'In view of the above mentioned authorities it is very well made out that in order to make out a prima facie case for the commission of bigamy it is necessary to allege form of marriage as well as essential ceremonies required for solemnisation of a valid marriage and then to lead some evidence in support thereof. Even the admission of second marriage by the petitioner is of no avail to the complainant. This inherent infirmity exists in the pleadings as well as in pre-charge evidence which cannot be cured at the stage of trial and under these circumstances continuance of proceedings will amount to abuse of process of Court.'

As stated above, a typical situation is that no religious rights or ceremonies may have been performed between the cohabiting couple during the currency of their stay in the country of origin. Also relevant to the status of such an alleged marriage is the decision of the Supreme Court of India in the case of *Santi Deb Berma v Kanchan Prava Devi*.[7] In this case the performance of 'saptapadi' was not proved, neither was the accused's marriage performed by any custom which dispensed with saptapadi. The accused and his alleged second wife were living as husband and wife, but there was no specific evidence regarding the performance of the essential rites, namely Saptapadi. The Supreme Court categorically held in paras 6 and 7 of the judgment (at p 817) that, in the absence of any reliable and acceptable evidence, it was not sustainable to draw an inference as to the performance of ceremonies essential for a valid marriage. Accordingly, the accused was acquitted of the alleged offence of bigamy.

The Supreme Court of India held in *Lingari Obulamma v Venkata Reddy and Others*[8] that while assailing the second marriage where there was absolutely no evidence to prove Saptapadi or performance of prevailing customs in the community, which was neither mentioned in the complaint nor proved in the evidence, the conviction under section 494 of the Indian Penal Code for the offence of bigamy could not be sustained.

As early as 1966 the Supreme Court of India held in *Kanwal Ram and Others v The Himachal Pradesh Administration*[9] that, in a bigamy case, the essential ceremonies constituting an alleged second marriage must be proved. Admission of marriage by the accused is not sufficient for the purpose of proving marriage in an adultery or bigamy case. This ruling in *Kanwal Ram* has been recently reiterated in the above-mentioned case of *Smt. Laxmi*.[10]

Merely because the parties to the marriage have lived as husband and wife, the status of wife is not conferred as laid down by the Supreme Court of India in

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6 1993 (27) *Hindu Law Reporter* 111 at 114.

7 *All India Reporter* 1991, SC 816.

8 *All India Reporter* 1979, SC 848.

9 *All India Reporter* 1966 SC 614 at 615.

10 *Supra*, note 5.

B.S. Lokhande v State of Maharashtra.[11] It was further held that merely going through certain ceremonies with the intention that the parties be considered married will not constitute the ceremonies prescribed by law or approved by any established custom. This Supreme Court ruling has been very recently reiterated by the Supreme Court of India itself in the above-mentioned case of *Surjit Kaur*.

In *Brij Lal Bishnoi v State and another*[12] the Delhi High Court held as follows:

> ‘11. I have already noticed above the law and it is that in a case like the one in hand the complainant has to provide strict proof of the marriage. The mere fact that they had been living together as husband and wife giving birth to their progeny would not do in a prosecution for matrimonial offences. And, as for section 50 of the Evidence Act, the fact that the man and woman spoke of each other as husband and wife, that others coming into their life in the passing or to endure also took them as husband and wife, proves nothing more than conduct, and conduct alone is no substitute of strict proof.’

The Supreme Court of India in a very recent case *P. Satyanarayana and another v P. Mallaiah and others*,[13] held that legal evidence is necessary to prove the fact of marriage on the basis of the tests laid down by this Court in *Bhaurao Shankar Lokhande and Another v State of Maharashtr and Another*,[14] *Kanwal Ram and Others v The Himachal Pradesh Administration*[15] and *Priya Bala Ghosh v Suresh Chandra Ghosh*.[16] The two earlier Supreme Court rulings, ie *Kanwal Ram* and *B.S. Lokhande*, reiterated by the Supreme Court in this ruling have already been elaborated upon above.

Furthermore, the Supreme Court of India has also held in the matter of *Valsamma Paul v Cochin University*[17] that: ‘[R]ecognition by family or community is not a pre-condition for married status’.

2 CASE-LAW TO THE CONTRARY: RAISING A PRESUMPTION IN FAVOUR OF A VALID MARRIAGE

There is also ample case-law contrary to the above-mentioned proposition of law. Some of the decisions of the Supreme Court of India and various of the High Courts on the reverse proposition are discussed below.

In *S.P.S. Balasubramanyam v Suruttayan alias Andali Padayachi and others*[18] the Supreme Court of India further held:

> ‘What has been settled by this court is that if a man and woman live together for long years as husband and wife then a presumption arises in law of legality of marriage existing between the two. But the presumption is rebuttable … In the Hindu society no father would normally tolerate behaviour of his son having a concubine …’

11 *All India Reporter* 1965 SC 1564.
12 1996 (3) *Recent Criminal Reports* 299 at 302.
13 *Judgements Today* 1996 (8) SC 203.
14 *All India Reporter* 1965 SC 1564.
15 *Supra*, note 9.
16 (1971) 1 *Supreme Court Cases* 864.
17 *All India Reporter* 1996 SC 1011 at 1022.
18 *All India Reporter* 1994 SC 133 at 134.

In *Chalakuttiyil Mutteri Karthiyayani Amma v Padinhare Talasseri Veettil Narayanan Nair*[19] the Kerala High Court observed as follows:

> 'Unnikrishna Kurup, J in the decision reported in *Kunji Pillai Amma v Somanathan Pillai*, 1971 KLJ 105, held as follows:
>
> > "The law appears to be clear that when the factum of marriage has been proved, the conditions required for a valid marriage would be presumed to have been fulfilled. The long course of conduct, the fact that the husband had openly acknowledged the 1st plaintiff as his wife and the 2nd plaintiff as his son, the marriage certificate and the various other circumstances afford ample proof that there was a valid subsisting marriage." '

In that case, the contention was that there was no legal evidence to show the presentation of cloth by the bridegroom to the bride as required by the provisions of the Nair Act. His Lordship relied on the decision of the Supreme Court in *Veerappa v Michael*,[20] and held that in so far as there is proof to show that the marriage had taken place, the law will presume that all the necessary ingredients have been performed.

In para 15 of this judgment at p 398, the Court followed *Badri Prasad*, which is discussed in the subsequent portion of this chapter.

In *Subhash Popatlal Shah v Smt. Lata Subhash Shah*[21] it was held by the High Court of Bombay as follows:

> 'However, at the hearing of these appeals, Mr Abhyankar, learned advocate appearing on behalf of the appellant, very vehemently urged that as per section 7 of the Hindu Marriage Act 1955, it had to be proved that a religious rite of completing saptapadi was performed and since there is no such evidence on record, a conclusion could not be drawn that the appellant and the respondent were legally wedded husband and wife. We are unable to persuade ourselves to agree with the submission of Mr Abhyankar for the simple reason that it is only when the marriage rites and ceremonies include saptapadi that the marriage becomes complete and binding when the seventh step is taken. There is nothing on record that there was such custom or rites and ceremonies between the parties before us. Thus, saptapadi is not always a must to prove valid marriage between the parties … Therefore, even if saptapadi was not one of the items of the marriage ceremony undertaken by the parties before us, we are of the opinion that the marriage between the appellant and the respondent cannot be held to be illegal and invalid. In fact, when some sort of marriage ceremony was undergone by and between the parties, there is always a presumption of validity of marriage unless the presumption is rebutted by quite cogent and satisfactory evidence.'

Subsequently, in para 8 of this judgment, the Bombay High Court reiterated quotes from *Ningu* and *Badri Prasad*, which have already been reproduced above.

In *S.P.S. Balasubramanyam v Suruttayan alias Andali Padayachi and others*[22] the Supreme Court of India has held that where a man and a woman were living under the same roof and cohabiting for a number of years, a presumption arises

19 1998 (1) *Hindu Law Reports* 393 at 397.

20 *All India Reporter* 1963 SC 23.

21 *All India Reporter* 1994 Bombay 43 at 45.

22 *Supra* note 18.

that they lived as husband and wife; and such presumption could not be destroyed by the circumstance and evidence proved in the instant case; and that the children were not illegitimate.

In *Smt. Nirmala and others v Smt. Rukminibai and others*,[23] the Karnataka High Court expressly reiterated *Badri Prasad* and *S.P.S. Balasubramanyam*.

In *Ningu Vithu Bamane and other v Sadashiv Ningu Bamane and others*[24] it was held in para 20 of the judgment as follows:

> 'I am of the opinion that in a well-organised, orderly and civilised society like ours which is not of loose and uncertain morals, the institution of marriage occupies an important place and plays a very vital role in the process of development of human personality. We have definite views and strong convictions about marital relations. The law as to presumption in favour of marriage under ss. 50 and 114, Evidence Act, is well crystallised. Thus when a man and woman, live together as husband and wife for sufficiently long time and were treated as husband and wife by friends, relatives and neighbours there is always a presumption in favour of their marriage. If children are born to such a couple, there is a further presumption in favour of their legitimacy. The presumption in favour of marriage does not get mitigated or weakened merely because there may not be positive evidence of any marriage having taken place. But if there is some evidence on record that the couple had gone through some form of marriage, the presumption gets strengthened. Therefore, though marriage ceremony said to have taken place may not be valid, the marriage can be held to be valid by force of habit and repute and the onus of rebutting such a marriage would be on the person who denies the marriage. It may also be stated here that this presumption of law in favour of marriage and legitimacy is not to be repelled lightly by mere balance of probability. The evidence for that should be strong, satisfactory and conclusive. If the presumption is permitted to be rebutted lightly, the weaker and vulnerable sections of the society, *viz*, the women and the children could be the victims of the vagaries of uncertainties as to their positions and status in life. This would be very much detrimental in the development of their human personality. They would be the worst sufferers in the society.'

Section 114 of the Indian Evidence Act 1872 reads as follows:

> '114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.'

In *Badri Prasad v Dy. Director of Consolidation and others*,[25] the relevant portion of the judgment reads as follows:

> 'A strong presumption arises in favour wedlock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon bastardy. In this view, the contention of Shri Garg for the petitioner, that long after the alleged marriage, evidence has not been produced to sustain its ceremonial process by examining the priest or other witnesses,

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23 *All India Reporter* 1994 Karnataka 247.

24 *All India Reporter* 1987 Bombay 27.

25 *All India Reporter* 1978 SC 1557.

> deserves no consideration. If a man and woman who live as husband and wife in society are compelled to prove, half a century later, by eye witness evidence that they were validly married, few will succeed.'

After analysing the law, it is clear that there is a conflict of law situation as far as presumption in favour of valid marriages is concerned, on the basis of cohabitation without cogent evidence of performance of ceremonies as envisaged in section 7 of the HMA 1955. This is a situation which needs to be remedied by the Apex Court. In an appropriate case this issue should be referred to a Supreme Court Constitution bench for finality.

Dr WF Menski, in one of his articles, has discussed the far-reaching implications of *Surjit Kaur*. He is of the opinion that this judgment particularly affects women who remarry after a divorce or after the death of their first husband. In such situations, it is customary not to have the full marriage rituals as done for a first marriage. Menski further states that in some instances it will be customary to have no marriage rituals at all. He further states that there are many cases in which a man and woman simply contract to marry, and whether or not it is done in writing is immaterial. However, it may be added by way of clarification that marriage is a sacramental union under Hindu law and the English concept of contract to marry is alien to the Indian system. Under the HMA 1955, no form of writing is necessary to solemnise a marriage.

In *Surjit Kaur's* case gur (jaggery) was distributed to friends of the newly married couple. There was public recognition in addition to a document purporting to be registration of the customary marriage. Menski's interpretation of section 7 of the HMA 1955 is that it is perfectly possible to enter a legally valid Hindu marriage without going through elaborate Sanskrit rituals. He opines that *Surjit Kaur's* case looks even more out of line, especially in comparison to *S.P.S. Balasubramanyam*, a judgment delivered by the Supreme Court of India at the same time as *Surjit Kaur*. *Balasubramanyam's* case relaxes the burden of proof and is exactly opposite to the law laid down in *Surjit Kaur*. Menski concludes: 'Bad decisions of this kind no doubt contribute to keeping women in subordination.'[26]

I Presumption of valid marriage – recent English law decision

As far as the position in English law is concerned, the Court of Appeal very recently held in *Chief Adjudication Officer v Bath* that where there was an irregular marriage ceremony followed by a period of long cohabitation, it would be contrary to the general policy of the law to refuse to extend to the parties the benefit of a presumption of marriage, which would apply to them if there were no evidence of any ceremony at all.

The Court of Appeal so held in a reserved judgment when it dismissed the appeal of the Chief Adjudication Officer challenging the decision of a social security commissioner, who on 7 May 1998, allowed the appeal of the claimant, Mrs Kirpal Kaur Bath, for benefits due to her as a widow. Initially, the social security appeal tribunal dismissed her appeal on 12 August 1994. The tribunal

26 See number 89 (July–August 1995) *Manushi*, pp 15–16.

held that it was not established and it could not be presumed that there was a valid marriage, because there was no evidence of a valid ceremony in accordance with the English Marriage Act 1949.

The claimant, aged 59, went through a Sikh marriage in 1956, when aged 16, with Zora Singh Bath, then aged 19, at the Sikh temple, the Central Gurdwara, 79 Sinclair Road, West Kensington, London, at a marriage ceremony administered by a Sikh priest in accordance with Sikh custom and religion.

They lived together as man and wife for 37 years until his death in January 1994. The temple moved to a new address some time between 1956 and 1983, at which latter date it was registered for marriages. There was some evidence that it was not a registered building for performing marriages in 1956.[27]

The facts of the above-mentioned case are a typical situation common to British Asians of Indian origin who migrated from the state of Punjab in the early sixties and seventies. The English ruling above will be of immense help to spouses of immigrants, in the event of any litigation, who had migrated at that point of time. From England itself, there are numerous instances where this class of early migrants altogether denied existence of their marriages to their Indian spouses, in divorce proceedings. This is with the ultimate agenda of avoiding paying any maintenance or stalling the distribution of assets. It is easy for the husband to deny the existence of the marriage, as registration of marriages in India is not compulsory under section 8 of the HMA 1955.

J Right to marry is not absolute

In a first of its kind judgment on the right of a patient suffering from contagious venereal disease to marry, the Supreme Court of India has ruled that, so long as the person is not cured of the disease or impotency, his right to marry cannot be enforced through a court of law. The judgment is reported as *Mr 'X' v Hospital 'Z'*.[28]

The Apex Court firmly held that if the man's marriage has been cancelled owing to his being an AIDS patient, his right to marry will remain a *suspended right*. Furthermore, he is not entitled to claim any compensation from the hospital which has disclosed his medical condition to the would-be bride's family.

The judgment came in the wake of a doctor's petition seeking compensation from the Apollo Hospital in Chennai. The hospital had detected that he was an HIV-positive patient. This fact was also disclosed to his would-be bride's family. The marriage was called off immediately. The doctor contended that the hospital had violated medical ethics by disclosing his medical condition to the bride's family. This led to his social ostracism.

The court dealt with yet another aspect of the matter in paras 40 and 41 of the judgment at p 503:

> 'Therefore, if a person suffering from the dreadful disease "AIDS," knowingly marries a woman and thereby transmits infection to that woman, he would be guilty of offences indicated in sections 269 and 270 of the Indian Penal Code.

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27 For details see the legal page of *The Times*, London, 28 October 1999.

28 *All India Reporter* 1999 SC 495.

> 41. The above statutory provisions thus impose a duty upon the appellant not to marry as the marriage would have the effect of spreading the infection of his own disease, which obviously is dangerous to life, to the woman whom he marries apart from being an offence.'

Sections 269 and 270 of the Indian Penal Code read as follows:

> '269 Negligent act likely to spread infection of disease dangerous to life – Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.
>
> 270 Malignant act likely to spread infection of disease dangerous to life – Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.'

The issue in the above-mentioned case has gone a step further. A petition has been filed in the Supreme Court of India, seeking clarification of the above-mentioned judgment to facilitate marriage of an HIV-positive person after 'full, free and informed consent is taken for the marriage.'[29]

The same Supreme Court Bench comprising of Justice BN Kirpal and Justice S Saghir Ahmad, which had handed down the earlier above mentioned judgment has issued notices to the Union of India and the Medical Council of India to ascertain their views. The second petition on this subject has been filed by Sahara, a centre for residential care and rehabilitation of HIV-positive persons under the AIDS care project.

II CHILD ABDUCTION AND GUARDIANSHIP

A Child abduction principles

International child abduction law in India stands substantially modified in terms of a recent Supreme Court judgment in the matter of *Dhanwanti Joshi v Madhav Unde.*[30] This judgment was handed down on 4 November 1997. The said judgment deals with the provisions and case law analysis relating to the Hindu Minority and Guardianship Act 1980 read with the Guardian and Wards Act 1890. These two enactments principally govern the law relating to child custody under the Indian laws.

Under Indian law, ie the Guardian and Wards Act 1890 and Hindu Minority and Guardianship Act 1956, the prime consideration is the welfare of the child,

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29 For details see: 'SC seeks opinion on AIDS patients' right to marry,' *The Times of India*, New Delhi, 8 February 2000.

30 *Judgements Today* 1997 (8) SC 720.

though section 6(a) of the latter Act says that the custody of a minor who has not attained the age of five shall ordinarily be with the mother.

It has been held in para 31 at pp 733–734 of the judgment, which is reproduced below for the purposes of ready reference :

> 'So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the Court to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in *McKee v McKee* (1951 AC 352), unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare, as explained in *Re L* [1974] 1 All ER 913 (CA). As recently as 1996–1997, it has been held in *P (A Minor) (Child Abduction: Non Convention Country), Re:* (1996) 3 FCR 233 (CA) by Ward LJ 1996 (Current Law) (Year Book) (pp 165–166) that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence – which was not a party to the Hague Convention 1980 – the Courts' overriding consideration must be the child's welfare. There is no need for the judge to attempt to apply the provisions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established.'

From the above mandate of law, it is clear that the Courts in India would not now exercise a summary jurisdiction to return children to the foreign country of habitual residence.

It has also been held, in para 21 of the above judgment, that orders relating to the custody of children are by their very nature not final, but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody, but such change in custody must be proved to be in the paramount interests of the child. This was the position of law laid down by the Supreme Court of India in *Rosy Jacob v Jacob A. Chakramakkal.*[31] The law laid down in *Rosy Jacob*'s case has been explicitly reiterated in the above mentioned 1997 ruling.

It has been further held in this judgment that the custody order of a foreign court is only one of the factors which will be taken into consideration by a court of law in India. The Court in India will form an independent judgment on the merits of the matter with regard to the welfare of the children. Lastly, superior financial capacity cannot be a sole ground for disturbing the children from their mother's custody.

The tenor of law laid down in the above-mentioned judgment of *Dhanwanti Joshi* has very recently been reiterated by the Supreme Court of India in *Sarita Sharma v Sushil Sharma.*[32] The brief facts of this case are mentioned below.

The parents of the children were living in the USA. The children were put in the custody of the father, while the mother was given visiting rights. In exercise of visiting rights on 7 May 1997, the mother picked up the children from the father's residence. She was to leave the children next morning. The father got the information that the children were not brought back to the school. Eventually, the

31 1973 1 *Supreme Court Cases* 840.

32 *Judgements Today* 2000 (2) SC 158.

mother without obtaining any order from the American Court, flew to India with the children.

The father filed a habeas corpus writ petition in the Delhi High Court on 9 September 1997. The wife's contention was that by virtue of the orders dated 5 February 1996 and 2 April 1997 made by the courts in America, both of them were appointed as possessory conservators. Hence, both the children were in her lawful custody.

The Delhi High Court held that in view of the interim orders made by the American Court, the wife had committed a wrong in not informing that Court and obtaining its permission to remove the children from the jurisdiction of that Court. The Delhi High Court took note of the fact that a competent court having territorial jurisdiction had granted a decree of divorce and had ordered that only the father should have the custody of the children. The Delhi High Court allowed the petition and directed the wife to restore the custody of the two children to the father. It was also declared that it was open to the husband to take the children to the USA without any hindrance. The wife appealed to the Supreme Court of India.

The Supreme Court, in para 4 of the judgment at p 263, noticed from the record that there were serious differences between the two. The husband was an alcoholic and had indulged in violence against the wife. The conduct of the wife was also not very satisfactory.

In para 4 of the judgment itself, the court framed the following issues:

> 'The question is whether the custody became illegal as she had committed a breach of the order of the American Court directing her not to remove the children from the jurisdiction of that Court without its permission. After she came to India a decree of divorce and the order for the custody of the children have been passed. Therefore, it is also required to be considered whether the mother's custody became illegal thereafter.'

The Supreme Court of India held, in para 6 of the judgment at pp 264 and 265, as follows:

> '6. Therefore, it will not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from USA despite the order of the Court of that country. So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. We have already stated earlier that in USA respondent Sushil is staying along with his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have the American citizenship and there is a possibility that in USA they may be able to get better education, it is doubtful if the respondent will be in a position to take proper care of the children when they are so young. Out of them one is a female child. She is aged about 5 years. Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after. It is also not desirable that two children are separated from each other. If a female child has to stay with the mother, it will be in the interest of both the children that they both stay with the mother. Here in India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time it must be said that the son, who is elder than the daughter, has good feelings for his father also. Considering all the aspects relating to the welfare of the

> children, we are of the opinion that in spite of the order passed by the Court in USA it was not proper for the High Court to have allowed the Habeas Corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to USA. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held.'

Furthermore, para 31 of the judgment in *Dhanwanti Joshi*'s case, which has been already reproduced above was expressly reiterated by the Supreme Court of India in para 5 of the judgment in *Sarita Sharma*'s case. *Sarita Sharma*'s case is second in line ruling of its kind handed down by the Supreme Court of India, altering the earlier dicta of child abduction law.

Before the above-mentioned 1997 and 1999 rulings were handed down by the Supreme Court of India, there was case-law to the contrary, allowing enforcement of foreign court custody orders on the principle of comity on a case-by-case basis. Such orders were normally enforced by initiating habeas corpus petitions under Article 226 of the Constitution of India in the High Court of the region where the child was situated, or directly in the Supreme Court of India under Article 32 of the Constitution of India.

It is pertinent to mention that Article 137 of the Constitution of India provides for review of judgments or orders made by the Supreme Court of India. Article 141 of the Constitution of India mandates that the law declared by the Supreme Court of India shall be binding on all courts within the territory of India.

There is ample earlier case-law contrary to the law recently laid down in *Dhanwanti Joshi* and *Sarita Sharma*. One such Supreme Court of India ruling – *Surinder Kaur Sandhu v Harbax Singh Sandhu*[33] has been noticed in para 5 at p 262 in *Sarita Sharma*'s case. Para 10 of the judgment in *Sandhu*'s case has been reproduced in para 5 of *Sarita Sharma*'s case, which is reproduced hereunder for ready reference:

> 'We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a bus driver. The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of his custody. The modern theory of conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely

33 *All India Reporter* 1984 SC 1224.

> detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses. (See *International Shoe Company v State of Washington* [90 L Ed 95 (1945): 326 US 310], which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case). It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy.'

The earlier mandate of law as laid down in *Sandhu*'s case elaborated above has not been followed by the Supreme Court of India in *Sarita Sharma*'s case.

In *Sarita Sharma*'s case, the Supreme Court has also noticed the earlier law laid down in *Elizabeth Dinshaw v Arvand M. Dinshaw.*[34] In this ruling the Apex Court had exercised summary jurisdiction regarding the return of the minor child. In *Dinshaw*'s case it was also stressed that the interest and the welfare of the minor child is the predominant criterion in child custody matters.

The earlier law laid down in *Sandhu* and *Dinshaw* stands substantially modified with the recent mandate of law in *Dhanwanti Joshi* and *Sarita Sharma*.

B Forum for custody proceedings

As far as the forum for securing the return of children is concerned, it is important to mention that India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980. Under Article 226 of the Constitution of India, a parent whose child has been abducted can petition the State High Court to issue a writ of habeas corpus against the abducting spouse for the return of the child. Alternatively, a habeas corpus petition seeking recovery of the abducted child can also be directly filed in the Supreme Court of India under Article 32 of the Constitution of India.

C Visiting rights cannot be denied

The Supreme Court of India, in a recent ruling reported as *N. Nirmala v Nelson Jeyakumar*,[35] held that deprivation of visiting rights is not justified. The question involved in this appeal concerned the custody of a minor daughter. The respondent-father was permitted to continue the custody as legal guardian. The learned single judge of the High Court confirmed the custody of the minor daughter with the father but gave visiting rights to the appellant-mother. Against the order passed by the learned single judge, the appellant-mother in search of an actual order of custody, appealed. The Division Bench of the High Court while dismissing the appeal held that the impugned judgment had deprived the appellant of her visiting rights for which there was no cross-objection on the part of the respondent.

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34 *All India Reporter* 1987 SC 3.

35 *Judgements Today* 1999(5) SC 223.

The Apex Court held in para 3 at p 223 of the judgment:

> 'In our opinion, such a further adverse order against the appellant was not justified. The interest of justice will be served if the order of the learned Single Judge continuing the custody of the minor child with the respondent and as confirmed by the Division Bench is maintained subject to the modification that visiting right which was denied to the appellant by the Division Bench be continued.'

D Welfare of the minor child is the paramount consideration

In *Om Prakash Bharuka v Shakuntala Modi*,[36] a custody dispute between the mother and father of the three minor children, custody had been granted to the mother. The wishes of the children were ascertained. They flatly refused to go and stay with their father. The court held, in para 17, at p 42 of the judgment:

> '17. Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them. Thus therefore, the Court in case of a dispute between the father and mother is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. In short, while giving custody of the children, the welfare of the children should be regarded as a paramount consideration.'

E Foreign orders

The principles governing the validity of foreign court orders are laid down in section 13 of the CPC. This has already been discussed under the sub-heading, guidelines laid down by the Supreme Court of India on recognition of foreign matrimonial judgments.

It is reiterated, as elaborated above, that the Indian Courts would not exercise summary jurisdiction to return children to the country of habitual residence. The Courts in India would consider the question on its merits bearing in mind the welfare of the children as of paramount importance.

Section 14 of the CPC talks of a presumption as to foreign judgments. It provides that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

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36 *All India Reporter* 1993 Gauhati 38.

F No provision for mirror orders in India

In light of the prevailing child abduction law in India as elaborated above, it is not possible to obtain mirror orders – a concept known to the English legal system – as there exists no provision for the same in the Indian legal mechanisms. Since foreign court custody orders cannot now be mechanically enforced, it is suggested that in the event of any litigation in the foreign country of habitual residence, a Letter of Request be obtained by the foreign court in which litigation is pending, incorporating safeguards and conditions to ensure the return of the minor child to the country of normal residence.

This Letter of Request should be addressed by the foreign court to the Registrar General of the High Court within whose jurisdiction the estranged spouse is residing with the minor child. It should also be categorically mentioned that the passports of the parent and the child should be deposited with the Registrar General of the State High Court.

G Habeas corpus can also be issued by a person who is not a citizen of India

It is well established that a writ of habeas corpus can be issued to secure the custody of a minor child. This can also be sought even by a person who is not a citizen of this country as recently held in *Miss Atya Shamim v Deputy Commissioner/Collector, Delhi (Prescribed Authority under Citizenship Act) and others.*[37] The Jammu and Kashmir High Court in this ruling reiterated *Elizabeth Dinshaw's* case (AIR 1987 SC 3) where the Supreme Court of India had issued a writ at the instance of a person who was not a citizen of this country.

H Child abduction and forced marriages

In a somewhat extreme and unusual set of circumstances, Mr Justice Singer of the High Court of London ruled that parents who take their children abroad to marry them off against their wishes were guilty of child abduction. This judgment was handed down by the Family Division, Principal Registry on 18 May 1999 and was reported as *Re KR (Abduction: Forcible Removal by Parents)*.[38]

The judge, in the opening paragraph of the judgment, highlights the extent to which courts and other agencies concerned need to be alert to safeguard the individual integrity of children from attack, even from their own family. This case has also highlighted the risk which adolescents, particularly girls of a marriageable age, encounter when they seek to depart from the traditional norms of their religious, cultural or ethnic group.

The ruling pertains to a 17-year-old British Sikh girl who had been taken by her parents to a remote village in India to be married to one of the suitors they had chosen for her. The judge employed the services of the British Foreign Office,

37 *All India Reporter* 1999 J and K 140.

38 [1999] 2 FLR 542.

Interpol, British High Commission, New Delhi and the Indian police to help the girl return to Britain.

The girl had left her home in April 1998 to avoid being married. She went to live with her 19-year-old sister, who had also left home to escape being forced into a marriage against her wishes.

In June 1998, the girl was taken to India where she stayed with her aunt in Punjab. Her passport was confiscated by the family. She was kept under a close watch. She managed to smuggle a letter to her sister in England pleading for help.

Her sister contacted Reunite, a renowned London-based international charity organisation, whose purpose is to give impartial and expert advice and support to the parents of children abducted or believed to be at risk of abduction. With Reunite's assistance, legal proceedings were initiated to make the girl a ward of the court and remove her from her parents' control.

Reunite had to act quickly because once the abducted girl was 18, she could no longer be a ward of the court. The English court wanted to be sure as to what were the intentions of the girl before it took any judicial steps. Her parents insisted that she wanted to stay in India and even provided taped telephone conversations and fax communications from her as proof. The court insisted that officials from the British High Commission should interview the girl. It was discovered that the girl was being moved from place to place to evade them.

Eventually, the girl convinced her parents that she should be taken to the British High Commission at New Delhi. She told the officials that she wanted to return to London.

During the course of the proceedings, Mr Justice Singer had drawn up an order which would have some extra-territorial effect, in the sense that it might encourage relevant authorities in India to give assistance. The judge rightly pointed out in the judgment that the order might be of assistance in comparable situations and it is reproduced hereunder:

> 'UPON hearing …
>
> AND UPON the application of all parties herein and by consent of all parties herein and upon reading … and upon hearing …
>
> AND WHEREAS KR is a Ward of this Honourable Court and is a British citizen; born in and domiciled in the United Kingdom; and currently travelling with a United Kingdom passport
>
> AND WHEREAS in consequence of the fact that this Court has ordered that KR remain a Ward of this Court while (until she attains the age of 18 years on [date]) she remains a minor, this Court is empowered and required to exercise its custodial jurisdiction over her and to ascertain her best interests and to facilitate and protect those best interests
>
> AND WHEREAS this Honourable Court is anxious to protect and secure her well-being and best interests and to ensure that she may freely express her wishes concerning her country and place of residence

> AND WHEREAS this Honourable Court is anxious to ensure that she is not induced or coerced into contracting any marriage or betrothal against her will
>
> AND WHEREAS this Honourable Court is satisfied that all interested parties are before the Court including the Official Solicitor appointed by the Court to represent the Ward
>
> AND WHEREAS this Honourable Court having heard limited oral evidence from [F and M] is of the view that serious grounds exist in the present circumstances to question whether this Honourable Court's Ward KR is able freely to express her views and wishes and in particular with regard to her country of residence
>
> IT IS ORDERED that every person in a position to do so shall co-operate in assisting and securing the immediate return to England of KR, a Ward of this Honourable Court
>
> AND NOW THEREFORE this Court invites all judicial and administrative bodies in the State of India to render assistance in establishing the whereabouts of the Ward of this Honourable Court and in arranging for her to be placed in contact with the British High Commission in New Delhi (Reference: [a named individual]) and to facilitate her travel to the British High Commission with a view to her immediate return to the United Kingdom.'

Indeed, the order was of assistance. The girl flew back to England on 5 March 1999. The court issued a protection order preventing her family from abducting her or trying forcibly to take her back to India.

The judge held at p 10 in the concluding portion of the judgment:

> 'Sensitivity to these traditional and/or religious influences is however likely, in English courts, usually to give way to the integrity of the individual child or young person concerned. In the courts of this country the voice of the young person will be heard and, in so personal a context as opposition to an arranged or enforced marriage, will prevail. The courts will not permit what is at best the exploitation of an individual and may in the worst case amount to outright trafficking for financial consideration.'

I The Hindu Minority and Guardianship Act 1956 (hereafter HMGA 1956)

It is important to advert to the provisions of the HMGA 1956, which is an act to amend and codify certain parts of the law relating to minority and guardianship among Hindus. The provisions of the HMGA 1956 are supplemental to the earlier Guardians and Wards Act 1890. The HMGA 1956, like the HMA 1955, has extra-territorial application. It extends to the whole of India except the States of Jammu and Kashmir.

In terms of section 4(a) of the 1956 Act 'minor' means a person who has not completed the age of 18 years. A 'guardian' in section 4(b) is defined as the natural guardian or one appointed by will or a court of law.

Section 6 of the HMGA 1956 defines the natural guardians of a Hindu minor, which recently came up for interpretation by the Supreme Court of India in the

matter of *Githa Hariharan (Ms) and another v Reserve Bank of India and another*.[39] Two cases involving a similar point of law were decided by the Apex court. In this landmark judgement the Supreme Court has given the mother her due place in the HMGA 1956 by ruling that both the mother and father would be treated as the natural guardians of their minor children.

In Writ Petition number 489 of 1995, the first petitioner and her husband, the second petitioner, jointly applied to the Reserve Bank of India, the first respondent, for the issue of Relief Bonds in the name of their son. They stated expressly that both of them agreed that the mother of the child, ie the first petitioner would act as the guardian of the minor for the purpose of investments made with the money held by their minor son. Accordingly, in the prescribed form of application, the first petitioner signed as the guardian of the minor. RBI replied to the petitioners advising them either to produce the application form signed by the father of the minor or a certificate of guardianship from a competent authority in favour of the mother. The bank contended that the mother was not the natural guardian of a minor in terms of section 6(a) of the HMGA 1956. Ultimately, the petitioners filed a writ petition under Article 32 of the Constitution of India seeking to strike down section 6(a) of the HMGA 1956 and section 19(b) of the GWA 1890 as a violation of Articles 14 and 15 of the Constitution of India. The petitioners also sought to quash and set aside RBI's decision not to accept the deposit from them and to issue a mandamus directing the acceptance of the same after declaring the first petitioner as the natural guardian of the minor. Article 14 mandates that the State shall not deny to any person equality before the law or the equal protection of laws within the territory of India, while Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth. Section 19 of the GWA 1890 contemplates three contingencies in which the Court has no authority to appoint or declare a guardian of a minor at all. By virtue of section 19(b), no order declaring a guardian can be made during the lifetime of a minor's father, unless in the opinion of the court he is unfit to be the guardian of the minor.

Section 6 of the HMGA 1956 is reproduced hereunder for ready reference:

> '6. The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are –
>
> (a) in the case of a boy or an unmarried girl – the father, and after him, the mother: Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
> (b) in the case of an illegitimate boy or an illegitimate unmarried girl – the mother, and after her, the father;
> (c) in the case of a married girl – the husband:
>
> Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section –
>
> (a) if he has ceased to be a Hindu, or
> (b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).'

39 (1999) 2 *Supreme Court Cases* 228.

The judgment of the Chief Justice of India Dr AS Anand assumes significance as he ruled, in para 7 of the judgment at p 234:

> 'The expression "natural guardian" is defined in Section 4(c) of the HMG Act as any of the guardians mentioned in Section 6 (supra). The term "guardian" is defined in Section 4(b) of the HMG Act as a person having the care of the person of a minor or of his property or of both, his person and property, and includes a natural guardian among others. Thus, it is seen that the definitions of "guardian" and "natural guardian" do not make any discrimination against mother and she being one of the guardians mentioned in Section 6 would undoubtedly be a natural guardian as defined in Section 4(c). The only provision to which exception is taken is found in Section 6(a) which reads "the father, and *after* him, the mother". (emphasis ours) That phrase, on a cursory reading, does give an impression that the mother can be considered to be the natural guardian of the minor only after the lifetime of the father. In fact, that appears to be the basis of the stand taken by the Reserve Bank of India also. It is not in dispute and is otherwise well settled also that the welfare of the minor in the widest sense is the paramount consideration and even during the lifetime of the father, if necessary, he can be replaced by the mother or any other suitable person by an order of the court, where to do so would be in the interest of the welfare of the minor.'

Both the authors of the judgment, Justices Dr Anand and Srinivasan, interpreting section 6(a) of the HMGA 1956 in a manner to keep it in the ambit of constitutional validity held that the word 'after' need not necessarily mean 'after the lifetime.' It means 'in the absence of', the word 'absence' referring to the father's absence from the care of the minor's property or person for any reasons whatever.

The court held, in para 10 of the judgment at p 235, that on the following grounds the father would be treated as absent and the mother being the recognised natural guardian, can act validly on behalf of a minor as the guardian:

(a) If the father is wholly indifferent to the matters of the minor even if he is living with the mother.
(b) If by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor.
(c) If the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity.

This progressive ruling also has a beneficial aspect for private international law. Paragraph 14 of the judgment at p 238 recites:

> 'The message of international instruments – the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 ("CEDAW") and the Beijing Declaration, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women is quite clear. India is a signatory to CEDAW having accepted and ratified it in June 1993. The interpretation that we have placed on Section 6(a) (supra) gives effect to the principles contained in these instruments. The domestic courts are under an obligation to give due regard to international conventions and norms for construing domestic laws when there is no inconsistency between them.'

Furthermore, Justice Banerjee, in para 35 of the judgment at pp 242 to 243, has drawn a parallel between English law and Indian law on the subject. It will be noticed from the English rulings below that the welfare of the child is the common denominator in both the jurisdictions. In *Re McGrath*,[40] Lindley LJ observed:

> 'The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.'

Lord Esher MR in *Re Gyngall*,[41] stated:

> 'The court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child, so far as it can be said to have any religion and the happiness of the child. Prima facie, it would not be for the welfare of the child to be taken away from its natural parent and given over to other people who have not that natural relation to it. Every wise man would say that, generally speaking, the best place for a child is with its parent. If a child is brought up, as one may say from its mother's lap in one form of religion, it would not, I should say be for its happiness and welfare that a stranger should take it away in order to alter its religious views. Again, it cannot be merely because the parent is poor and the person who seeks to have the possession of the child as against the parent is rich, that, wihout regard to any other consideration, to the natural rights and feelings of the parent, or the feelings and views that have been introduced into the heart and mind of the child, the child ought not to be taken away from its parent merely because its pecuniary position will be thereby bettered. No wise man would entertain such suggestions as these.'

Justice Banerjee has observed that English law has been consistent with the concept of welfare of the child. Likewise, Indian law also does not make any departure therefrom.

III INTER-COUNTRY ADOPTION IN INDIA

This section briefly discusses the inter-country adoption procedure coupled with the relevant legislation to be complied with by foreigners seeking to adopt children from India. At the outset, it is important to clarify that at present there exists no general law on adoption of children governing non-Hindus and foreigners. Adoption is permitted by statute among Hindus and by custom among some other communities.

At present, non-Hindus and foreigners can only be guardians of children under the Guardianship and Wards Act 1890. In actual practice, foreign nationals desirous of adopting children from India first obtain guardianship orders from the District Court or the High Court, as the case may be, within whose jurisdiction the

40 (1893) 1 Ch 143: 62 LJ Ch 208.

41 (1893) 2 QB 232.

child is residing. This is with a view to formal adoption in accordance with the legal system of the country of their habitual residence.

The Ministry of Welfare pursuant to certain guidelines issued by the Supreme Court of India, in a public interest litigation petition reported as *Lakshmi Kanta Pandey v Union of India*,[42] framed guidelines governing inter-country adoption. This case was monitored by the Supreme Court from time to time until the year 1991. The court scrupulously reviewed the existing procedure and practices followed in inter-country adoptions. The objective was to prevent trafficking of children and to protect the welfare of adopted children.

After the implementation of the initial guidelines in 1989 it was felt necessary to revise them. Accordingly, a task force comprising a cross-section of representatives of adoption agencies under the chairmanship of former Chief Justice of India Mr Justice PN Bhagwati was constituted on 12 August 1992. The Chairman of the Task Force submitted its report on 28 August 1993. The Indian Government accepted the recommendations of the above mentioned task force, and accordingly, circulated revised guidelines to regulate matters relating to adoption of Indian children (1994). These guidelines were published by the Government in the *Gazette of India* on 20 June 1995. These guidelines are discussed below.

A Procedure to be followed in inter-country adoption

In the first place, para 2.14 of the guidelines stipulates that every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the Government of that country in which the foreigner is resident. Furthermore, the agency should be recognised by the Central Adoption Resource Agency (hereafter CARA) set up under the aegis of the Ministry of Welfare, Union of India. CARA is the principal monitoring agency of the Government handling all affairs connected with in-country and inter-country adoptions.

No application by a foreigner to adopt a child should be entertained directly by any social or child welfare agency in India working in the areas of inter-country adoption or by any institution or centre to which the children are committed by the Juvenile Court. The reasons behind this directive have been very appropriately summed up by MN Das in his recent book[43] at pp 80–81 and reproduced below:

> 'Firstly, it will help to reduce, if not eliminate altogether, the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption, he might, in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency or individual procuring the child. Secondly, it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and

42 *All India Reporter* 1984 SC 469.

43 MN Das, *Guardians and Wards Act*, 14th ed (Eastern Law House, 1995).

> secure family life to the child and would be able to handle trans-racial, trans-cultural and trans-national problems likely to arise from such adoption, because, where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely. Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it.'

Regulation 2.15 of the new guidelines provides that where there is no recognised foreign agency in a particular country, then the concerned Government Department or Ministry of that country may forward the applications and related documents of the prospective adoptive parents to CARA. CARA will in turn examine and send those papers to the recognised Indian placement agencies indicated in the application.

It is also mandatory for the enlisted foreign agency to send a copy of the application, as well as the prescribed documents, including the home study report, to CARA. These documents have to be duly notarised by a Notary Public whose signature is additionally duly attested either by an officer of the Ministry of External Affairs or Justice or Social Welfare of the country of the foreigner or by an officer of the Indian Embassy or High Commission or consulate in that foreign country.

B Home study report

Regulation 2.14 of these new guidelines categorically and emphatically enumerates the contents of the home study report. Since the home study report is a crucial document, it is mandatory that it should include the following information:

(1) social status and family background;
(2) description of the home;
(3) standard of living as it appears in the home;
(4) current relationship between the husband and wife;
(5) current relationship between the parents and children (if there are any children);
(6) development of the already adopted children (if any);
(7) current relationship between the couple and the members of each other's family;
(8) employment status of the couple;
(9) health details such as clinical test, hearing condition, past illness etc (medical certificate etc);
(10) economic status of the couple;
(11) accommodation for the child;
(12) schooling facilities;
(13) amenities in the home;
(14) reasons for wanting to adopt an Indian child;

(15) attitude of grandparent/s and relatives towards the adoption;
(16) anticipated plans for the adoptive child;
(17) legal status of the prospective adoptive parents.

Mere receipt of the application as well as other original documents will not entitle the Indian placement agency to proceed with the case. The Indian placement agency can proceed only after obtaining a ‘no objection certificate’ from CARA.

Regulation 2.14 further states that CARA should endeavour, as far as possible, to see that this no objection certificate should be issued within a reasonable period of time, say five weeks from the date of the receipt of the certified copies of the application and other relevant documents.

After the receipt of the original application and the original documents from the enlisted foreign agency by the Indian placement agency, the concerned placement agency will then register the name of the prospective foreign parents in the appropriate register.

The recognised Indian placement agency will then proceed to examine carefully the home study report of the prospective foreign adoptive parents and start the exercise in matching the home study report with the child study report. When it arrives at the conclusion that a child can be placed with that particular family then they will have to ensure that the concerned child is cleared by the Voluntary Coordinating Agency (hereafter VCA) for inter-country adoption. It is pertinent to mention that there exist separate VCAs in every state for that particular jurisdiction.

Thereafter, the recognised placement agency will send the child study report, the photograph of the child and the medical report to the sponsoring foreign agency for the approval of the prospective adoptive parents. After obtaining the approval of the child by the prospective adoptive parents, the recognised placement agency concerned will apply to CARA to get a clearance for the child.

It is at this stage that CARA will have to ensure that the recognised placement agency has put in adequate efforts to find an Indian family for the said child. CARA, after going through the information furnished by the recognised placement agency and the VCA, will immediately give the clearance to the agency. The VCA clearance is mandatory.

C Guardianship order

The recognised placement agency will then process the case with the local court with jurisdiction to award the guardianship of the child to the foreign prospective adoptive parents.

Once again, the scrutinising agency must, at this stage, inspect all the documents and advise the competent court that the inter-country adoption is in the best interest of the child. The court will award the guardianship of the child to the foreign parents within the stipulated time as laid down by the Supreme Court of India.

On the basis of the court guardianship order the recognised placement agency must apply to the regional passport office for an Indian passport for the child.

Thereafter, the entry clearance/visa is to be obtained from the Embassy/High Commission of the country where the child is to live. After this rigorous drill has been carried out, the child leaves the country along with the prospective adoptive parents or with the escort, as the case may be, to go to the country of the prospective adoptive parents.

The Supreme Court of India in *Karnataka State Council for Child Welfare and another v Society of Sisters of Charity St. Gerosa Convent and others*[44] held that the rationale behind finding Indian parents or parents of Indian origin is to ensure that the children should grow up in Indian surroundings so that they retain their culture and heritage. This is definitely an issue which has a bearing on the question of the welfare of the children. The welfare of the children is the main and prime consideration.

The Gujarat High Court, in a progressive judgment, upheld the validity of guardianship orders in favour of two Norwegian couples who were appointed as guardians of Hindu children. In this particular matter, reported as *Jayantilal and another v Asha*,[45] the court tersely held in para 12 of the judgment at p 156:

> '… if the biological parents have died rendering the child an orphan then the society owes a duty to the child that at least a semblence of comfort and care which the biological parents could have provided will be provided to the child, if some people from howsoever distant a corner of this planet, come forth to do so. In such a case a petty contention like the change of religion or culture of the child can hardly stand in the way of the court in sanctioning inter-country adoption. Unfounded and imaginary apprehensions also are of little consequence and once the court is assured that there is no possibility of the child being abused, which assurance can flow from the independent agencies which are ordained for the purpose, then nothing can and need prevent the court from sanctioning an inter-country adoption.'

Experience of counsel while dealing with the Ministry of Welfare suggests that the documentation should be compiled meticulously. This is in order to avoid bureaucratic delays. In addition to the home study report, the following additional documents (see annex A of the Regulations) are required to be submitted by the foreign adoptive parents. Here, it will be noticed that the Indian requirements are quite similar to the stipulations prescribed in various appendices of RON 117 issued by the Home Office in Britain.

(1) recent photographs of the adoptive family;
(2) marriage certificate;
(3) declaration concerning health of adoptive parents;
(4) certificate of medical fitness duly certified by a medical doctor;
(5) declaration regarding financial status with supporting documents, including employer's certificate, wherever applicable;
(6) employment certificate, if applicable;
(7) income tax assessment order;
(8) bank references;
(9) particulars of properties owned;

44 *All India Reporter* 1994 SC 658.
45 *All India Reporter* 1989 Gujarat 152.

(10) joint declaration stating willingness to be appointed guardian of the child;
(11) undertaking from the social or child welfare enlisted agency sponsoring the foreigner to the effect that the child would be legally adopted by the foreign adoptive parents, according to the law of the country, within a period not exceeding two years from the time of arrival of the child;
(12) undertaking to the effect that the child would be provided necessary education and upbringing according to status of the adoptive parents;
(13) undertaking from the recognised foreign social or child welfare agency that the report relating to the progress of the child along with his/her recent photograph would be sent quarterly during first two years and half yearly for the next three years in the prescribed proforma through the Indian Diplomatic post in the country of the adoptive parents;
(14) power of attorney conferred by the intending parents in favour of the social or the child welfare agency in India which will be required to process the case and such power of attorney should also authorise the lawyer in India to handle the case on behalf of the foreign adoptee parents, if they are not in a position to come to India;
(15) certificate from the foreign enlisted social or child welfare agency sponsoring the application to the effect that they are permitted to adopt a child according to the laws of their country;
(16) undertaking from the overseas social or child welfare agency to the effect that in case of disruption of the adoptive family, before the legal adoption has been effected, it will take care of child and find a suitable alternative placement for the child with prior approval of CARA;
(17) undertaking from the overseas social or child welfare enlisted agency that it will reimburse all expenses to the concerned Indian social or child welfare agency as fixed by the competent court towards maintenance of the child and the processing charge fees.

It is important to reiterate that all the above certificates/declarations/ documents in support of the application have to be notarised, as already explained in the preceding paragraphs.

D Domestic law

The principal law relating to adoption in India by Hindus only is contained in the Hindu Adoptions and Maintenance Act 1956 (hereafter the HAMA 1956).

Having elaborated the law and procedure relating to inter-country adoptions, brief reference is made to the domestic law governing adoptions by Hindus.

E Requisites of a valid adoption

Section 6 stipulates four conditions for a valid adoption which are reproduced hereunder:

(1) the person adopting has the capacity, and also the right, to adopt;
(2) the person consenting to adoption has the capacity to do so;
(3) the person adopted is capable of being adopted; and

(4) the adoption is made in compliance with the other conditions mentioned in chapter 2 of HAMA 1956.

Section 6(iv) requires that the adoption should be made in compliance with other conditions mentioned in chapter 2 of HAMA 1956. In other words, in order that the adoption should be valid the provisions of section 7 to section 11 must be satisfied. Section 7 deals with capacity of a male Hindu to adopt; while section 8 talks of capacity of a female Hindu to adopt; section 9 qualifies persons capable of giving up children for adoption; section 10 categorises persons who may be adopted; section 11 enumerates other conditions for valid adoption. Thereafter, section 12 elaborates the effects of a valid adoption.

F Effects of a valid adoption

Section 12 categorically deals with the legal effects of an adoption made in accordance with the provisions of HAMA 1956. Here it can be pointed out that section 12 of HAMA 1956 satisfies the requirements of clause (ix) of para 310 of H.C. 395 of the current British Immigration Rules governing adoption. This clause (ix) of para 310 in very harsh terms states that the adopted child 'has lost or broken his ties with his family of origin'.

Insofar as relating to the legal effects of a valid adoption, it is important to cite certain decisions of the Supreme Court of India. It was held by the Supreme Court of India in *Smt. Sitabai and another v Ramchandra*,[46] reported as A.I.R. 1970 S.C. 343, in para 6 at p 348:

> 'The true effect and interpretation of Sections 11 and 12 of Act No. 78 of 1956 therefore is that when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created by the adoption in the adoptive family.'

Similarly, it was held by the Supreme Court in the matter of *Kartar Singh v Surjan Singh*,[47] that the wording in section 11(vi) 'with intent to transfer the child from the family of its birth to the family of its adoption' is merely indicative of the result of the actual giving and taking by the parents or guardians concerned referred to in the earlier part of the clause. Where an adoption ceremony is gone through and the giving and taking takes place, there cannot be any other intention. Much more recently, the Supreme Court of India, in the matter of *Chandan Bilasini v Aftabuddin Khan*,[48] held in para 6 of the judgment at p 81:

> 'Section 12 of the Hindu Adoptions and Maintenance Act clearly provides that an adopted child shall be deemed to be the child of his adoptive father or mother for all purposes with effect from the date of the adoption and from such date all ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family.'

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46 *All India Reporter* 1970 SC 343.

47 *All India Reporter* 1974 SC 216.

48 1996 (1) *Hindu Law Reporter* 79 (SC).

Finally, section 15 of the 1956 Act underlines the irrevocability of the validly performed adoption.

G Problems faced in inter-country adoption

At present non-Hindus and foreign nationals can only be guardians of children under the Guardianship and Wards Act 1890. They cannot adopt children. The child is a loser by being deprived of the benefits that are available in course of a valid adoption. There have been disturbing press reports about greedy social activists.[49] It has been pointed out that at the root of the problem is certain placement agencies' love for lucre and their propensity to extort money from childless foreigners. Secondly, it has been observed in this report that the paper work in practice is complex. The system is not working, on account of long delays at different levels of scrutiny. Thirdly, India has not ratified the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption (29 May 1993). As pointed out by the *Bhagwati* Panel, the political and legal rights of the Indian child with foreign adoptive parents can be best assured through bilateral pacts under the Convention.

H Conflict of laws

As counsel dealing with adoption applications at the British High Commission, New Delhi, we have encountered a conflict of laws situation. Quite often non-resident Indians, who have been residing abroad for several decades, adopt children within the family itself. The preference is for immediate blood relatives. This is a common South Asian phenomenon.

The unsuspecting adoptive parents duly comply with the above-mentioned requirements of HAMA 1956 while taking the child in adoption. The adoption deed is flashed with pride and authority before the immigration authorities, and this is where the trouble begins. The UK immigration authorities completely disregard the Indian adoption deed. They are legally justified in doing so in terms of the Adoption (Designation of Overseas Adoptions) Order 1973 (SI 1973/19).

In terms of the 1973 Order, if a child has been legally adopted from a country whose adoption orders are recognised as valid for UK law (a 'designated' country), then the parents may apply for the child to join them in the United Kingdom as their adopted child.

If the child has not been legally adopted from a 'designated' country or the adoption is from a country whose adoption orders are not recognised as valid in UK law (a 'non-designated' country), entry clearance will have to be obtained for the child to travel to the UK for adoption through the English Courts. India is specified as a 'non-designated' country in terms of the 1973 Order.

The adoptive parents, then, are confronted with a refusal by the immigration authorities on the ground that the adoption deed is not valid under the above-mentioned 1973 Order although there has been due compliance of the provisions

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49 See Sharma Vinod, 'Indian child losing out in adoption mart', *Hindustan Times*, New Delhi, 9 September, 1997.

of HAMA 1956. The only avenue then available to the parents is to challenge the refusal by way of appeal or lodge a fresh application.

The real dilemma in such a situation is to set back the clock to satisfy the requirements of British immigration law. How can a non-resident Indian adoptee couple obtain a guardianship order from a local court once a formal irrevocable adoption process has taken place? Certainly, a guardianship order is not on a better footing than a valid adoption under HAMA 1956. This is a proposition, which sooner or later will have to be tested by the British courts.

There has been a growing demand for a general law of adoption enabling any person irrespective of his religion, race or caste to adopt a child. There is now a clear case for overhauling the existing adoption law in India.

IV CONCLUSION

From the above analysis, it is clear that there is a conflict of law situation as far as the presumption in favour of valid marriages is concerned, on the basis of cohabitation without clear evidence of performance of ceremonies as envisaged in section 7 of the HMA 1955 and the marriage not having been registered. This is a situation which needs to be remedied by a larger bench of the Supreme Court of India. As far as foreign court child custody orders are concerned, they cannot be mechanically enforced in the Indian courts. The courts would come to an independent judgment, the prime consideration being the welfare of the minor children. The law of adoption also needs to be overhauled, to permit formal adoption by non-Hindus and foreigners rather than limiting them to mere custody orders.

2004

INDIA

ANALYSIS OF THE LAW OF MARRIAGE FROM AN INTERNATIONAL PERSPECTIVE, UNDER HINDU LAW

Anil Malhotra[*] *and Ranjit Malhotra*[**]

Résumé

Cet article analyse la loi sur le mariage en Inde d'un point de vue international. Il étudie les jugements récemment rendus par la Cour Suprême indienne sur le droit au mariage. Il examine également le fervent débat actuel concernant la nécessité d'un code civil homogène régissant les affaires de polygamie à la lumière des inégalités entre les hommes et les femmes.

I INTRODUCTION

The present India chapter principally analyses recent significant judgments and the position of law in the realm of marriage under the provisions of the Hindu Marriage Act 1955. The discussion starts with the Supreme Court of India's very recent interpretation in the year 2003 of the right to marry in the case of those persons affected by HIV. The positive interpretation of the issue of bigamous marriages has time and again triggered a vigorous debate for enacting a uniform civil code in India. This is much more so in the light of a recent judgment, handed down by a bench headed by the Chief Justice of India, in a succession case. The trail of judgments of the highest court of the land stressing the need for enacting a uniform civil code in polygamy cases has been suitably highlighted. The root cause of the need for a uniform civil code in India is that of the legal inequalities between men and women. These are also discussed in this chapter.

II SUPREME COURT OF INDIA'S RECENT INTERPRETATION OF THE RIGHT TO MARRY

In a first judgment of its kind on the right of a patient suffering from contagious venereal disease to marry, the Supreme Court of India has ruled that, so long

[*] Advocate at the Punjab and Maryana High Court at Chandigarh and Supreme Court of India or New Delhi. Formerly part-time lecturer at the Faculty of Laws, Punjab University, Chandigarh.

[**] Advocate at the Punjab and Harayana High Court at Chandigarh and Supreme Court of India. Regional representative for India of the migration and nationality law committee of the International Bar Association.

as the person is not cured of the disease or impotency, his right to marry cannot be enforced through a court of law. The judgment is reported as *Mr 'X' v Hospital 'Z'*.[1]

The Supreme Court firmly held that if the man's marriage has been cancelled due to his being an AIDS patient, his right to marry will remain a 'suspended right'. Furthermore, he is not entitled to claim any compensation from the hospital which has disclosed his medical condition to the would-be bride's family.

The judgment came in the wake of a doctor's petition seeking compensation from Apollo Hospital in Chennai. The hospital had detected that he was an HIV-positive patient. This fact was also disclosed to his would-be bride's family. The marriage was called off immediately. The doctor contended that the hospital had violated medical ethics by disclosing his medical condition to the bride's family. This led to his social ostracisation.

The issue in the above-mentioned case went a step further. A subsequent petition was filed in the Supreme Court of India, seeking clarification of the above-mentioned judgment to facilitate marriage of an HIV-positive person after 'full, free and informed consent is taken for the marriage'.[2]

The same Supreme Court Bench comprising Justice BN Kirpal and Justice S Saghir Ahmad, which had earlier handed down the above-mentioned judgment, issued notices in the subsequent petition to the Union of India and the Medical Council of India to ascertain their views. The second petition on this subject was filed by Sahara, a centre for residential care and rehabilitation of HIV-positive persons under the AIDS care project and is discussed below.

The original judgment in *X v Hospital Z* (1998) again came up for reinterpretation and reconsideration before a different bench of the Supreme Court of India. The subsequent rollover judgment is reported as *Mr 'X' v Hospital 'Z'*.[3] The author of the subsequent judgment, Justice Rajendra Babu, is clearly in disagreement with the findings given in the earlier judgment in 1998.

The court in para 3 at p 502 explained the reasons for reopening of the case as follows:

> '3. A special leave petition was filed before this court. This court made an order on 21 September 1998[4] dismissing the said petition. However, in the course of the order several findings have been given, particularly those relating to "suspend right to marry". In that proceeding, this court heard only the appellant and there was no issue of notice to any other person nor had this court occasion to hear any of the persons representing the HIV or AIDS infected persons or their rights, much less any of the non-government organisations which are doing work in the field were heard. In those circumstances, a writ petition was filed under Art 32 of the Constitution before this court for setting aside the said judgment. However, in the proceedings dated 7 February 2000 it was noted that prayer was deleted and the other prayer which indirectly concerned the correctness of the judgment already passed was also deleted. However, the petition was ordered to be treated as an application for clarification or directions in the case already decided by this court …'

1 1998 (8) SCC 296.

2 For details see 'SC seeks opinion on AIDS patients' right to marry', *The Times of India*, New Delhi, 8 February 2000.

3 2003 (1) SCC 500.

4 1998 (8) SCC 296.

Accordingly, the court directed that the fresh writ petition filed under Art 32 of the Constitution of India be registered separately as an interlocutory application for clarification/directions in the earlier original judgment.[5] Notices were also issued to the National Aids Control Organisation, Union of India, Indian Medical Association and the Medical Council of India.

The court held and clarified in paras 4–7 at p 503 of the judgment as follows:

> '4. By an order dated 2 September 2001, it has been further directed that the IAs should be listed before a three-Judge Bench.
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> 5. In IA No 2 of 1999 filed by the impleaded petitioner, the petitioner has raised the question whether a person suffering from HIV(+) contracting marriage with a willing partner after disclosing the factum of disease to that partner will be committing an offence within the meaning of ss 269 and 270 IPC. In substance, the petitioner wants the court to clarify that there is no bar for the marriage, if the healthy spouse consents to marry in spite of being made aware of the fact that the other spouse is suffering from the said disease.
>
> 6. The various organisations to which the notice was issued have also entered their appearance before this court and filed a plethora of material giving their respective stands. The practical difficulties in ensuring disclosure to the person proposed to be married or in monitoring such cases are pointed out. It is not necessary to examine these matters in any detail inasmuch as in our view this court has rested its decision on the facts of the case that it was open to the hospital or the doctor concerned to reveal such information to persons related to the girl whom he intended to marry and she had a right to know about the HIV-positive status of the appellant. If that was so, there was no need for this court to go further and declare in general as to what rights and obligations arise in such context as to right to privacy or confidentiality or whether such persons are entitled to be married or not or in the event such persons marry they would commit an offence under law or whether such right is suspended during the period of illness. Therefore, all those observations made by this court in the aforesaid matter were unnecessary, particularly when there was no consideration of the matter after notice to all the parties concerned.
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> 7. In that view of the matter, we hold that the observations made by this court, except to the extent of holding as stated earlier that the appellant's right was not affected in any manner in revealing his HIV-positive status to the relatives of his fiancée, are uncalled for. We dispose of these applications with these observations.'

Analysing the above two judgments, it seems that the subsequent judgment in 2003 takes away what the earlier judgment in 1998 gave. In the 1998 decision, the Supreme Court, while laying down that the infringement of the suspended right to marry cannot be legally compensated by damages either in torts or common law, expounded the rights of persons suffering from a communicable disease like AIDS. The latter judgment by the Supreme Court in 2003, instead of further delving into the concepts, cut short the matter by stating that even the earlier observations of the court were unnecessary, particularly when there was no consideration of the matter. Thus, the rights of persons suffering from diseases like AIDS or who are HIV-positive, which could have been further gone into, were abruptly cut short. There is no specific legislation in India which takes care

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[5] 1998 (8) SCC 296.

of rights of such persons. Therefore, in some appropriate case, the judiciary itself will be faced with the task of interpreting the rights of such persons by expounding the benefit of existing legislation. Whether the rights will be extended or curtailed remains to be seen. But certainly, the Supreme Court which lays down the law of the land under Art 141 of the Constitution, and which can under Art 142 of the Constitution pass such orders as are necessary for doing complete justice in any cause or matter pending before it, may have to address the above issue sooner or later given the gravity of the matter. Avoiding answering the questions may not serve the purpose. Thus, with all humility, it may be argued that the earlier judgment in 1998 was better law in the making. It would have been immensely helpful had the subsequent judgment in 2003 laid down some sort of criterion regarding obligations, duties and liabilities of HIV or AIDS-affected persons embarking upon matrimony, both in the event of wilful and non-wilful disclosure, which may have shed some more light on the subject.

III MODERN HINDU LAW PROHIBITS POLYGAMY, AND SUPREME COURT OF INDIA'S CONCERN FOR ENACTING UNIFORM CIVIL CODE

It is important to refer to ss 11 and 15 of the 1955 Act and s 494 of the Indian Penal Code which prohibit polygamy. Sections 11 and 15 of the 1955 Act read as follows:

> '**11. Void marriages** – Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of s 5.
>
> **15. Divorced persons when may marry again** – When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.'

Section 494 of the Indian Penal Code reads as follows:

> '**494. Marrying again during lifetime of husband or wife** – Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of it taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to 7 years, and shall also be liable to fine.
>
> Exception – This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.'

Much more recently, in *Smt Sarla Mudgal, President, Kalyani v UOI*,[6] the Supreme Court of India dealt in depth with the issue of bigamy. In para 2 of the judgment at p 336, the following questions were formulated for consideration:

> '2. The questions for our consideration are whether a Hindu husband, married under Hindu Law, by embracing Islam, can soleminise a second marriage? Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage qua the first wife who continues to be Hindu? Whether the apostate husband would be guilty of the offence under s 494 of the Indian Penal Code (IPC)?'

Justice Kuldip Singh after eloquently analysing the case-law on bigamy way back from 1891, held in para 14 at p 341 of the judgment:

> '14. It is thus, obvious from the catena of case-law that a marriage celebrated under a particular personal law cannot be dissolved by the application of another personal law to which one of the spouses converts and the other refuses to do so. Where a marriage takes place under Hindu Law the parties acquire a status and certain rights by the marriage itself under the law governing the Hindu Marriage and if one of the parties is allowed to dissolve the marriage by adopting and enforcing a new personal law, it would be tantamount to destroying the existing rights of the other spouse who continues to be Hindu. We, therefore, hold that under the Hindu Personal Law as it existed prior to its codification in 1955, a Hindu marriage continued to subsist even after one of the spouses converted to Islam. There was no automatic dissolution of the marriage.'

Paragraph 17 of the above-mentioned judgment tersely lays down that Modern Hindu Law strictly enforces monogamy. A marriage performed under the 1955 Act cannot be dissolved except on the grounds available under s 13 of the 1955 Act. The grounds of divorce are discussed in a separate chapter. One of the grounds under s 13(I)(ii) is that 'the other party has ceased to be a Hindu by conversion to another religion'.

Apart from crystallising and consolidating the law on bigamy, the main thrust of the judgment at the end of the day was to propose to the Government of India that it should enact a Uniform Civil Code, as envisaged in Art 44 of the Constitution of India.

In a very recent case, *Lily Thomas, etc v Union of India*,[7] the identical issue of conversion as in *Sarla Mudgal's* case again arose for consideration before the Supreme Court of India. This was a collection of six cases decided by the apex court involving the same legal point.

In one of the cases, civil writ petition number 509 of 1992, the respondent husband adopted the Muslim religion and became a convert to that religion for the sole purpose of having a second wife which is strictly forbidden under Hindu law. The court noticed that the 34-year-old unemployed petitioner wife was undergoing great mental trauma.

The court was at pains to observe in para 21 of the judgment at p 624:

> 'That in the past several years, it has become very common amongst the Hindu males who cannot get a divorce from their first wife, that they convert to Muslim religion solely for the purpose of marriage. This practice is invariably adopted by those erring

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6 Reported as JT 1995 (4) SC 331.

7 Reported as JT 2000 (5) SC 617.

> husbands who embrace Islam for the purpose of second marriage but again become reconvert so as to retain their rights in the properties etc and continue their service and all other business in their old name and religion.'

The court strongly deprecated this practice in para 37 of the judgment at p 636 by observing:

> '… Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution. Under Hindu Law, Marriage is a sacrament. Both have to be preserved.'

The earlier mandate of law as in *Sarla Mudgal's* case was reiterated in para 34 of the judgment at p 634:

> 'From the above, it would be seen that mere conversion does not bring to an end the marital ties unless a decree for divorce on that ground is obtained from the court. Till a decree is passed, the marriage subsists. Any other marriage, during the subsistence of first marriage would constitute an offence under s 494 read with s 17 of the Hindu Marriage Act, 1955 and the person, in spite of his conversion to some other religion, would be liable to be prosecuted for the offence of bigamy. It also follows that if the first marriage was solemnised under the Hindu Marriage Act, the "husband" or the "wife", by mere conversion to another religion, cannot bring to an end the marital ties already established on account of a valid marriage having been performed between them. So long as that marriage subsists, another marriage cannot be performed, not even under any other personal law, and on such marriage being performed, the person would be liable to be prosecuted for the offence under s 494 IPC.'

In this judgment, the apex court has differed on the issue of direction given by the Supreme Court itself in *Sarla Mudgal's* case. Justices RP Sethi and Sagir Ahmad held that any direction for the enforcement of Art 44 of the Constitution of India could not have been issued by only one of the judges in *Sarla Mudgal's* case.

Furthermore, this judgment has additionally touched on two very important issues. First, reliance has been placed on *Sayeda Khatoon and AM Obadiah v M Obadiah*,[8] wherein it was held that a marriage solemnised in India according to one personal law cannot be dissolved according to another personal law simply because one of the parties has changed his or her religion.

Secondly, the court made a distinction under Mahommedan law regarding conversion. It was held in para 35 at p 635 of the judgment that:

> 'The position under the Mahommedan Law would be different as, in spite of the first marriage, a second marriage can be contracted by the husband, subject to such religious restrictions as have been spelled out by Brother Sethi J in his separate judgment, with which I concur on this point also. This is the vital difference between Mahommedan Law and other personal laws. Prosecution under s 494 in respect of a second marriage under Mahommedan Law can be avoided only if the first marriage was also under the Mahommedan Law and not if the first marriage was under any other personal law where there was a prohibition on contracting a second marriage in the life-time of the spouse.'

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8 (1944–45) 49 CWN 745.

It emanates from these two recent judgments of the Supreme Court of India that the interpretation of the law of bigamy is crystal clear. The judgments in *Sarla Mudgal* and *Lily Thomas* plug the legal loophole and put an end to the popular notion that a Hindu man can circumvent the punishment for bigamy if he remarries after conversion to the Muslim faith as he professes that he ceases to be a Hindu.

It is important to advert to the most recent judgment handed down by the Supreme Court of India on 21 July 2003. Chief Justice of India VN Khare's observation while heading a bench in *John Vallamattam and another v Union of India*,[9] that Art 44 of the Constitution of India has not been given effect to and that the Parliament of India is still to step in for framing a common civil code, has triggered off a vigorous debate.

Chief Justice Khare lamented in para 44 at p 627 of the judgment:

> 'Before I part with the case, I would like to state that Art 44 provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz Arts 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Arts 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Arts 25 and 26 is a suspect legislation, although it is doubtful whether the American doctrine of suspect legislation is followed in this country. In *Sarla Mudgal v Union of India*[10] it was held that marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined under Arts 25 and 26 of the Constitution. It is a matter of regret that Art 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.'

The three-judge bench in *John Vallamattam* struck down the legality of s 118 of the Indian Succession Act 1925. Justice Khare in penultimate para 45 of his judgment declared s 118 to be unconstitutional, being violative of Art 14 of the Constitution of India. Section 118 reads as follows:

> '**118. Bequest to religious or charitable uses** – No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than 12 months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the will of the living person:
>
> [Provided that nothing in this section shall apply to a Parsi.]'

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9 (2003) 6 Supreme Court cases 611.

10 (1995) 3 Supreme Court cases 635.

It has also been held in para 26 of the judgment that under s 118 the testator who lives beyond the statutory period of 12 months is not able to execute his wishes in relation to his property; the impugned provision defeats the object of the will. Such a provision is unreasonable and arbitrary.

Dr Justice AR Lakshmanan in his concurring judgment ruled in para 67 at p 632:

> 'The Indian Succession Act though is claimed to be a universal law of testamentary disposition, but in effect, crucial sections apply only to Christians. There is no acceptable answer from the other side as to why s 118 of the Act is made applicable to Christians alone and not to others.'

Both *Sarla Mudgal* (1995) and *Lily Thomas* (2000) thus highlight the focus of the apex judiciary and the real concern to stem the rampant exploitation of Indian women, through misuse of personal laws, especially in the lower strata of the society. Instances also abound of women not enjoying equal legal rights on a par with men. Some such instances are discussed below.

IV THE HINDU MARRIAGE ACT 1955

The principal law of marriage and divorce relating to Hindus is contained in the Hindu Marriage Act 1955 (HMA 1955), which came into force on 8 May 1955. The HMA 1955 also governs validity of marriages of those Indian spouses who are permanently resident overseas. It is an Act to amend and codify the law relating to marriage among Hindus.

Extent and jurisdiction of the HMA 1955

Section 1 of the HMA 1955 states that the said Act extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories. In effect, the Act has extra-territorial application, because a Hindu carries with him the personal law of marriage.

Application of the HMA 1955

In terms of s 2 of the HMA 1955, Hindu law applies to the following three categories:

(a) any person who is a Hindu, Jain, Sikh or Buddhist by religion;
(b) any person who is born of Hindu parents; and
(c) any other person domiciled in the territories to which this act extends who is not a Muslim, Christian, Parsi or Jew.

V SOME INSTANCES OF LEGAL INEQUALITIES BETWEEN MEN AND WOMEN IN INDIA

Personal laws in India govern the institution of marriage, divorce, succession, inheritance, child custody, alimony and maintenance. It is a matter of fact that personal laws of different religions discriminate in varying degrees as to women's right to equality as guaranteed by the Constitution of India. Although, as explained above, Hindu law prohibits bigamy, the practice continues unabated among Hindu men. This is more common among men from the rural areas, men who migrate abroad and remarry, leaving their women in the lurch. Such Hindu women who seek divorce or maintenance have the insurmountable task of proving the factum of the second marriage. Since registration of marriages is not compulsory under the provisions of the HMA 1955, it becomes all the more difficult to prove the remarriage of the erring spouse. Desertion of wives in the State of Punjab by husbands residing abroad is a very common phenomenon. This multiplies their woes. According to a study conducted by the Indian Council of Social Welfare Punjab, the State is home to as many as 8000 women who have been deserted by their non-resident Indian husbands. The results of this survey were published in the Chandigarh edition of the *Indian Express* dated 9 March 2003.[11] Regrettably, even in the twenty-first century of cybervision, female infanticide, bride burning, torture, cruelty and domestic violence are common among Hindus. As of today, in India we do not have any direct legislation to deal with the issue of domestic violence.

The Hindu Succession Act 1956 (hereafter HSA 1956) provides for an equal right to parental property for Hindu women in the case of intestate succession. But the prevalent practice is that women relinquish their right to parental property. The trade off is at the time of marriage. The marriage expenses and the dowry in lieu thereof are construed and actually taken to be the share of the woman from inheritance of the property left behind by the parents. Most of the women do not protest at all, for the fear of spoiling relations with their family.

Likewise, the HSA 1956 has a provision for a Hindu Undivided Family to ensure that the property remains within the male line of descent. A son gets a share corresponding to his father's share. On the other hand, regressively, a daughter gets only a share in her father's share of the property. Furthermore, a daughter cannot reside in the family home unless she is single or divorced, and also cannot claim her share of the property as long as the men of the family continue to live in the family household. These are some glaring instances of discrimination against Hindu women in Indian society.

Some Muslim laws have been codified in the Shariat Act 1937, The Dissolution of Muslim Marriages Act 1939, and the Muslim Women (Protection of Rights on Divorce) Act 1986. The Shariat Act states that Muslim personal law shall govern Muslims and that law has priority over custom. Muslim personal law is mostly based on the interpretations from the holy book of Quran. In terms of the 1939 Act, Muslim women can seek divorce on grounds of cruelty and impotence,

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11 See article entitled 'Women's day: NRI marriages revisited, 8000 women in Punjab deserted by NRIs: Study'.

which of course are very difficult to prove. On the other hand, a Muslim man is armed with the right to unilateral divorce on the basis of triple *talaq*. Furthermore, the 1937 Act outrightly denies the right for women to hold any agricultural land.

As far as the Christians are concerned, their personal laws are contained in the Indian Christian Marriage Act 1872, and the Divorce Act 1869 (DA 1989). The Divorce Act has recently been amended by the Indian Divorce (Amendment) Act 2001 providing comprehensive grounds of divorce both to the husband and the wife including divorce by mutual consent. Under the DA 1869, couples wanting to seek divorce on the basis of mutual consent have to wait for a two-year separation. The analogous provision under the HMA 1955 mandates a one-year waiting period for couples desirous of seeking divorce on the basis of mutual consent.

These are some of the intense inequalities among Hindus, Muslims and Christians. The degree of stigma attached to divorced women in India is intimately connected with the issue of inequalities between men and women as discussed. The status of divorced women in India is of immense concern to foreign lawyers, especially when they are acting on behalf of battered and separated spouses whose immigration status is at stake. They may be on the verge of deportation. The overseas immigration lawyers in such a situation plead gender persecution in the event of deportation to India, depending upon the facts and circumstances of each case. Quite often, the authors are called upon to prepare expert reports on this branch of law.

VI STIGMA ATTACHED TO DIVORCED WOMEN IN INDIA

A Attitude in rural areas

It is common knowledge that divorce in rural areas, semi-rural areas and small towns in India is considered to be a taboo and a social stigma. Divorced women in such areas encounter negative peer pressure, and pressure from the society as a whole. Social considerations in such situations and in certain communities in some geographical areas lead to ill-treatment of divorced women.

Divorced women in rural areas are treated very shabbily. They can be ill treated and condemned to a life of misery. In Indian metropolitan cities, divorce may not be a taboo, which again depends upon the standing and the education of the spouses.

Divorced women remarrying in India, especially in rural and semi-rural areas, have to make many compromises. This can be on account of the age gap and economic considerations. Quite often, in a situation where the divorced girl is young and is not from an economically privileged background, she may be compelled to marry a much older man of means. This is a case where the girl is at the lower end of the scale. Both the girl and her family have to compromise severely, only with a view to rehabilitation. Reported instances abound in the media, where divorced spouses, who have remarried or are single, and also separated spouses are subject to domestic violence. This is a big issue of grave concern to the judiciary, lawyers, academics, jurists and social organisations in India.

B Acceptance in metropolitan cities and big towns

With a growing number of divorces, second marriages are no longer considered to be a taboo, especially in metropolitan cities and big towns. In the present day's fast changing socio-economic conditions, many parents want their daughters to remarry and settle down. This is more prominent in cases where their daughters have been divorced at a relatively young age. Social pressures in the upwardly mobile milieu are not a hair-raising issue. Young educated people remarry because they feel that they have an entire life ahead of them. This obviously precipitates the desire to get married again. The loneliness in such situations is also the motivating factor. The joint family system is somewhat disintegrating in the present day and age. This is on account of individualism, better education and career prospects and a shrinking world without borders. A broken marriage may no longer be tolerated by a working woman. Relationships formed by working spouses at places of work influence younger people to form new unions. New work avenues and increasing job opportunities with good career prospects have changed the culture and lifestyle in big Indian cities for modern Indian young men and women.

Many women also take the plunge to get remarried simply because they do not want to end up as a liability to their ageing parents. Winds of change are blowing fast. Times have changed. Quite often, mutual incompatibility may be the main reason for divorce between couples who are high up on the social ladder. Unlike in the past, a large number of men and women may have clung to a dead marriage for the sake of children, which however is not the case any more. People today prefer walking out of a bad marriage and optimistically taking the plunge the second time. Changing attitudes in a new ethos, economic independence and increasing freedom to choose partners are some of the factors responsible for forming new matrimonial unions when the wear and tear of old liaisons takes its toll. Although this may be the case in big Indian cities and metropolitan areas it is not in rural areas and small towns, where the age-old concept of relationships for ever is still traditionally adhered to, observed and followed. Therefore, the changes are limited to the areas stated above.

DIVORCE NULLITY AND RELATED MATTERS UNDER THE HINDU MARRIAGE ACT 1955

Anil Malhotra* and Ranjit Malhotra**

Résumé

Étant donné que la contribution de l'an dernier à cet ouvrage portait sur le droit du mariage, le présent article met cette fois l'accent sur le divorce et sur l'annulation du mariage. Cet article expose et commente les causes du divorce prévues par la Loi hindoue du mariage de 1955 et il fait état de certaines questions relatives à la juridiction et à la procédure en matière de divorce. Il s'intéresse également à un important arrêt de la Cour suprême de l'Inde concernant l'obligation faite aux tribunaux d'encourager le véritable règlement négocié des différends matrimoniaux. De plus, cet article analyse les conditions d'obtention du divorce coutumier que reconnaît la Loi hindoue du mariage de 1955. Il examine ensuite les différentes causes de nullité et d'annulation du mariage en Inde et touche également à un certain nombre de thèmes connexes comme la procédure de divorce par consentement mutuel, la reconnaissance des jugements étrangers ou les diverses législations en matière alimentaire. En conclusion, l'article propose une réflexion sur la nécessité d'une éventuelle réforme du droit du divorce en Inde.

The HMA 1955 recognises nine fault grounds of divorce which are available to both the spouses, as provided in s 13(1) of the HMA 1955. Additionally, a further four fault grounds of divorce are available to the wife alone in terms of s 13(2) of the HMA 1955. Sections 13(1) and (2) of the HMA are briefly stated hereunder:

* Advocate at the Punjab and Haryana High Court at Chandigarh and the Supreme Court of India. Formerly part-time lecturer at the Faculty of Laws, Punjab University, Chandigarh.

** Advocate at the Punjab and Haryana High Court at Chandigarh and the Supreme Court of India. Regional representative for India of the migration and nationality law committee of the International Bar Association.

Both the authors can be contacted at malhotrasunilindia@yahoo.co.in.

DIVORCE – UNDER S 13, HMA 1955

'13(1) Any Hindu marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on any of the grounds that the other party—

Adultery

(i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse;

Cruelty

(ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or

Desertion

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

Conversion

(ii) has ceased to be a Hindu by conversion to another religion; or

Unsound mind

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation – In this clause –

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or

Incurable and virulent leprosy

(iv) has been suffering from a virulent and incurable form of leprosy; or

Venereal disease

(v) has been suffering from venereal disease in a communicable form; or

Renunciation

(vi) has renounced the world by entering any religious order; or

Presumption of death

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it had that party been alive;
Explanation – In sub-section 13(1)(ib) the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and it also includes the willful neglect of the petitioner by the other party to the marriage.'

NON-COMPLIANCE OF A DECREE OF JUDICIAL SEPARATION OR RESTITUTION OF CONJUGAL RIGHTS

Furthermore, s 13(1A) of the HMA 1955 provides that either spouse may petition for divorce on the ground that there has been no resumption of cohabitation for one year or more after the decree of judicial separation or the decree for restitution of conjugal rights.

ADDITIONAL GROUNDS AVAILABLE TO THE WIFE

'13(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the following four grounds:

(i) Where the marriage was solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner:
Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has been guilty of rape, sodomy or bestiality after the marriage; or

(iii) that an order or a decree for the maintenance of the wife has been passed against the husband under Section 18 of the Hindu Adoption and Maintenance Act, 1956 or under Section 125 of the Code of Criminal Procedure and since such order, cohabitation between the parties has not been resumed for one year or more; or

(iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining the age of fifteen years but before attaining the age of eighteen years.

DIVORCE BY MUTUAL CONSENT – UNDER S 13B, HMA 1955

Section 13B(1) provides that, subject to the provisions of the HMA 1955, a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

Section 13B(2) provides that after a joint petition has been presented by both the parties to the marriage, there is a waiting period of six to eighteen months during which the petition is heard by the Court for passing a decree of divorce. This is subject to the condition that the petition is not withdrawn in the meantime, and the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage is to be dissolved with effect from the date of the decree.

NO PETITION FOR DIVORCE TO BE PRESENTED WITHIN ONE YEAR OF MARRIAGE

Section 14 of the HMA 1955 provides that it shall be not competent for any Court to entertain any petition for dissolution of a marriage within one year of marriage with an exception in cases of exceptional hardship or exceptional depravity.

JURISDICTION AND PROCEDURE FOR OBTAINING DIVORCE – COURT TO WHICH THE PETITION SHALL BE PRESENTED

Section 19 of the HMA 1955 stipulates that every petition under the Act shall be presented to the district court within the local limits of its ordinary original civil jurisdiction where —

‘(i) the marriage was solemnised, or
(ii) the respondent, at the time of the presentation of the petition, resides, or
(iii) the parties to the marriage last resided together, or
(iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a

> period of seven years or more by those persons who would naturally have heard of him if he were alive.'

CONTENTS AND VERIFICATION OF PETITIONS

Section 20(1) stipulates that every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded [except in a petition for a void marriage] and that there is no collusion between the petitioner and the other party to the marriage.

Section 20(2) of the HMA 1955 further states that the statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints, and may, at the hearing, be referred to as evidence.

Divorce proceedings are governed by the Indian Code of Civil Procedure (see s 21 of the HMA 1955).

CONSIDERATIONS TO BE FOLLOWED BY THE COURT BEFORE GRANTING THE DIVORCE DECREE

In terms of s 23 of the HMA 1955 the Court is duty bound to consider the following issues before granting the decree of divorce:

(a) that the petitioner is not taking advantage of his or her own wrong or disability;

(b) that the petitioner has not connived at or condoned the acts complained of or where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty;

(bb) when a divorce is being sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence;

(c) that there is no collusion between the parties;

(d) that there is no unnecessary or improper delay in presenting the petition;

(e) that there is no legal ground as to why relief should not be granted.

In terms of s 23(2) the court must endeavour to bring about a reconciliation between the parties before granting divorce. The court may order the respondent to make maintenance pendente lite and expenses of the proceedings (s 24) or subsequently permanent alimony and maintenance (s 25). The court may make any order regarding custody, maintenance and education of the minor children, consistent with their wishes (s 26). The court may make such provisions in the decree as it deems just and proper

with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife (s 27). Section 28 of the Act states that all decrees made by the District or the High Court under the Act, shall be appealable as decrees of the court made in the exercise of its original civil jurisdiction on all points except costs of the parties. Section 28(A) of the Act provides that all decrees and orders made by the court in any proceeding under this Act shall be enforced like any other decree or order made by the court in the exercise of its original civil jurisdiction.

DUTY OF COURT TO ENCOURAGE GENUINE SETTLEMENT OF MATRIMONIAL DISPUTES

In a recent remarkable judgment, *BS Joshi and others v State of Haryana and another* 2003(4) SCC 675, the apex court emphasised the need of the hour, ie the inherent duty of the court to encourage genuine settlements of matrimonial disputes. Justice YK Sabharwal tersely conveyed this message in paras 2, 12 and 13 respectively, at pp 678 and 682 of the judgment as follows:

> ‘2. The question that falls for determination in the instant case is about the ambit of the inherent powers of the High Courts under Section 482 of the Code of Criminal Procedure (the Code) read with Articles 226 and 227 of the Constitution of India to quash criminal proceedings. The scope and ambit of power under Section 482 has been examined by this Court in a catena of earlier decisions but in the present case that is required to be considered in relation to matrimonial disputes. The matrimonial disputes of the kind in the present case have been on considerable increase in recent times resulting in filing of complaints by the wife under Sections 498-A and 406 IPC not only against the husband but his other family members also. When such matters are resolved either by the wife agreeing to rejoin the matrimonial home or mutual separation of husband and wife and also mutual settlement of other pending disputes as a result whereof both sides approach the High Court and jointly pray for quashing of the criminal proceedings or the first information report or complaint filed by the wife under Sections 498-A and 406 IPC, can the prayer be declined on the ground that since the offences are non-compoundable under Section 320 of the Code, therefore, it is not permissible for the court to quash the criminal proceedings or FIR or complaint ...
>
> 12. The special features in such matrimonial matters are evident. It becomes the duty of the court to encourage genuine settlements of matrimonial disputes.
>
> 13. The observations made by this Court, though in a slightly different context, in *G.V. Rao Vs. L.H.V. Prasad* 2000 (3) SCC 693 are very apt for determining the approach required to be kept in view in a matrimonial dispute by the courts. It was said that there has been an outburst of matrimonial disputes in recent times. Marriage is a sacred ceremony, the

> main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in commission of heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case. There are many other reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their 'young' days in chasing their 'cases' in different courts.'

Noticeably, the court has itself highlighted the problem of delays in fighting bitter legal matrimonial battles in District Courts, where the couples literally waste the best years of their life. This is especially the situation where adamant parties to the litigation contest divorce proceedings on the fault grounds. This is also a true acceptance of undue delays in Indian courts where matrimonial cases are known to linger on because of different reasons responsible for the same.

SAVINGS AND REPEALS

Chapter VI primarily comprises the savings clause, which is very important as besides other things it gives statutory recognition to customary marriages and divorces. This aspect of the matter is very important as far as a certain category of Indian immigrants are concerned, who have migrated abroad from parts of rural India, and have subsequently remarried after divorcing their Indian wives by pleading customary divorce. Before permanent settlement can be obtained by the Indian immigrant, who has subsequently remarried a girl of foreign origin and extraction, the immigration authorities want to be satisfied about the legal validity of the customary divorce obtained in India. There are certain principles regarding the validity of the custom, before it can be applied. The custom must be ancient, certain and reasonable. It is very important to note that custom has to be pleaded and proved and must be a settled practice in the community of the parties pleading the same.

Section 29 of the HMA 1955, is reproduced hereunder for ready reference:

> '**29.** **Savings.**– (1) A marriage solemnised between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same gotra or pravara or belonged to different religions, castes or sub-divisions of the same caste.
>
> (2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the

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

(3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.

(4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954, (43 of 1954) with respect to marriages between Hindus solemnised under that Act, whether before or after the commencement of this Act.'

CUSTOMARY DIVORCE

Section 29 of the HMA 1955 gives statutory recognition to customary divorce. But the party relying on a custom needs to prove the existence of such a custom. Also, such a custom should be ancient, certain, reasonable and not opposed to public policy. The Madras High Court in *P Mariamonia v Padmanabham*, AIR 2001 Madras 350, overruled the trial court finding that there cannot be customary divorce after the HMA 1955 came into force. It was categorically held that customary divorce was recognised both before and after passing of the HMA 1955 and the courts also uphold such a custom if it is not opposed to public policy. It was further held that since such customs are saved under s 29(1) of the HMA 1955, it is not necessary for the parties in such a case to go to court to obtain divorce on grounds recognised by custom.

COURTS CAN TAKE JUDICIAL NOTICE OF GENERAL CUSTOMS

The Punjab and Haryana High Court in *Ranbir Kaur alias Harjit Kaur v Gurnam Singh*, 1996(2) HLR 71, held that the courts can take judicial notice of general customs. The court elaborated that the term 'general custom' is used in the sense that it has by repeated recognition by courts over a period of time become entitled to judicial notice. Paragraph 8 at p 74 of this judgment crystallizes the law on judicial notice of general customs by consolidating the earlier case-law as follows:

'8. Whoever sets up a custom must prove the same. Sometimes the custom is recognised by Courts and it passes into the law of the land. This question was considered by the Supreme Court in the case of *Ujagar Singh Vs. Mst. Jeo*, AIR 1959 SC 1041. In paragraph 14 it was held:-

"14. It therefore appears to us that the ordinary rule is that all customs, general or otherwise, have to be proved. Under S.57 of the Evidence Act however nothing need to be proved of

> which courts can take judicial notice. Therefore, it is said that if there is a custom of which the courts can take judicial notice, it need not be proved. How the circumstances in which the courts can take judicial notice of a custom were stated by Lord Dunedin in *Raja Ram Rao Vs. Raja of Pittapur*, 45 Ind App 148 at pp. 154, 155: (AIR 1918 PC 81 at P.83), in the following words, 'When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without necessity of proof in each individual case.' When a custom has been so recognised by the courts, it passes into the law of the land and the proof of it then becomes unnecessary under S.57(1) of the Evidence Act. It appears to us that in the courts in the Punjab the expression 'general custom' has really been used in this sense, namely, that a custom has by repeated recognition by courts, become entitled to judicial notice as was said in *Bawa Singh Vs. Mt. Taro*, AIR 1951 Punjab 239; and *Sukhwant Kaur Vs. Balwant Singh*, AIR 1951 Punjab 242."'

Thus, to sum up, it can be stated that the onus of proving and establishing a custom would lie on the party who claims its benefit. Whether it is to be taken judicial notice of or it is to be proved separately, would depend upon the facts and circumstances of each case. It may be added that in the northern Indian State of Punjab, customary divorce and subsequent re-marriage is an acceptable customary practice in some local communities. *A Digest of Customary Law (in Punjab)* authored by Sir WH Rattigan way back in 1880 and reprinted subsequently by other authors, discusses in great detail customary law practices prevalent in the Punjab in all walks of life. The now available reprinted edition (1995) in Ch V specifically reports and discusses known prevalent customary practices of Marriage and Divorce in different classes and communities in the State of Punjab.

RESTITUTION OF CONJUGAL RIGHTS AND JUDICIAL SEPARATION

Section 9 of the HMA 1955 provides for restitution of conjugal rights. Section 9 states that 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.

Section 10 of the HMA 1955 talks of judicial separation. It states that either party to a marriage, whether solemnised before or after the commencement of this Act, may present a petition praying for a decree for judicial separation

on any of the grounds specified in s 13(1) of the HMA 1955, as reproduced above and in the case of a wife also on any of the grounds specified in s 13(2) thereof, as grounds on which a petition for divorce might have been presented.

Section 10(2) further states that where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

NULLITY OF MARRIAGE

A void marriage is one which cannot be enforced by either of the parties to the marriage. A voidable marriage is one which can be avoided at the option of either of parties to the marriage and, until it is done so, it remains a valid marriage for all purposes. Section 11 of the HMA 1955 provides the grounds for void marriages. Section 12 of the Act lays down grounds for voidable marriages. Both the sections are reproduced hereunder for ready reference:

VOID MARRIAGES

Section 11 of the Act states that any marriage solemnised after the commencement of the Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of s 5 of the HMA 1955.

VOIDABLE MARRIAGES

Section 12(1) of the HMA 1955 states that any marriage solemnised, whether before or after the commencement of the Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:

‘(a) that the marriage has not been consummated owing to the impotence of the respondent; or

(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5 of the HMA 1955; or

(c) that the consent of the petitioner, or the consent of the guardian in marriage of the petitioner was obtained by fraud. Consent of the guardian was required under section 5 as it stood immediately before the

commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978).

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.'

TIME-LIMITS FOR PRESENTING A NULLITY PETITION

Section 12(2) of the HMA 1955 imposes time-limits for instituting a nullity petition, which reads as follows:

'12(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage–

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if–

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause 12(1)(d) shall be entertained unless the court is satisfied–

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within one year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground.'

Sections 11 and 12 came up for interpretation by the Supreme Court of India in *Yamunabai v Anantrao,* reported as AIR 1988 Supreme Court 644. In this case the apex Court also elaborated upon the distinction between void and voidable marriages. Paragraph 3 of the judgment at page 647 in this regard is reproduced below:

'... The marriages covered by Section 11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose. The provisions of Section 16, which is quoted below, also throw light on this aspect:

> **"16. Legitimacy of children of void and voidable marriages.** – Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), *and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.*
>
> (2) *Where a decree of nullity is granted in respect of a voidable marriage under Section 12*, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties of the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.
>
> (3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage *which is null and void or which is annulled by a decree of nullity under Section 12,* any rights in or to the property of any person, other than the parents, in any case where but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents."' (Emphasis added).

Sub-section (1), by using the words italicised above, clearly implies that a void marriage can be held to be so without a prior formal declaration by a court in a proceeding. While dealing with cases covered by s 12, sub-section (2) refers to a decree of nullity as an essential condition and sub-section (3) prominently brings out the basic difference in the character of void and voidable marriages as covered respectively by ss 11 and 12. It is also to be seen that while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. The marriage of the appellant must, therefore, be treated as null and void from its very inception.

LEGITIMACY OF CHILDREN OF VOID AND VOIDABLE MARRIAGES

Section 16 of the HMA 1955 above lays down the provisions for legitimacy of children of void and voidable marriages. These provisions confer legitimacy and all succession rights even on children of void marriages. In this regard, the law laid down by the Supreme Court of India in *Rameshwari Devi v The State of Bihar and others*, reported as (2000) 2 Supreme Court Cases 431, may be quoted in support. In this particular case a Hindu government employee had contracted a second marriage during the subsistence of his first marriage. There were children born out of the second

marriage. Although, the second marriage itself was void, the children born out of the second marriage were held to be legitimate and also entitled to family pension.

It may further be added that the Supreme Court of India in *PEK Kalliani Amma v K Devi,* reported as AIR 1996 Supreme Court 1963, clearly laid down that the provisions of s 16(1) which intend to confer legitimacy on children born of void marriages will operate with full vigour in spite of s 11 which nullifies only those marriages which are concluded after the enforcement of the Act and in the performance of which s 5 is contravened. Therefore, Indian law does not discriminate against children and by a legal fiction they are treated as legitimate notwithstanding that the marriage was void or voidable.

There are three specific areas in this realm of divorce law which are of main concern to non-resident Indians and their foreign lawyers, ie irretrievable breakdown of marriage, divorce by mutual consent and recognition of divorce decrees passed by foreign courts. Validity of foreign divorce decrees is of immense concern to Indian spouses married to NRIs, which issue is discussed in detail in the subsequent portion of this chapter. Only these three areas are being elaborated upon while the rest of the fault grounds, as elaborated above are not being discussed. Of course, desertion and cruelty are also serious major issues in cross-border marriages.

IRRETRIEVABLE BREAKDOWN OF MARRIAGE

A marriage under the provisions of the SMA 1954 or the HMA 1955 cannot be dissolved by a decree of divorce on the ground of irretrievable breakdown of marriage. It is not a ground of dissolution of marriage either in s 13 of the HMA 1955 or s 27 of the SMA 1954, respectively. Recent Supreme Court judgments are seriously addressing this issue, which has become very relevant because of changing social conditions especially in urban India and metropolitan cities. The irretrievable breakdown ground could be of immense help where either of the spouses is a non-resident Indian or a foreign national and the marriage has not worked out. Obviously, this will depend upon the facts and circumstances of each case. One has to tread with caution. This weapon in the armoury of divorce law, can work as a double-edged sword, facilitating the dumping of spouses from India married to NRIs. One has also to bear in mind that it is very difficult to access social welfare measures in India. Neither are state run pensions disbursed to unemployed or deserted spouses.

The Supreme Court of India has recently held in *Chetan Dass v Kamla Devi,* reported as 2001 (4) SCC 250, that is not appropriate to apply the irretrievable breakdown as a straight jacket formula for the grant of relief of divorce. *Chetan Dass* is one of the leading decisions highlighting the legal position in Indian law that breakdown of marriage is not in itself a ground

for divorce. It may be a governing factor to be borne in mind at the time of adjudication by the Court. From the catena of leading cases discussed on this issue, it emerges that the irretrievable breakdown principle is a cautious import of judge-made law into family law jurisprudence. But, the rider 'in facts and circumstances of each case', firmly continues to be in place.

A few excerpts from the Seventy-first Report of the Law Commission of India on the Hindu Marriage Act 1955, 'Irretrievable breakdown of marriage', dated 7 April 1978, have been boldly highlighted in a Supreme Court of India decision, *Ashok Hurra v Rupa Bipin Zaveri,* reported as AIR 1997 Supreme Court 1266. The relevant extracts of this Law Commission Report appear in para 23 at pp 1273–1274 of this judgment and are reproduced below:

> 'Irretrievable breakdown of marriage is now considered, in the laws of a number of countries, good ground of dissolving the marriage by granting a decree of divorce ...
>
> Proof of such a breakdown would be that the husband and wife have separated and have been living apart for, say, a period of five or ten years and it has become impossible to resurrect the marriage or to reunite the parties. It is stated that once it is known that there are no prospects of the success of the marriage, to drag the legal tie acts as cruelty to the spouse and gives rise to crime and even abuse of religion to obtain annulment of marriage ...
>
> The theoretical basis for introducing irretrievable breakdown as a ground of divorce is one with which, by now, lawyers and others have become familiar. Restricting the ground of divorce to a particular offence or matrimonial disability, it is urged, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked. The marriage has all the external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bounds which are of the essence of marriage have disappeared.
>
> After the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce. The parties alone can decide whether their mutual relationship provides the fulfillment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances ...
>
> Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one's

offspring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage "breakdown" and if it continues for a fairly long period, it would indicate destruction of the essence of marriage "irretrievable breakdown".'

The Supreme Court of India way back in 1985 in *Ms Jorden Diengdeh v SS Chopra,* reported as 1985 (2) HLR 199, forcefully made a judicial recommendation for a complete reform of the law of marriage and also for introducing irretrievable breakdown of marriage as a ground for divorce. Justice O Chinnappa Reddy lamented in the penultimate paragraph of the judgment at p 207:

> 'It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present find themselves in. We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such action as they may deem fit to take. In the meanwhile, let notice go to the respondents.'

In *Bhagat v Bhagat,* reported as AIR 1994 Supreme Court 710, the court held in no uncertain terms in para 23 of the judgment at pp 720–721:

> '... Merely because there are allegations and counter-allegations, a decree of divorce cannot follow. Nor is mere delay in disposal of the divorce proceedings by itself a ground. There must be really some extraordinary features to warrant grant of divorce on the basis of pleadings (and other admitted material) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself. But while scrutinising the evidence on record to determine whether the ground(s) alleged is made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluble mess, when the Court finds it in the interest of both the parties.'

The Supreme Court of India while exercising its inherent powers under Art 142 of the Constitution of India in several cases has held that, where the marriage is dead and there is no chance of its retrieval, it is better to bring it to an end. This was also the mandate of law laid down in *Chanderkala Trivedi v Dr SP Trivedi,* reported as 1993 (4) SCC 232.

A similar situation warranting exercise of the apex court's inherent powers arose in *Romesh Chander v Savitri,* reported as AIR 1995 Supreme Court 851. In this case the husband and the wife had been litigating for 25 years. The court held in paras 3 and 4 of the judgment at p 852:

> '... In this case the marriage is dead both emotionally and practically. Continuance of marital alliance for name-sake is prolonging the agony and affliction. It cannot be disputed that the husband has not been dutiful and conscious of his responsibilities either towards his wife or his son. He did not contribute any thing towards upbringing of the child. Yet the marriage being dead, the continuance of it would be cruelty, specially when the child born out of the wedlock of the appellant and the respondent as far back as 1968 having now grown and being in service. The appellant has expressed remorse for his conduct and is willing to compensate for his past mistakes by transferring the only house in his name in favour of his wife.
>
> 4. Considering the facts and circumstances of this case we, in exercise of power under Article 142 of the Constitution of India, direct that the marriage between appellant and the respondent shall stand dissolved subject to the appellant transferring the house in the name of his wife. The house shall be transferred within four months from today. The dissolution shall come into effect from the date the house is transferred and possession is handed over to the respondent.'

Similarly, in *Sneh Prabha v Ravinder Kumar,* reported as AIR 1995 Supreme Court 2170, the apex court while exercising its powers under Art 142 of the Constitution of India, tersely held that where in an appeal against an order confirming the decree of restitution of conjugal rights, despite conciliation and much efforts by the Supreme Court itself, it felt that the marriage of the parties had irretrievably broken down and there were no chances of the husband and wife living together, divorce should be granted. Hence, the Supreme Court granted the divorce.

Much more recently, in *Chetan Dass v Kamla Devi,* reported as 2001(4) SCC 250, the Supreme Court came down very heavily on an erring adulterous husband. In this case the husband wanted to dump his wife on the ground of desertion. The wife's contention of adultery and the illegitimate relationship of the husband with another woman stood proved before the trial court. The high court upheld these findings and held that, given the circumstances of the case, a decree of divorce on the ground of irretrievable breakdown of marriage could not be granted. The husband contended before the Supreme Court that the marriage had broken down irretrievably and no purpose would be served by prolonging the agony of the parties. The wife was still ready to live with the husband provided he discontinued the adulterous relationship. The court held that the appellant husband alone was to be blamed for such an unhappy and unfortunate situation.

In para 19 at pp 260 and 261 Brijesh Kumar, J said:

> '19. In the present case, the allegations of adulterous conduct of the appellant have been found to be correct and the courts below have recorded a finding to the same effect. In such circumstances, in our view, the provisions contained under Section 23 of the Hindu Marriage Act would be attracted and the appellant would not be allowed to take advantage of his own wrong. Let the things be not misunderstood nor any permissiveness under the law be inferred,

> allowing an erring party who has been found to be so by recording of a finding of fact in judicial proceedings, that it would be quite easy to push and drive the spouse to a corner and then brazenly take a plea of desertion on the part of the party suffering so long at the hands of the wrongdoer and walk away out of the matrimonial alliance on the ground that the marriage has broken down. Lest the institution of marriage and the matrimonial bonds get fragile easily to be broken which may serve the purpose most welcome to the wrongdoer who, by heart, wished such an outcome by passing on the burden of his wrongdoing to the other party alleging her to be the deserter leading to the breaking point.'

Brijesh Kumar, J also distinguished the three earlier Supreme Court cases cited by counsel for the appellant husband. The court was of the considered opinion that the facts of the case in *Chanderkala Trivedi,* 1993 (4) SCC 232, were peculiar in nature. The court remarked that the factual position in this case was entirely different and hence it had no application to the present case.

Coming to the second case of *Romesh Chander,* 1995 AIR SC 851, the court observed that the order in this case was passed considering the facts and circumstances of the case 'in exercise of inherent powers of the Supreme Court under Article 142 of the Constitution of India'.

The third case *Saroj Rani v Sudarshan Kumar Chadha,* 1984 (4) SCC 90, was also found to be inapplicable to the present case. In this case the husband did not obey the decree of restitution of conjugal rights obtained by his wife to which he had initially not objected. But later on, he filed a petition for divorce under s 13(1-A)(ii) of the HMA 1955, on the ground that one year had passed from the date of decree of restitution of conjugal rights but no actual cohabitation had taken place between the parties. The wife raised a plea that the husband was taking advantage of his own wrong in terms of s 23(1)(a) of the HMA 1955, as he had not resumed his matrimonial relationship even after the decree of restitution of conjugal rights was passed. The court held that the conduct of the husband did not attract Section 23(1)(a) of the HMA 1955. The wife had also alleged maltreatment both by the husband as well as her in-laws. The court observed in para 9 of the judgment in Saroj Rani's case:

> '... Furthermore we reach this conclusion without any mental compunction because it is evident that for whatever be the reasons this marriage has broken down and the parties can no longer live together as husband and wife, if such is the situation it is better to close the chapter.'

Hence, the observations in *Saroj Rani* were not accepted simpliciter as affording divorce on the ground of irretrievable breakdown in the present case of *Chetan Dass* [2001].

In a recent case, *Savitri Pandey v Prem Chandra Pandey,* reported as 2002(2) SCC 73, the wife was initially granted divorce by the Family Judge. Cross appeals were filed by both the parties. The high court disposed of both

the appeals by setting aside the decree and holding that the appellant wife herself was the guilty party and that she had been unable to prove the allegations of cruelty and desertion. Before the Supreme Court it was argued that the appellant wife had remarried after the decree of divorce was granted by the Family Judge and also a child was born from the subsequent remarriage; the marriage ought to be dissolved in the interest of justice. The court did not sympathise at all with her conduct. The appellant wife was disentitled from claiming divorce on the ground of desertion. The court held that granting divorce to her would result in allowing her to take advantage of her own wrong. The court came down with a heavy hand and held in paras 17 and 18 at pp 84 and 85 of the judgment as follows:

> '17. The marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in *V. Bhagat Vs. D. Bhagat* held that irretrievable breakdown of the marriage is not a ground by itself to dissolve it.
>
> 18. As already held, the appellant herself is trying to take advantage of her own wrong and in the circumstances of the case, the marriage between the parties cannot be held to have become dead for invoking the jurisdiction of this Court under Article 142 of the Constitution for dissolving the marriage.'

Hence, it is clear from the enunciation of law laid down by the apex Court above, that under the guise of irretrievable breakdown of marriage, the Supreme Court cannot be asked to invoke its powers under Art 142 of the Constitution. Besides, the bar of s 23(1)(a) HMA obstructs the grant of such relief. Moreover, in some cases, the policy of law does not seem to be to confer judicial recognition on the principle of irretrievable breakdown of marriage where the Court is of the opinion that it is an abuse or misuse of the due process of law.

The apex Court in this ruling of *Savitri Pandey,* reported as 2002 (2) SCC 73, also distinguished the earlier cases from the facts of the present case in hand. Counsel for the appellant cited the following authorities: *Anita Sabharwal v Anil Sabharwal* (1997) 11 SCC 490; *Shashi Garg v Arun Garg* (1997) 7 SCC 565; *Ashok Hurra v Rupa Bipin Zaveri* (1997) 4 SCC 226; *Madhuri Mehta v Meet Verma* (1997) 11 SCC 81. The court opined in para 15 at p 84 of the judgment:

> '... In all the cases relied upon by the appellant and referred to hereinabove, the marriage between the parties was dissolved by a decree of divorce by mutual consent in terms of application under Section 13-B of the Act. This Court while allowing the applications filed under Section 13-B took into consideration the

> circumstances of each case and granted the relief on the basis of compromise. Almost in all cases the other side was duly compensated by the grant of lump sum amount and permanent provision regarding maintenance.'

The earlier observations of the apex Court in *Jorden Deingdeh* [1985] regarding complete reform of the law of marriage, to make a uniform law applicable to all people irrespective of religion or caste and for introduction of the irretrievable breakdown theory, also finds mention in para 16 at p 84 of *Pandey's* judgment.

Another very important issue that arises in this case is that the husband's appeal against the divorce decree was instituted 4 months after the limitation period had expired. Meanwhile, during the pendency of the appeal in the Supreme Court, the wife solemnised a second marriage. The apex Court declared the second marriage of the appellant wife to be invalid as the same was solemnised during the pendency of appeal. The facts and circumstances of the case are not clear as to whether the wife had received the notice of the appeal before her remarriage. However, the issue that emanates is the time frame to which the parties need to keep a check on the appellate legal recourse. After the divorce decree is granted and the limitation stands expired, before they get remarried, would the parties be required to wait still further? The apex Court in *Savitri Pandey's* case has recommended to the Ministry of Law and Justice for appropriate changes in the legislation to increase the period of limitation from 30 days to 90 days since 30 days has been held to be insufficient and inadequate for filing the appeal.

In *GVN Kameswara Rao v G Jabilli,* 2002 (2) SCC 296, the Supreme Court came to the rescue of a highly educated couple who had been unsuccessfully litigating for the last 15 years. The court held that because of the non-cooperation and the hostile attitude of the respondent wife, the appellant husband had been subjected to a serious traumatic experience which could safely be termed as cruelty within the purview of s 13(1)(i-a) of the HMA 1955. From the evidence on record, the court came to the conclusion that the relationship between the parties had irretrievably broken down. In this case, the main issue was that of mental cruelty inflicted upon the husband, while the court suo moto applied the breakdown theory in the facts and circumstances of the case.

Parveen Mehta v Inderjit Mehta, 2002(5) SCC 706, is another case of a high degree of cruelty inflicted upon the husband. In this case the parties had been living separately for the last 10 years. The marriage took place in the year 1986, while the divorce petition was filed in the year 1996. All frantic compromise efforts failed to calm down the appellant wife. There was a long period of separation between the husband and the wife. The court inferred from the circumstances of the case that the marriage had broken down irretrievably without any fault of the respondent husband. The court concluded that on this ground the decision of the high court in favour of the respondent for the dissolution of the marriage should not be disturbed. Also,

a very high degree of cruelty had been inflicted upon the respondent husband by his wife.

From both the above mentioned cases of *GVN Kameswara Rao,* 2002 (2) SCC 296, and *Parveen Mehta,* 2002(5) SCC 706, it will be noticed that a high degree of proved inflicted mental cruelty among other attendant circumstances prompted the apex Court to apply the irretrievable breakdown principle. These two recent judgments, in addition to other cited cases, canvass the fact that the breakdown principle is not applied simpliciter in a mechanical fashion. There is an extreme degree of reluctance on the part of the courts to apply the same. *Chetan Dass,* 2001 (4) SCC 250, as discussed above, is a glaring example in this regard. What then is required to be done? The breakdown theory which finds judicial recognition under s 13(1A) HMA as an additional ground for divorce on non-resumption of cohabitation after one year of the passing of the decree of judicial separation or restitution of conjugal rights, does not seem to serve the purpose anymore in the current situation. The trend of some recent judgments of the apex Court clearly demonstrates that irretrievable breakdown of marriage itself directly needs to be brought on to the statute book as an additional independent ground for obtaining divorce. Undoubtedly, it will have to be hedged about with all necessary safeguards and precautionary conditions to prevent hasty divorces and other abrupt attempts at misuse. But, all the same, the time has now come to make it available separately as a ground for divorce in Indian matrimonial law. This will greatly facilitate parties to settle amicably their matrimonial disputes and prevent them from entering into protracted litigation where allegations and insinuations are hurled freely for achieving a matrimonial victory. Such a legislative change will thus bring relief not only to litigating spouses but also to members of extended families who are invariably involved in the litigation process as a common Indian practice.

DIVORCE BY MUTUAL CONSENT: REQUIREMENTS

Section 13B of the HMA 1955, came up for interpretation by the Bombay High Court in *Leela Mahadeo Joshi v Mahadeo Sitaram Joshi,* reported as AIR 1991 Bombay 105. The Court held that the three ingredients with regard to which the Court must satisfy itself before granting divorce by mutual consent are, first that the petition must be a joint petition presented by both the parties praying for a divorce by mutual consent. Secondly, that they have been living separately for a period of one year or more prior to the presentation of the petition. Lastly, they have not been able to live together and have mutually agreed that the marriage should be dissolved. The safeguards as enumerated in s 23 of the HMA 1955 must undoubtedly be borne in mind, namely that the consent of the parties has not been obtained by force, fraud or undue influence and this aspect must necessarily be ascertained by the trial Court.

Furthermore, the court held in para 13 at p 108 of the above mentioned judgment:

> 'It is material to note that section 13B, sub section (2) makes it mandatory on the part of the Court to pass a decree once the above ingredients are satisfied and it is, therefore, not open to the Court to refuse to pass a decree in such circumstances. Such refusal would be contrary not only to the provisions of law but the very purpose of the amendment and would frustrate the basic objective of providing an honourable and effective dissolution of marriage in cases of matrimonial break-down without having to go through the exercise of an adversary litigation involving allegations against each other ...'

MERE COMPROMISE NOT SUFFICIENT

Section 13B stipulates specific conditions and circumstances for grant of divorce by mutual consent, only upon satisfaction of the court. In *Munesh v Anasuyamma,* reported as AIR 2001 Karnataka 355, the husband's petition for divorce on the grounds of desertion was dismissed. This was on account of the failure of the husband to prove the desertion against the wife. The husband appealed against the decision. Pending the institution of the appeal, the husband recorded a compromise under Order 23 Rule 3 of the Code of Civil Procedure 1908, which was placed on record in the pending family appeal in the High Court. The compromise petition did not contain any averment or admission to show that the wife had deserted her husband without any justifiable cause. The court doubted the compromise petition. The said petition only recited that the litigation had been continuing for more than 15 years, the marriage itself was dead, and both the parties were agreeable to judicial separation. The court frowned upon such an agreement. The court held that such an agreement is not a lawful agreement. It was further held that no decree for divorce can be granted on the basis of such a compromise. The court observed that such compromise is against the scheme of the provisions of ss 13 and 13B of the HMA 1955 and renders nugatory these provisions of the Act. According to the court, such a divorce petition should have been presented before the original competent court, ie the District Court or the Family Court.

SUPREME COURT'S PURPORTED EXERCISE OF INHERENT POWERS UNDER ART 142 OF THE CONSTITUTION OF INDIA TO GRANT DIVORCE BY MUTUAL CONSENT

In *Shashi Garg v Arun Garg,* reported as 1997(7) SCC 565, the Supreme Court in an application under s 25 of the Code of Civil Procedure (Power of

the Supreme Court to transfer suits, etc from one jurisdiction to another) substantially altered the relief available to the parties.

In this case, initially a petition for dissolution of the marriage had been filed by the respondent husband on the grounds of cruelty. The wife moved the apex Court seeking to transfer the proceedings from the Court of the District Judge, Delhi to the Court of competent jurisdiction at Rewari, Haryana. Notice of the transfer petition was issued to the respondent husband.

When the transfer petition came up for hearing, the parties settled outside the court and filed a memorandum of agreement in the Supreme Court. In the light of the agreement, the Supreme Court took the matter on board. The apex Court scrutinised the agreement. The parties to the marriage prayed to the Court that their marriage be dissolved by mutual consent which was otherwise emotionally dead and for all other practical reasons. The Court concluded as follows in para 8 of the judgment at p 566:

> 'The requirements of Section 13-B of the Act have been satisfied and there is no impediment in granting the decree for divorce by mutual consent by altering the relief in HMA Case No. 221 of 1996, as one available under Section 13-B of the Act with a view to do complete justice between the parties and avoid unnecessary further litigation. We are also satisfied that the interest of the minor daughter has been safe guarded ...'

In the ruling above, the apex Court seems to have exercised its powers under Art 142 of the Constitution of India, without expressly referring to the same. The Court was more than particular in protecting the pecuniary interest of the minor daughter. The use of the phrase 'to do complete justice between the parties and avoid unnecessary further litigation' is indicative of this fact. Under Art 142 of the Constitution, the Supreme Court in the exercise of its jurisdiction may pass any decree or order as is necessary for doing 'complete justice' in any matter pending before it. Section 25 CPC only empowered the Supreme Court to transfer the case from one Civil Court to another. Perhaps, in its wisdom, the apex Court to prevent any further ordeal to the parties of relegating them for further relief to another Court, took upon itself the task of doing substantial justice by there and then terminating a dead marriage, hence rendering substantial justice to all the parties to the litigation.

In *Madhuri Mehta v Meet Verma,* reported as 1997 (11) SCC 81, during the course of the hearing of the transfer petition, the parties to the marriage made an application for dissolution of their marriage under s 13B of the HMA 1955. The Court also conferred visitation rights on the husband to meet their only child from the marriage. The court noticed that the parties had been estranged and had been living apart since January 1996. The court entertained the joint plea of the parties to the marriage. The ruling concluded in no uncertain terms, that divorce by mutual consent was being granted in exercise of powers under Article 142 of the Constitution of India, for which there is ample authority reflective from the past decisions of the apex court itself.

In a third transfer petition case, reported at the same time as *Maduri Mehta's* case (1997 (11) SCC 81) the apex Court gave a yet more liberal interpretation to the mutual consent provisions. This is the case of *Anita Sabharwal v Anil Sabharwal* which is reported as 1997 (11) SCC 490.

In this case the respondent husband's divorce petition was pending in the court of the Additional District Judge, Delhi. The wife moved the transfer petition seeking transfer of the said case to Mumbai. During the pendency of the transfer petition, the parties as well as the Counsel put on the record of the court a compromise deed wherein they had agreed to get divorced by mutual consent.

The Judges observed that the petition had not been filed under s 13B of the HMA 1955 and that the statutory period of 6 months had not even commenced. The apex Court summoned the trial court record and noticed that the parties had been married for 14 years. The court noticed that sadly enough, they had spent the prime of their life in acrimony and litigation. The court held that it was time that their mutuality bore some fruit in putting them apart. The court concluded in this short but liberal judgment at p 491:

> '... We, therefore, in the spirit of Section 13-B of the Act, and in view of the fact that all hopes to unite them together have gone, hereby grant to the parties divorce by a decree of dissolution by mutual consent to end their prolonged unhappiness. Ordered accordingly. The transfer petition stands disposed of.'

The remarkable feature of this judgment is that the court was not bogged down by the technicalities of law while interpreting s 13B of the HMA 1955. Also, the Court adequately satisfied itself as to the financial arrangements for the education of the children. The estranged father tendered in Court a sum of seven lacs by way of bank drafts. He was also given visitation rights to visit his children. The decision of the Court to do substantial justice to the parties was unfettered. The spouses parted amicably. Due provision was made for the future and welfare of the children's rights. Hence, the Court rendered complete justice to the parties.

MERELY LIVING SEPARATELY IS NO GROUND FOR A 13-B PETITION

Mere agreement of the parties to live separately, and the fact of living separately, is not a ground for granting divorce under s 13-B of the HMA 1955. A decree for divorce can be granted only when all of the statutory conditions mentioned in the HMA 1955 for the grant of relief are found to exist and not merely on the ground that the parties had agreed to the grant of such a decree. This was the mandate of law laid down in *Surinder Kaur v Amarjit Singh,* reported as 1986 (2) HLR 120, and *Apurba Mohan Ghosh v Manashi Ghosh* 1989 (1) HLR 247.

MUTUAL CONSENT SHOULD CONTINUE UNTIL THE DIVORCE DECREE

There has been conflict of law situation as to whether consent of both the parties to the marriage should continue up to the date of the final decree. This issue was resolved by the Supreme Court of India in 1992 but the correctness of this decision has been doubted by the apex court itself in the year 1997. The law at this moment in time appears to be that mutual consent of both the parties should continue until the decree is passed by the court. The law on this issue is analysed briefly hereunder.

The Punjab and Haryana High Court in *Harcharan Kaur v Nachhatar Singh*, reported as AIR 1988 P&H 27, held that either party to the marriage is at liberty to revoke its consent any time before the petition is finally disposed of. The court held in para 11 of the judgment at p 30:

> '... In our view, unless the parties to the petition under Section 13-B of the Act, who have mutually consented to have the marriage dissolved, continued to signify their mutual consent for the dissolution of the marriage right up to the date of the decree, the marriage cannot be dissolved under sub-sec. (2) of Section 13-B of the Act merely on the basis that six months earlier the parties had together presented the petition for dissolution of marriage by mutual consent. Either of the parties to the petition under Section 13-B, that is, husband or wife, is at liberty to revoke its consent any time before the petition is finally disposed of; and if the other party is still keen to have the marriage dissolved, the other provisions of the Hindu Marriage Act are still available for the grant of necessary relief if a case is made out for the same. The object of Section 13-B is to provide an additional speedy remedy to the husband and wife to have the marriage dissolved if even after sufficient efflux of time both of them find, that it is not possible for them to continue as husband and wife any further. Obviously, if both the parties agree, the decree of divorce can be granted by mutual consent under S. 13-B and if one of them fails to agree and does not want to oblige the other party by extending the requisite consent to the divorce, decree of divorce cannot be passed under Section 13-B of the Act. For that, other provisions of the Act would have to be resorted to.'

The Delhi High Court in a contradictory view to the above mentioned decision of the Punjab and Haryana High Court in *Chander Kanta v Hans Kumar*, reported as AIR 1989 Delhi 73, held that a petition presented under s 13-B of HMA 1955 cannot be withdrawn by one party unilaterally. Of course, if the court is satisfied that the consent was not a free consent and it was the result of force, fraud or undue influence then it is a different situation because the court in such a case is empowered to refuse to grant the decree of divorce.

The Kerala High Court, like the Punjab and Haryana High Court in *KI Mohanan v Jeejabai*, AIR 1988 Kerala 28, held that it is open to one of the

spouses to withdraw the consent given to the petition at any time before the Court passes a final decree for divorce.

In *Sureshta Devi v Om Prakash,* reported as AIR 1992 Supreme Court 1904, the apex Court had the occasion to deal in detail with the conflicting views of different High Courts on the question of withdrawal of consent by either party to the marriage before the passing of the divorce decree. The law laid down in this ruling was that a party to a 13B petition for divorce by mutual consent can unilaterally withdraw the consent. It is not irrevocable. Mutual consent must continue till the time a final divorce decree is passed. Therefore, if in the interregnum period of 6 to 18 months waiting, the mutual consent is withdrawn, no divorce by mutual consent can be granted. The apex Court upheld the interpretation given by the High Courts of Kerala, Punjab & Haryana and Rajasthan and overruled the views of the High Courts of Bombay, Delhi and Madhya Pradesh as not laying down good law.

The court while supporting the above views held in para 13 of the judgment at pp 1907–1908;

> '13. From the analysis of the Section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under sub-section (2). There is nothing in the Section which prevents such course. The Section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable. At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section (2) of Section 13-B is clear on this point. It provides that "on the motion of both the parties ... if the petition is not withdrawn in the meantime, the Court shall ... pass a decree of divorce ..." What is significant in this provision is that there should also be mutual consent when they move the Court with a request to pass a decree of divorce. Secondly, the Court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the Court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the Court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent.'

The court in para 14 of the judgment at p 1908 also relied on *Halsbury's Laws* by stating that:

> '... The consent must continue to decree nisi and must be valid subsisting consent when the case is heard.' (See *Halsbury's Laws of England*, 4th edn, vol 13, para 645; *Rayden on Divorce*, 12th edn, vol 1, p 291; and *Beales v Beales*, (1972) 2 All ER 667.)

The Supreme Court in *Ashok Hurra's* case (AIR 1997 SC 1266) has doubted the correctness of the above mentioned decision. It has been held that for mutual consent to continue till the divorce decree is passed after a passage of 6 to 18 months appears to be too wide and does not logically accord with s 13B(2) of the HMA. The Supreme Court in this later decision has held that the observations made in *Sureshta Devi's* case, to the effect that mutual consent should continue till the divorce decree is passed, even if the petition is not withdrawn by either of the parties within the period of 18 months, appears to be too wide and is not in consonance with s 13B(2) of the HMA 1955. The court felt that this issue would require reconsideration in an appropriate case. The Judges did not deliberate further on this issue. Since in this case the wife had withdrawn her consent for divorce before the passing of the final decree and the Supreme Court felt that the marriage was dead and that it warranted the exercise of jurisdiction under Art 142 of the Constitution to grant a decree of divorce by mutual consent under s 13B of the Act, the Supreme Court dissolved the marriage between the parties in order to meet the ends of justice. The Court held that ground realities cannot deter it to take a total and broad view of the situation when dealing with adjustment of human relationships. Subject to the financial settlement between the parties, the Court dissolved the marriage by mutual consent under s 13B, HMA. This judgment seems to be an eye-opener where the Court brushed aside the technical interpretation of continuing consent till the passing of the final decree and for rendering complete substantial justice between parties clearly differed from the earlier view of the Supreme Court. The judgment is thus indeed salutary in nature.

SIX MONTHS STATUTORY WAIVER PERIOD

The tenor of several High Court decisions lays down that the statutory requirement of the waiting period of 6 to 18 months after filing the mutual consent divorce petition, can be waived, in instances where the parties have been litigating for a long time or where the marriage has lasted for a sufficient period of time and the spouses have been living apart. The period of 6 to 18 months is given in divorce by mutual consent so as to give time and opportunities to the parties to reflect on their move and seek advice from relations and friends if there is any hope of reconciliation between the parties.

The Punjab and Haryana High Court in *Mohinder Pal Kaur v Gurmit Singh*, reported as 2002 (1) HLR 537, held that the 6 months waiting period under s 13B of the HMA 1955, can be reduced in cases where the divorce petition

is already pending on some other fault ground for more than 6 months and the reconciliation efforts have been unsuccessful. The court also added a rider that this period cannot be curtailed altogether in freshly instituted petitions.

The same court in *Vinod Kumar v Kamlesh*, reported as 2002(1) HLR 270, has held that the statutory period of 6 months as provided under s 13B(2) of the HMA 1955 can be waived if the marriage has broken down completely and the parties are living separately. This Punjab and Haryana High Court ruling places reliance on an earlier Andhra Pradesh High Court decision in *Re Grandhi Venkata Chitti Abbai and another,* reported as AIR 1999 AP 91. In the instant case, criminal proceedings and maintenance proceedings were already pending. On the intervention of village elders and friends the parties agreed to obtain a divorce by consent. Under the terms of the compromise the maintenance settled was payable to the wife only after the divorce. She, therefore, filed an application before the senior sub-judge for preponement of the divorce. The same was rejected, hence the appeal was instituted in the High Court. The court held that there was no possibility of revival of marriage in this case. The court held in para 5 at p 92 of the judgment as follows:

> '... When once such a situation is ruled out having liberalised the process of divorce by mutual consent which was not there prior to the amendment it will not serve any purpose in directing the parties to continue the agony for six more months. Hence, in a case of this nature, I feel that the statutory period of six months prescribed under the statute for taking divorce by mutual consent can be waived and the parties can be given liberty to part their company without waiting for the statutory period.'

Likewise in *Paresh Shah v Vyjayanthimala*, reported as AIR 1999 AP 186, in a case pertaining to a well-educated couple, where the marriage had lasted for several years, the court granted a divorce decree by consent. Paragraph 4 at p 188 of the judgment takes cognisance of the agony of the parties in such a situation. Paragraph 4 reads as follows:

> 'From the above compromise memos, filed by both the parties, it is clear that both are educated and in a position to understand the concept of marriage and their responsibility towards each of them as husband and wife. But their feelings, mal-adjustment and temperament, made their lives miserable and to pull on as husband and wife an impossibility. For them, divorce is a blessing than to continue as husband and wife in miserable circumstances ...'

In *Bijal Chandreshbhai Bhatt v Chandreshbhai Sahdevbhai Bhatt*, AIR 1999 Gujarat 203, the parties to the marriage had irreconcilable differences which also culminated in criminal litigation between them. The parties were not at all willing to reunite. The court while dispensing with the requirement of 6 months waiting period, highlighted the need to shorten litigation in such matters.

In conclusion it can be inferred that Indian Courts do exercise their discretion to waive the statutory 6 to 18 months waiting period in suitable cases as an exception wherever the need is felt to do so. However, as a normal rule, the statutory 6 to 18 months waiting period has to be adhered to necessarily. This time gap is a safeguard which prevents hasty divorces and helps parties to think over and decide on their intentions to divorce by mutual consent.

GUIDELINES LAID DOWN BY THE SUPREME COURT OF INDIA ON RECOGNITION OF FOREIGN MATRIMONIAL JUDGMENTS

Section 13 of the Indian Code of Civil Procedure is the general provision of law relating to conclusiveness of judgments by foreign courts. There is no separate provision of law prescribed in the HMA or SMA relating to recognition of foreign matrimonial judgments. Hence, the general provisions of law laid down in s 13 CPC are also applicable to matrimonial matters decided by foreign courts.

The Supreme Court of India in 1991 laid down comprehensive fresh guidelines to recognise foreign matrimonial judgments by the Courts in India.

The apex Court in *Y Narasimha Rao and others v Y Venkata Lakshmi and another*, JT 1991 (3) Supreme Court 33, made it clear that Indian courts would not recognise a foreign judgment if it has been obtained by fraud which need not be only in relation to the merits of the matter but may also be in relation to jurisdictional facts. The ruling declared a divorce decree passed by a US court as 'unenforceable.'

In this case a decree for dissolution of marriage had been passed by the Circuit Court of St Louis County Missouri, USA. Three important factors were noteworthy in the case. In the first instance, the Court assumed jurisdiction over the matter on the ground that the first appellant had been a resident of the State of Missouri for 90 days preceding the commencement of the action and hence the petition could be filed in that Court. Secondly, the decree had been passed on the only ground of irretrievable breakdown of marriage. Thirdly, the respondent wife had not submitted to the jurisdiction of the Court. The Supreme Court of India observed from the record, that the wife had filed two replies of the same date. Both were identical in nature except that one of the replies began with an additional averment as follows:

> '... without prejudice to the contention that this respondent is not submitting to the jurisdiction of this Hon'ble court, this respondent submits as follows ...'

This observation is found in para 5 at p 37 of the judgment. The wife raised several objections in her defence along with other issues. She stated that they both were Hindus, were governed by Hindu law and got married at Tirupati in India under Hindu law. She further contended that she was an Indian citizen and was not governed by the laws in force in the State of Missouri. Hence, the foreign court had no jurisdiction to entertain the petition.

The Supreme Court held that in terms of s 19 of the HMA 1955, (s 19 lays down the Court to which the divorce petition shall be presented), the Circuit Court of St Louis County, Missouri had no jurisdiction to entertain the petition, in terms of which admittedly the parties were not married. Secondly, irretrievable breakdown of marriage is not one of the grounds recognised by the HMA 1955 for dissolution of the marriage. Hence, the decree of divorce passed by the foreign court was on a ground which was not available under the HMA 1955.

The Court interpreted s 13 of the Indian Code of Civil Procedure 1908 (hereafter CPC 1908) with special reference to validity of foreign divorce decrees. Section 13 of the CPC 1908 states that a foreign judgment is not conclusive as to any matter directly adjudicated upon between the parties if:

(a) it has not been pronounced by a Court of competent jurisdiction;

(b) it has not been given on the merits of the case;

(c) it is founded on a incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;

(d) the proceedings are opposed to natural justice;

(e) it is obtained by fraud;

(f) it sustains a claim founded on a breach of any law in force in India.

Justice PB Sawant analysed and consolidated the reasons for framing the guidelines in terms of s 13 of the CPC 1908. The reasons are advanced in paras 11 and 13 at pp 39 and 40 respectively of the judgment which are reproduced hereunder:

> '11. The rules of Private International Law in this country are not codified and are scattered in different enactments such as the Civil Procedure Code, the Contract Act, the Indian Succession Act, the Indian Divorce Act, the Special Marriage Act etc. In addition, some rules have also been evolved by judicial decisions ...
>
> 13. We cannot also lose sight of the fact that today more than ever in the past, the need for definitive rules for recognition of foreign judgments in personal and family matters, and particularly in matrimonial disputes has surged to the surface. Many a man and woman of this land with different personal laws have migrated and are migrating to different countries either to make their permanent abode there or for temporary residence. Likewise there is also immigration of the nationals of other countries. The advancement in

> communication and transportation has also made it easier for individuals to hop from one country to another. It is also not unusual to come across cases where citizens of this country have been contracting marriages either in this country or abroad with nationals of the other countries or among themselves, or having married here, either both or one of them migrate to other countries. There are also cases where parties having married here have been either domiciled or residing separately in different foreign countries. This migration, temporary or permanent, has also been giving rise to various kinds of matrimonial disputes destroying in its turn the family and its peace. A large number of foreign decrees in matrimonial matters is becoming the order of the day. A time has, therefore, come to ensure certainty in the recognition of the foreign judgments in these matters ...'

The apex Court laid down the following broad principles in the interpretation of s 13 of the CPC 1908, with special emphasis on foreign matrimonial judgments.

(i) Clause (a) of s 13 states that a foreign judgment shall not be recognised if it has not been pronounced by a court of competent jurisdiction. The court was of the view that this clause should be interpreted to mean that only such court will be a court of competent jurisdiction, which the HMA 1955 or the law under which the parties are married, recognises as a court of competent jurisdiction to entertain the matrimonial dispute.

(ii) Clause (b) of s 13 states that if a foreign judgment has not been given on the merits of the case, the courts in this country will not recognise such a judgment. This clause should be interpreted to mean (a) that the decision of the foreign court should be on a ground available under the law under which the parties are married, and (b) that the decision should be a result of the contest between the parties. The latter requirement is fulfilled only when the respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the court and contests the claim, or agrees to the passing of the decree with or without appearance. A mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the court, or an appearance in the Court either in person or through a representative for objecting to the jurisdiction of the Court, should not be considered as a decision on the merits of the case.

(iii) The marriages which take place in India can only be under either the customary or the statutory law in force in India. Hence, the only law that can be applicable to the matrimonial disputes is the one under which the parties are married, and not any other law. When a foreign judgment is founded on a jurisdiction or on a ground not recognised by such law, it is a judgment which is in defiance of the law in India. Hence, it is not conclusive of the matters adjudicated therein and, therefore, unenforceable in India.

(iv) Section 13(d) of the CPC 1908 which makes a foreign judgment unenforceable on the ground that the proceedings in which it is obtained

are opposed to natural justice. The court held that in the realm of family law such as matrimonial disputes, this principle has to be extended to mean something more than mere compliance with the technical rules of procedure. Therefore, it is necessary for the court to ascertain whether the respondent was in a position to represent himself/herself and effectively contest the said proceedings.

(v) Section 13(e) of the CPC 1908 stipulates that the courts in India will not recognise a foreign judgment, which is prima facie obtained by fraudulent means. The court here placed reliance on its earlier decision in *Satya v Teja Singh* 1975 (2) SCR 197. In this case it was held that the fraud need not be only in relation to the merits of the matter but may also be in relation to jurisdictional facts.

The apex Court ruled in para 20 at p 43 of the judgment that the jurisdiction assumed by the foreign court as well as the grounds on which the relief was granted must be in accordance with the matrimonial law under which the parties were married. The court also elaborated upon the exceptions to this rule, which are as follows:

(a) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married;

(b) where the respondent voluntarily and effectively submits to the jurisdiction of the forum and contests the claim which is based on a ground available under the matrimonial law under which the parties are married;

(c) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

Therefore, the Indian Apex Court has given clear guidelines in accordance with the general law of the land for enforcement of foreign matrimonial judgments in India to prevent erring spouses from taking advantage of liberal matrimonial laws of foreign jurisdiction which permit quick divorce on easier grounds not available in the Indian Jurisdiction. The necessity to do so arose on account of a large number of foreign divorce decrees mostly obtained in default, being sought to be enforced on Indian soil and which gave no choice to a helpless spouse invariably deserted and pitted on Indian land much against his or her wishes.

Smt Neeraja Saraph v Jayant V Saraph & Anr, reported as JT 1994 (6) Supreme Court 488, is another case of wife dumping by a foreign husband. The apex Court rightly so, came down heavily on the erring husband by upholding an interim order for compensation payable to the helpless wife. The facts of this case are as follows. The appellant was a post-graduate daughter of a senior Air Force Officer. She was serving as a teacher and drawing a salary of Rs3000/-. She was married to respondent number 1, a

doctor in computer sciences who was employed in the USA. The marriage took place at the behest of her father-in-law who approached through a common family friend. The marriage was performed on 6 August 1989 and the appellant was taken on a honeymoon to Goa for a few days. Respondent number 1 returned to the USA on 24 August 1989, wrote letters to the appellant on 15 September, 20 October and 14 November 1989 persuading her to give up her job and suggesting the various avenues for her career in the US. The appellant was lured, she tried to obtain a visa and ultimately resigned from her job in November 1989. But from December things started getting cold. Ultimately, in June 1990 the respondent's brother came to Delhi and handed over a petition for annulment of marriage presented in an American Court and the father-in-law had sent a sentimental letter owning moral responsibility only. The wife filed a suit in India for damages against the husband and the father-in-law for ruining her life in *forma pauperis*. The suit was decreed ex parte for rupees 22 lacs.

The court held in paras 4 and 5 at pp 490 and 491 of the judgment respectively;

> '... Various submissions have been advanced on behalf of the father-in-law to support the order of the High Court including his helplessness financially. Is it a case of any sympathy for the father-in-law at this stage? In our opinion not. True the decree is ex-parte. Yet it is a money decree. However, no opinion is expressed on this aspect as the appeal is pending in the High Court. But the order of the High Court is modified by directing that the execution of the decree shall remain stayed if the respondents deposit a sum of Rs.3,00,000/- including Rs.1,00,000/- directed by the High Court within a period of two months from today, with the Registrar of the High Court...
>
> 5. Why the facts of this case have been narrated in brief with little background is to impress upon readers the need and necessity for appropriate steps to be taken in this direction to safeguard the interest of women. Although it is a problem of private International Law and is not easy to be resolved, with change in social structure and rise of marriages with NRI, the Union of India may consider enacting a law like the Foreign Judgments (Reciprocal Enforcement) Act, 1933 enacted by the British Parliament under Section (1) in pursuance of which the Government of the United Kingdom issued the Reciprocal Enforcement of Judgments (India) Order, 1958. Apart from it there are other enactments such as the Indian and Colonial Divorce Jurisdiction Act, 1940 which safeguard the interest so far as the United Kingdom is concerned. But the rule of domicile replacing the nationality rule in most of the countries, for assumption of jurisdiction and granting relief in matrimonial matters, has resulted in conflict of laws. This domicile rule is not necessary to be discussed. But feasibility of legislation safeguarding the interests of women may be examined by incorporating such provisions as the following–
>
> (1) no marriage between a NRI and an Indian woman which has taken place in India may be annulled by a foreign court;
> (2) provision may be made for adequate alimony to the wife in the property of the husband both in India and abroad.

(3) the decree granted by Indian courts may be made executable in foreign courts both on the principle of comity and by entering into reciprocal agreements like Section 44A of the Civil Procedure Code which makes a foreign decree executable as it would have been a decree passed by that court.'

ACCEPTING MAINTENANCE UNDER FOREIGN COURT JUDGMENT DOES NOT BAR FILING OF DIVORCE PETITION IN INDIA

The above mentioned case of *Narasimha Rao,* JT 1991 (3) Supreme Court, was followed by the Delhi High Court in *Veena Kalia v Jatinder Nath Kalia,* reported as AIR 1996 Delhi 55. The husband in this case had filed divorce proceedings in the Supreme Court of Nova Scotia in Canada on the ground of irretrievable breakdown. The court held that, since the wife had not contested the proceedings in Canada, it would not mean that she had conceded to the jurisdiction of the Canadian Court. The court further held that the decree of divorce granted by the Canadian Court was violative of the principles of natural justice and was as such a nullity. The subsequent petition for divorce by the wife in India on the ground of adultery, cruelty and desertion was not barred by the principles of estoppel or from res judicata simply because she had accepted maintenance under the foreign judgment.

MAINTENANCE, DISPOSAL OF PROPERTY AND CUSTODY OF CHILDREN UNDER HINDU LAW

The Hindu husband has a statutory liability to maintain his wife under the provisions of the HMA 1955, HAMA 1956 and the Indian Code of Criminal Procedure, 1973 (hereafter CrPC 1973). The crucial distinction is that under ss 24 and 25 of the HMA 1955, the wife is entitled to ask for maintenance only in the event of any matrimonial litigation. But, there is no such contingency or embargo imposed by the provisions of the CrPC 1973. The wife, while invoking the jurisdiction under CrPC 1973, can claim maintenance if she is living separately in the absence of any matrimonial litigation, provided she meets the conditions stipulated in s 125 of the CrPC 1973. Additionally, the Hindu wife can also claim maintenance under s 18 of the HAMA 1956, under certain circumstances in the absence of any matrimonial proceedings.

Section 26 of the HMA 1955, deals with the provision for the custody of children. Section 27 of the HMA 1955 provides for disposal of the property of the parties to the litigation. The relevant maintenance provisions under the

HMA 1955, CrPC 1973, HAMA 1956 and the custody and the disposal of property provisions under the HMA 1955 are reproduced hereunder:

MAINTENANCE UNDER THE PROVISIONS OF THE HINDU MARRIAGE ACT 1955

'**24. Maintenance pendente lite and expenses of proceedings**.– Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

[Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within 60 days from the date of service of notice on the wife or the husband, as the case may be.]

25. Permanent alimony and maintenance.– (1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant , the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has re-married or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just.'

MAINTENANCE UNDER S 125 OF THE INDIAN CODE OF CRIMINAL PROCEDURE 1973

Significantly it will be noticed that the ambit of s 125 of the CrPC 1973, also extends to maintenance of children and parents. The relevant extract of s 125 reads as follows:

> '**125. Order for maintenance of wives, children and parents**,– (1) If any person having sufficient means neglects or refuses to maintain—
> (a) his wife, unable to maintain herself, or
> (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
> (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
> (d) his father or mother, unable to maintain himself or herself,
>
> a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such magistrate thinks fit, and to pay the same to such person as the magistrate may from time to time direct ...'

MAINTENANCE OF THE WIFE UNDER THE PROVISIONS OF THE HINDU ADOPTIONS AND MAINTENANCE ACT 1956

Section 18 of the HAMA 1956, is reproduced hereunder for ready reference:

> '**18. Maintenance of wife**.– (1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life time.
> (2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance—
> (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish or willfully neglecting her;
> (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;
> (c) if he is suffering from a virulent form of leprosy;
> (d) if he has any other wife living;
> (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(f) if he has ceased to be a Hindu by conversion to another religion;

(g) if there is any other cause justifying living separately.

(3) A Hindu wife shall not be entitled to separate residency and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.'

The Delhi High Court in *Neelam Malhotra v Rajinder Malhotra,* AIR 1994 Delhi 234, held that after considering the status of the husband, the wife should be awarded maintenance pendente lite, even though there is no separate provision in HAMA 1956, for grant of maintenance pendente lite. The obligation to maintain the wife remains on the husband even though the wife might be living separately. The court was conscious of the fact that the suit for maintenance under s 18 of the Act may take a long time before it is decided, hence, the wife in the first instance cannot be subjected to starvation and then subsequently granted maintenance from the date of filing of suit. The court was of the opinion that such a restrictive view would be against the letter and spirit of s 18 of the Act.

Section 19 of the HAMA 1956, provides for maintenance of the widowed daughter-in-law and is reproduced hereunder for ready reference:

'**19. Maintenance of widowed daughter-in-law.** – (1) A Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained after the death of her husband by her father-in-law:

Provided and to the extent that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance–

(a) from the estate of her husband or her father or mother, or

(b) from her son or daughter, if any, or his or her estate.

(2) Any obligation under sub-section (1) shall not be enforceable if the father-in-law has not the means to do so from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share, and any such obligation shall cease on the re-marriage of the daughter-in-law.'

FACTORS GOVERNING QUANTUM OF MAINTENANCE

Section 23 provides that it shall be at the discretion of the Court to determine the amount of maintenance, if any, payable at all and in doing so the Court shall be guided by the considerations set out in ss 23(2) or (3) of the HAMA 1956, which are stated hereunder:

'23(2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, the following factors shall be taken into account–

(a) the position and status of the parties;

(b) the reasonable wants of the claimant;

(c) if the claimant is living separately, whether the claimant is justified in doing so;
(d) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source;
(e) the number of persons entitled to maintenance under this Act.

(3) In determining the amount of maintenance, if any, to be awarded to a dependant under this Act, regard shall be had to–
(a) the net value of the estate of the deceased after providing for the payment of his debts;
(b) the provision, if any, made under a will of the deceased in respect of the dependant;
(c) the degree of relationship between the two;
(d) the reasonable wants of the dependant;
(e) the past relations between the dependant and the deceased;
(f) the value of the property of the dependant and any income derived from such property, or from his or her earnings or from any other source;
(g) the number of dependants entitled to maintenance under this Act.

Section 25 of the HAMA 1956 also provides that the amount of maintenance may be altered on change of circumstances.

CUSTODY OF CHILDREN UNDER S 26 OF THE HMA 1955

Section 26 of the HMA 1955 provides for custody of children of the parties to the litigation and is reproduced hereunder:

'**26. Custody of Children.**– In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

[Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within 60 days from the date of service of notice on the respondent.]'

DISPOSAL OF PROPERTY UNDER S 27 OF THE HMA 1955

Section 27 of the HMA 1955, empowers the court to adjudicate upon the division and distribution of the properties of the divorced couple at the time of the passing of the decree, and is reproduced hereunder for ready reference:

> '**27. Disposal of property**.– In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.'

The Delhi High Court held in *Subhash Lata v VN Khanna,* AIR 1992 Delhi 14, that s 27 of the Act concerns only the properties presented at or about the time of marriage, which are alleged to belong jointly to both the spouses. Section 27 can only relate to a limited class of property that is owned jointly by the spouses which has been presented at or about the time of marriage. The pre-condition for getting relief is that such property must belong jointly to both the spouses.

CONCLUSION

The Supreme Court of India's concern in its judgments directing the Government of India to consider enacting a uniform civil code has gone completely unheeded. Such directions have been necessitated on account of legal inequities that exist between men and women in India. It will be noted that customary divorce, subject to certain conditions, is given statutory recognition under the provisions of the HMA 1955. Further, children of void and voidable marriages are recognised as legitimate in the eyes of the law. The issue of the stigma attached to divorced women in India, especially those hailing from rural areas, married to NRIs becomes an important issue, in the event of broken marriages, where they may be on the verge of deportation.

DOES DIVORCE LAW IN INDIA NEED AN OVERHAUL?

In brief conclusion to this chapter, after analysing the divorce options and its interpretations by Indian courts, a lurking thought arises. Does the divorce law in India need a overhaul? Keeping in mind that the institution of marriage under HMA in India is sacramental and not contractual, any major overhaul may be counter-productive to the very concept of Hindu marriage. The answer therefore is that the existing three-tier divorce structure in India under the HMA and SMA, ie the fault grounds, mutual consent principle and breakdown theory, seems to provide sufficient options in the existing societal structure. Therefore, no major changes are called for. However, a

civilised parting of spouses where a marriage has irretrievably broken down needs to be incorporated in the statute book as an additional ground for divorce. This will have an immediate two-fold benefit. First, where parties have irreconcilable differences and want to part amicably, an option will be available to spouses legally and logically to part without resorting to a protracted time-consuming legal battle on trumped up charges. Secondly, resort to divorce in a foreign jurisdiction may reduce once a proper legal option of irretrievable breakdown is available on Indian soil to spouses of a dead marriage. Irretrievable breakdown can thus serve as an additional ground for divorce in the HMA and SMA to prevent hasty divorces or misuse and sufficient statutory safeguards can be incorporated to arm the judiciary to stall any abuse of the process of law. Keeping the Hindu ceremonial and sacramental concept of marriage intact must be adhered to. Erosion of values in matrimonial life must be checked. Marriage in its traditional form must be protected. Hindu divorce law does not need an overhaul. It only needs some amendments. The Hindu institution of a family, a home and children of the marriage as they exist today under Hindu law needs protection.

PROBLEMS WITH FOREIGN EX-PARTE DIVORCE DECREES/MATRIMONIAL JUDGMENTS

It will be noticed that the proposed guidelines in both the above mentioned Supreme Court rulings are meaningful and, if implemented, can mitigate the plight of wives dumped in India by foreign husbands. Though the apex Court has clearly stated that there is need for suitable legislation on the subject, until now no comprehensive Indian law has been enacted to protect the rights of deserted and abandoned spouses in India. In essence, therefore, judicial verdicts of the Courts of Law are the only available law in India to come to the rescue of helpless Indian spouses who protest against the uncontested foreign divorce decrees invariably obtained in default by spouses from overseas jurisdictions. Some codified laws on the subject are undoubtedly now an absolute necessity in India today to cope with the need for interpretation and enforcement of foreign matrimonial judgments of overseas courts.

PRACTICAL PROBLEMS IN REALISING MAINTENANCE

As a brief concluding note to this chapter, it may be submitted that even though sufficient legislation exists in India for providing maintenance and settlement of other ancillary relief, in practice the implementation and enforcement of this beneficial legislation needs attention. The quantum of maintenance awarded by the courts is generally quite low and procedural delays of the process do not provide much succour to a spouse in distress.

Issues of settlement of matrimonial property and custody of children are often overtaken by bitter matrimonial wrangling between the contesting spouses and the benevolent purpose of beneficial legislation for settling the aftermath is clouded and overshadowed in courts where the focus is on the divorce proceedings only. The priorities in the courts need to change. Sufficient maintenance in need must be awarded and the rights of children need to be settled more vigorously and placed on a higher pedestal. This is perhaps one area where the courts of law need to pursue the above propositions with more vehemence and more generously to expedite the settlement of adequate maintenance and matrimonial property besides providing quicker justice to the children of a broken marriage.

2007

India (Part 1)

HINDU LAW AND UNIFORM CIVIL CODE – THE INDIAN EXPERIENCE

Anil Malhotra and Ranjit Malhotra[*]

Résumé

Comment fonctionne le système juridique dans la société indienne? Comment un Code Civil Uniforme peut-il s'insérer harmonieusement dans le contexte d'une société multiculturelle et multireligieuse qui reconnaît la liberté fondamentale de religion? De quelle façon les tribunaux de l'Inde harmonisent-ils le droit et la réligion dans une république démocratique, laïque, souveraine et socialiste? Quels sont les opinions exprimées par les tribunaux dans les arrêts qui touchent à ces questions? Les tribunaux religieux et les instances extra-judiciaires sont-ils acceptés par le système judiciaire indien? Un Code Civil Uniforme est-il une illusion? Est-ce que le droit de la famille en Inde nécessite une réforme? L'activisme judiciaire en Inde pourrait-il provoquer une réforme du droit de la famille? Comment se résolvent les questions relatives aux conflits de lois en droit extrapatrimonial de la famille? La coutume l'emporte-t-elle sur le droit écrit? La question du déplacement d'enfants comme conséquence de la rupture du mariage, doit-elle être encadrée législativement? Les Indiens non résidents invoquent-ils des jugements étrangers qui sont contraires au droit de l'Inde et que les tribunaux indiens refusent d'appliquer automatiquement? Ce ne sont là que quelques situations problématiques dont traite le présent article qui propose également une analyse de la jurisprudence dans d'autres secteurs du droit de la famille.

Avec la brève description ci-dessus pour toile de fond, cet article tente modestement de présenter quelques réponses possibles aux différentes questions posées et aux problèmes soulevés. Son objectif est d'examiner les possibilités de coexistence harmonieuse du droit et de la religion dans la démocratie indienne, à la lumière des différentes législations en matière familiale ainsi que des avis exprimés par la Cour Suprême indienne sur ces questions.

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* Anil Malhotra has been a practising Advocate at the Punjab and Haryana High Court, Chandigarh, India since September 1983. Ranjit Malhotra was the first Indian lawyer to be awarded the prestigious Felix Scholarship to read for the LLM degree at the School of Oriental and African Studies, University of London. He is an India-based lawyer handling substantial international work. This paper was originally written for the South African Family Law Conference 2007.

June 28, 2007

I INTRODUCTION: THE INDIAN BACKGROUND

The Constitution of India enacted on 26 November 1949 resolved to constitute India as a Union of States and a Sovereign, Socialist, Secular, Democratic Republic. Today, a population of over one billion Indians lives in 28 States and seven Union Territories within India besides about 25 million Indians who reside in foreign jurisdictions and are called non-resident Indians. Within the territory of India, spread over an area of 3.28 million sq kms, the large Indian population, comprised of multicultural societies professing and practising different religions and speaking different local languages, coexist in harmony in one of the largest democracies in the world.

The Indian Parliament at the helm of affairs legislates on central subjects in the Union and Concurrent lists and State legislatures enact laws pertaining to State subjects as listed in the Constitution of India. Likewise, pertaining to the Judiciary, under Art 214 of the Indian Constitution there shall be a High Court for each State and under Art 124 there shall be a Supreme Court of India. Under Art 141 of the Constitution, the law declared by the Supreme Court shall be binding on all Courts within the territory of India. However, the Supreme Court may not be bound by its own earlier views and can render new decisions.

Part III of the Constitution of India secures to its citizens 'Fundamental Rights' which can be enforced directly in the respective High Courts of the States or directly in the Supreme Court of India by issue of prerogative writs under Arts 226 and 32 respectively of the Constitution of India. Under the Constitutional scheme, among others, Freedom of Religion and the right to freely profess, practise and propagate religion are sacrosanct and are thus enforceable by a writ.

Simultaneously, Part IV of the Indian Constitution lays down 'Directive Principles of State Policy' which are not enforceable by any Court but are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles while making laws. Under Art 44 of the Constitution in this Part, the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. However, realistically speaking, to date a Uniform Civil Code remains an aspiration which India has yet to achieve and enact.

How does the system of law and society work in India? Against the background of an enforceable Fundamental Right of Religion in a multicultural and diverse society professing different religions, how does a Uniform Civil Code fit in? How do Indian Courts harmonise law and religion in a Democratic, Secular, Sovereign, Socialist Republic? What are the views expressed by Courts in judgments on such issues? Do religious Courts and extra judicial forums find acceptance in the Indian judicial system? Is a Uniform Civil Code an illusion? Does family law in India need reform? Does judicial activism in India trigger off an impetus for making changes in family

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laws? How are the clashes on issues of personal family laws resolved? Does custom override statutory family laws? Does child removal as fallout of broken marriages need to be curbed by legislation? Do non-resident Indians bring in foreign judgments contrary to Indian family law which Indian Courts do not implement mechanically? These are only some conflict areas which will be dealt with in this chapter along with supporting case-law in some areas of family law to see how best the current system seeks to handle them.

Against the backdrop of the brief description above, this chapter is a modest attempt to put together possible answers to the above questions and issues raised to examine the harmonious coexistence of law and religion in the Indian democracy in the light of the different family law legislation enacted by the Indian Parliament and the views of the Indian Supreme Court expressed on the issues posed above.

II EXISTING FAMILY LAW LEGISLATION PREVALENT IN INDIA

India is a land of diversities with several religions. The oldest part of the Indian legal system is the personal laws governing the Hindus and the Muslims. The Hindu personal law has undergone changes by a continuous process of codification. The process of change in society has brought changes in law reflecting the changed social conditions and attempting to solve social problems by new methods in the light of experience of legislation in other countries of the world. The Muslim personal law has been comparatively left untouched by legislations.

The Indian legal system is basically a common law system. The Indian Parliament has enacted the following family laws which are applicable to the religious communities defined in the respective enactments themselves. A brief description of each of these separate enactments is given hereunder.

(a) The main marriage law legislation in India applicable to the majority population constituted of Hindus is known as the Hindu Marriage Act 1955, which is an Act to amend and codify the law relating to marriage among Hindus. Ceremonial marriage is essential under this Act and registration is optional. It applies to any person who is a Hindu, Buddhist, Jaina or Sikh by religion and to any other person who is not a Muslim, Christian, Parsi or Jew by religion. The Act also applies to Hindus resident outside the territory of India. Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment. Likewise, in other personal law matters, Hindus are governed by the Hindu Succession Act 1956, which is an Act to amend and codify the law relating to intestate succession among Hindus. The Hindu Minority and Guardianship Act 1956 is an Act to amend and codify certain parts of the law relating to minority and guardianship

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among Hindus and the Hindu Adoptions and Maintenance Act 1956 is an Act to amend and codify the law relating to adoptions and maintenance among Hindus.

It may be pertinent to point out that the Indian Succession Act 1925 is an Act to consolidate the law applicable to intestate and testamentary succession in India unless parties opt and choose to be governed by their respective codified law otherwise applicable to them. In respect of issues relating to guardianship, the Guardian and Wards Act 1890 would apply to non-Hindus. Interestingly, s 125 of the Code of Criminal Procedure 1973 provides that irrespective of religion, any person belonging to any religion can approach a magistrate to be provided with maintenance. Therefore, apart from personal family law legislations, both Hindus and non-Hindus have an independent right of maintenance under the general law of the land, if he or she is otherwise entitled to maintenance under this Code.

(b) The Indian Parliament also enacted the Special Marriage Act 1954 as an Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorces under this Act. This enactment of solemnising marriage by registration is resorted to by Hindus, non-Hindus and foreigners marrying in India who opt out of the ceremonial marriage under their respective personal laws. Registration is compulsory under this enactment. Divorce can also be obtained by non-Hindus under this Act. This legislation governs people of all religions and communities in India, irrespective of their personal faith. Likewise, under the Foreign Marriage Act 1969, a person has only to be a citizen of India to have a marriage solemnised under this Act outside the territorial limits of India.

(c) The Parsi Marriage and Divorce Act 1936, as amended in 1988, is an Act to amend the law relating to marriage and divorce among the Parsis in India.

(d) The Christian Marriage Act 1872 was enacted as an Act to consolidate and amend the law relating to the solemnisation of the marriages of Christians in India and the Divorce Act 1869, as amended in 2001, is an Act to amend the law relating to divorce and matrimonial causes relating to Christians in India.

(e) The Muslim Personal Law (Shariat) Application Act 1937, Dissolution of Muslim Marriages Act 1939, Muslim Women (Protection of Rights on Divorce) Act 1986 and Muslim Women (Protection of Rights on Divorce) Rules 1986, apply to Muslims living in India.

For enforcement and adjudication of all matrimonial and other related disputes of any person in any of the different religious or non-religious communities under the respective legislation mentioned above, the designated judicial forum or court where such petition is to be lodged is prescribed in the respective

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enactments themselves. There is an organised system of designated civil and criminal judicial courts within every State in India which works under the overall jurisdiction of the respective High Court in the State. It is in the hierarchy of these courts that all family and matrimonial cases are lodged and decided by the aggrieved party. In addition, the Indian Parliament has enacted the Family Courts Act 1984 to provide for the establishment of Family Courts with a view to promote conciliation in and to secure speedy settlement of disputes relating to marriage and family affairs. Despite the existence of an organised, well regulated and established hierarchy of judicial courts in India, there are still unrecognised parallel community and religious courts in existence whose interference has been deprecated by the judicial courts since such unauthorised and unwarranted bodies work without the authority of law and are not parts of the judicial system.

III CONFLICT AREAS IN INDIAN FAMILY LAW

To assess, evaluate, analyse and examine how different codified Indian family laws actually work in the Indian societal set up and how Courts interpret them and also to construe what are the lacunas involved in these individual family causes, it would be appropriate to deal with the individual subjects hereunder.

(a) Marriage laws

Societal conflicts, law and realities

All the codified marriage legislation in India stipulates conditions of a valid marriage. The bone of contention in these stipulations hovers around two harsh realities, ie age of marriage and registration of marriages. The principal family law legislation in India, ie the Hindu Marriage Act 1955, does not render a marriage void or voidable in the event that the boy has not reached the age of 21 years or the girl has not reached the age of 18 years. Child marriages are performed even though the Child Marriage Restraint Act 1929 provides punishment for solemnising child marriages of boys below 20 years of age and girls below 18 years of age. To add to the problem, India to date does not have a compulsory requirement by law for registration of marriages. This practice is in harmony with reality. Child marriages in practically all religious communities in India are accepted practices, which obviously cannot be registered due to non-fulfilment of the minimum age of marriage. Therefore, the violation of the condition of the minimum age of marriage does not entail nullity of the marriage since registration is optional and not compulsory.

However, the lack of will on the part of the Indian legislature to enact a compulsory law for registration of marriages has not gone unnoticed by the courts. The Supreme Court of India in *Seema v Ashwani Kumar*,[1] has directed all States in India to notify rules for compulsory registration of marriages

[1] *Seema v Ashwani Kumar*, Judgments Today 2006 (2) SC 378.

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irrespective of religion, in a time bound period. This reform, which has been spearheaded by the National Commission for Women, has struck a progressive blow to check child marriages, prevent marriages without consent of the parties, check bigamy/polygamy, enable women's rights of maintenance, inheritance and residence, deter men from deserting women and check young girls being sold in the garb of marriage. The Supreme Court of India in another unreported decision dated 27 March 2006 has stayed the legal validity of the marriages of minor girls below 18 years of age, which had been earlier upheld by the two High Court orders being appealed against in the Supreme Court. At least seven States in India have high incidence of child brides and the law does not take care of the anomaly by banning child marriages.

The orders of the Indian Apex Court may open a Pandora's box. Besides Hindus, the problem will also be with the other minority religious communities. Even among Muslims mere non-registration of a marriage will not make it invalid. Codification of some personal laws among some religious communities in India is itself a very debatable issue. Besides, consequences of non-registration of marriages has created a large number of abandoned spouses in India deserted by non-resident Indians who habitually reside abroad. Times have changed, laws have not. Education, economic prosperity, agricultural improvements, cross border migration and Western influences have changed practices and lifestyles in urban India while rural set-ups are still struggling with adherence to customary practices in family law matters. Will society catch up with law or will the legislature enact a law on the request of the Courts to change societal practices? This remains to be seen. However, the fact remains that until the rural masses in India are educated and motivated to change for the better, any change in laws will not really help. Reality must dawn that the unhealthy social edifices of child marriage must be dismantled and the exploitation of married women must cease. Awareness must come from within the people and cannot be enforced by any law.

Inter caste marriages: a national interest

The Constitution of India guarantees the Fundamental Rights to equality, freedom and protection of life and personal liberty. Equality of laws and equal protection of laws are the touchstone and the spirit of these rights. Additionally, the Directive Principles of State Policy endeavour to get the State to strive to promote the welfare of the people in a social order in which justice, social, economic and political, shall inform all the institutions of national life. However, the fact remains that in India when young men and women marry outside their castes or community, it evokes strong sentiments and even honour killings, although there is no bar to inter caste marriages under any codified marriage law. In one such recent decision rendered by the Indian Supreme Court in *Lata Singh v State of UP*,[2] it was held that the caste system is a curse on the nation and needs to be destroyed for the better. Acts of violence and threats against such inter caste couples are wholly illegal and those who commit

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2 *Lata Singh v State of UP*, Judgments Today 2006 (6) SC 173.

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them should be severely punished. The administration and police authorities all over the country were directed by the Supreme Court to ensure that no inter caste couple is harassed by anyone or subjected to any threat or acts of violence. Truly, the message of the Court is clear, India of the 21st century cannot be built on the basis of casteism. To amalgamate as a nation, inter caste and inter religious marriages among communities in India must be accepted by society. Barbaric practices of honour killings must be obliterated. But how far can Court decisions achieve this? The government must enforce the law of the land and uphold the citizen's fundamental rights. A heavy hand is required to check this menace. The realisation must dawn on citizens that in the path to development such archaic practices retard growth, reverse progress and kill the spirit of equality. Therefore, law and society must be in tandem to root out such prejudicial practices.

Unconstitutional extra judicial courts: a blow to codified laws

Community practices in certain States in India in certain religious denominations have led to the creation of Community or Religious Courts which do not have the legitimate backing of the system of law and have no sanctity in the official legal system. It is in the matter of inter caste or inter religious marriages or divorces that such self-styled extra-constitutional authorities take upon themselves the power of Courts of law to issue community mandates to people within the community. Such religious edicts result from summary hearings often in violation of Fundamental Rights guaranteed by the Constitution of India. In this regard, the Supreme Court of India on 27 March 2006 in *Vishwa Lochan Madan v Union of India and others*, issued notices to the Central Government, State Governments, All India Muslim Personal Law Board (AIMPLB) and Darul Uloom, an Islamic seminary, in the matter of the existence of parallel Islamic and Shariat Courts in the country, which are posing a challenge to the Indian judicial system. In this petition filed as a Public Interest Litigation petition in the Supreme Court of India, Advocate Vishwa Lochan Madan was seeking immediate dissolution of all Islamic and Shariat Courts in India. Earlier, on 16 August 2005, in *Vishwa Lochan Madan v Union of India and others*, the Supreme Court of India had also issued notices to the Indian States of Uttar Pradesh, Haryana, Assam, Madhya Pradesh, Rajasthan, West Bengal and Delhi, where, according to the petition, Islamic courts have been formed and were posing a challenge to the judicial system of the country.

The Petitioner in the above case sought an immediate dissolution of all Islamic and Shariat courts in India, alleging that the AIMPLB had established Darul Qaza (Muslim Courts) in India at Thane (Maharashtra), Akola Dholiya (Rajasthan), Indore (Madhya Pradesh), South and East Delhi, Asansol and Purulia (West Bengal), Lucknow and at Sitapur (Uttar Pradesh). Citing the fatwa (a religious decree) issued by the Deoband-based seminary in the State of Uttar Pradesh known as Darul Uloom in an earlier rape case and the supporting stand of AIMPLB, the above named petitioner pointed out that the criminal law was not allowed to have its natural course as the entire issue was

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said to be hijacked by the Muslim clerics. The petitioner sought a ban on the establishment of such Islamic courts, along with a declaration that these fatwas have no legal sanctity and requested the Court to direct the Central and the State Governments to take effective steps to dissolve all Darul Qazas and Shariat Courts in India.

The petitioner further sought a direction from the Court to the AIMPLB and Darul Uloom, Deoband, other seminaries and Muslim organisations asking them to refrain from establishing a parallel Muslim Judicial System (Nizam-e-Qaza). A direction from the Court was also sought to restrain these organisations from interfering with the marital status of Indian Muslim citizens and passing any judgment, remarks or fatwas as well as deciding matrimonial disputes amongst Muslims. This petition no doubt raises a crucial issue as to whether there could be two parallel legal systems in operation, one legal and the other religious, particularly when the Constitution of India prohibits discrimination on grounds of caste or religion, and whether the right to freedom of religion could be extended to the establishment of a parallel judicial system. At the time of the submission of this paper, the matter had not been decided, still pending final adjudication in the Supreme Court of India, and no conclusive final decision stands reported on the issue by the Court.

On similar lines exist the caste panchayats (village councils) especially in the State of Haryana in India. These caste panchayats throw several lives into turmoil, often by declaring marriages invalid, and invariably their victims belong to the weakest sections of society. Traditionally, caste panchayats have played a powerful role at the village level in several other States of the country also. However, khap panchayats (caste-based village councils) are not elected bodies and their decisions are not enforceable by law as such extra-constitutional bodies have no sanctity or recognition in law. They, however, derive support from community recognition.

Khap panchayats are so powerful because of their ability to mobilise a large number of people that they appear to be democratic from the outside, but they are not. They exclude women, the young people as well as the groups who are lower down in the caste hierarchy in the village.

Recently, in response to a public interest litigation (PIL) filed by the Haryana unit of the People's Union for Civil Liberties (PUCL), the State's High Court directed the government to protect the life and liberty at all costs of a couple who had entered into an inter caste wedlock. The High Court also directed the authorities to ensure that nobody coerced the couple to change the status of their marriage. A similar situation had arisen when the Punjab and Haryana High Court heard a number of writ petitions challenging the fatwas issued by the self-styled caste-based khap panchayats in the State of Haryana ordering married couples to dissolve their marriages and live separately and ordering their expulsion from the villages on their refusal to do so. Another recent village panchayat dictated that a divorced Muslim woman could remarry her

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husband only if she marries and divorces her brother-in-law first – this has also been reported in the *Indian Express* dated 6 August 2006. Other such decisions are also glaring and abound.

The positive decisions by the courts of law are no doubt a setback to the caste panchayats of Haryana which have a powerful influence in its socially and culturally backward villages. A positive step has been taken by the Court but there cannot be a constructive outcome until society as a whole decides to fight back to demolish this age-old obsolete system. The executive authorities have done little to check the extra-judicial activities of these unauthorised courts which are a blatant interference with the Fundamental Rights of citizens. The responsibility of the State cannot be abdicated. If this be so, judicial courts in India seem to be the best recourse in giving relief in individual matters involving blatant violation of Fundamental Rights of the citizens by community councils enforcing their edicts by force and extra-judicial means on alleged moral grounds. But then, should courts grant relief as an alternative to ailing legislation? Courts may not legislate but must vindicate human rights. Clearly, the duty of the State also to enforce the law of the land is the need of the day. The courts unhesitatingly should strike down any mandates of any such extra-judicial bodies which have no legal sanctity in a civilised society.

(b) Divorce: customs, practice and law

The two principal family law pieces of legislation in India, ie the Hindu Marriage Act 1955 and the Special Marriage Act 1954, contain three sets of separate grounds in a three-tier divorce structure. These are the fault grounds, breakdown grounds on non-compliance with judicial separation or restitution of conjugal rights and grounds of mutual consent. Irretrievable breakdown of marriage *simpliciter* is not a ground for divorce under any codified Indian family law. The Parsi Marriage and Divorce Act 1936 (as amended) and the Divorce Act 1869 (as amended) follow suit. The Dissolution of Muslim Marriages Act 1939 lays down the grounds for a decree for dissolution of marriage of Muslims.

Custom and the effect of codified law

Section 29 of the Hindu Marriage Act 1955 gives statutory recognition to customary divorces. This in effect means that parties relying on a custom need not go to Court and obtain a decree for divorce. However, the onus on the party who relies on a custom is indeed weighty and the custom should be ancient, certain, reasonable and not opposed to public policy. Even though Courts take judicial notice of customs, the validity of a deed of dissolution of marriage under a customary practice has to be established by leading cogent evidence by the person propounding such custom. In *Subramani v M Chandralekha*,[3] the Apex Court, following well-settled earlier principles of law, held that, since there was no custom prevalent in the community to which the

3 *Subramani v M Chandrlekha*, Judgments Today 2005 (11) SC 562.

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parties belonged for dissolution of marriage by mutual consent, the alleged deed of dissolution marriage could not be executed.

It is common for parties in India to set up customary divorce practices as a short cut to statutory procedures but with the vigilant judiciary such abuse of the process of law does not succeed. Regardless, multiple marriages are often solemnised in contravention of codified law by taking advantage of non-existent customs. To this extent neither law nor the Courts come to the rescue of such parties. However, s 16 of the Hindu Marriage Act clearly provides that, notwithstanding that such marriage is null and void, any child of such marriage who would have been legitimate if the marriage had been valid shall be legitimate. Consequently, even though spouses may not gain, the statute protects and provides property and other inheritance rights to children of such unions. Conferring such rights upon children has been recently reiterated by the Supreme Court of India in *Bhogadi v Vuggina*.[4] The policy of law is therefore clear to provide beneficial effects to the offspring without condoning the contravention and violation of marriage laws. Customs will not die but their misuse must be prevented and curtailed.

Divorce by irretrievable breakdown of marriage: is it now a necessity?

Keeping in mind that the institution of marriage in Indian society is largely still a sacrament and not a contract, especially under the Hindu Marriage Act, any major overhaul may be counter-productive to the very concept of Hindu Marriage. The existing three-tier divorce structure in India, largely applicable to all communities, i e fault grounds, breakdown theory and the mutual consent principle, provide the codified and statutory grounds for divorce in Indian Courts. Two different High Court decisions, i e *Yudhister Singh v Sarita*,[5] *Kakali Dass v Dr Asish Kumar*,[6] and a Supreme Court of India decision in *Sham Sunder v Sushma*,[7] give a clear indication that the ground of irretrievable breakdown of marriage should be rarely used.

However, some recent decisions of the Supreme Court of India indicate that the Apex Court has recommended that 'irretrievable breakdown of marriage' should be added as a ground for divorce on the statute book. The Supreme Court in *Naveen Kohli v Neelu Kohli*,[8] has recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act to incorporate irretrievable breakdown of marriage as a ground for divorce. It is not uncommon for the Apex Court to apply this principle in dissolving marriages as was recently done in *Durga Prasanna v Arundhati*,[9] following five earlier precedents of the Apex Court rendered in the last 5 years.

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4 *Bhogadi v Vuggina*, Supreme Court Cases 2006 (5) 532.
5 *Yudhister Singh v Sarita*, Hindu Law Reporter 2004 (1) 228.
6 *Kalkali Dass v Dr Asish Kumar*, Hindu Law Reporter 2004 (1) 448.
7 *Sham Sunder v Sushma*, Judgments Today 2004 (8) SC 166.
8 *Naveen Kohli v Neelu Nohli*, Judgments Today 2006 (3) SC 491.
9 *Durga Prasanna v Arundhati*, Judgments Today 2005 (7) SC 596.

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In view of the above noted position of law, in the opinion of the authors, a civilised parting of spouses where a marriage has irretrievably broken down needs to be incorporated in the statute book as an additional ground for divorce, but only in cases where both the parties to the marriage jointly petition the Court for such relief. This will have an immediate two-fold benefit. First, where parties have irreconcilable differences and want to part amicably, an option will be available to them to part legally and logically without resorting to a protracted time consuming legal battle on trumped-up grounds. Secondly, recourse to *ex-parte* divorce in foreign jurisdictions by non-resident Indians against hapless spouses on Indian soil may decline once a proper legal option of irretrievable breakdown is available to spouses on Indian soil. However, to prevent hasty divorces or misuse, sufficient statutory safeguards can be incorporated to arm the judiciary to prevent any abuse of the process of law. Retaining the ceremonial and sacramental concept of marriage, irretrievable breakdown hedged with safeguards can be introduced where both parties consent to it. To harmonise and blend modern family requirements in urban areas with traditional Indian concepts of family law, the above middle path can be best advocated.

Child removal – a fallout of broken marriages

The world is a far smaller place now than it was a decade ago. Inter-country and inter-continental travel is easier and more affordable than it has ever been. The corollary to this is an increase in relationships between individuals of different nationalities and from different cultural backgrounds. Caught in the crossfire of broken relationships with ensuing disputes over custody and relocation, the hazards of international abduction loom large over the chronic problems of maintaining access or contact internationally with the uphill struggle of securing cross-frontier child support. In a population of over a billion Indians, 25 million are non-resident Indians who by migrating to different jurisdictions have generated a new crop of spousal and family disputes.

Cross-border family relationships arising from such exchange have carved out a new niche in the jurisdiction of family law disputes. Such problems have no ready made solutions in the conventional legislation prevailing within the legal system in India. The net result: the innovative judicial system in India with its dynamic jurisprudence when invoked provides a tailor-made answer for every individual case. But then, this does not provide a consistent, uniform and universal remedy to be adhered to in an international perspective. What then is the answer in the highly sensitive area of family law disputes involving conflict of jurisdictions in inter-parental child custody cases when children are removed to India in violation of inter-parental rights or infringement of foreign court orders?

In a recent decision dated 3 March 2006 of the High Court of Bombay at Goa, between a 62-year-old American father and 39-year-old British mother resident in Ireland litigating over the custody of their 8-year-old daughter said to be

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illegally detained in Goa by the father, the Court declining the issuance of a writ of habeas corpus held that the parties could pursue their remedies in normal civil proceedings in Goa. The Court dismissing the mother's plea for custody concluded that the question of permitting the child to be taken to Ireland without first adjudicating upon the rival contentions of the parents in normal civil proceedings in Goa is not possible and directed that the status quo be observed. The mother's appeal to the Supreme Court of India against the above High Court decision was dismissed on 21 August 2006, with a direction that, if a custody petition was filed in the appropriate forum, it would be decided within 3 months and until then the status quo would be observed regarding the custody and visitation rights as held by the High Court. This in effect means that the 8-year-old girl continues to live in Goa without her mother or any other female family member in the father's house.

The Hague Convention on Civil Aspects of International Child Abduction came into force on 1 December 1983 and has now 75 contracting nations to it. The Convention secures the prompt return of children wrongfully removed to or retained in any Contracting State and ensures the rights of custody and access under the laws of such Contracting States. India unfortunately to date is not a signatory to the Hague Convention and from practical experience it can be stated that the principles laid down in the Convention are not applicable in India. However, India is now actively considering accession to the said Convention due to the fact that its 25 million non-resident Indian population, spread out over 110 countries of the globe, seriously require such an initiative from an international perspective.

The above situation promotes and encourages child removal to India by an offending parent and deprives the child's custody rights from being determined by the laws of the country where the child was normally resident. It also diverts the best interest of the child as the litigation in India gets converted into a fight of superior rights of parents whereas the real issue of the welfare of the child becomes subservient and subordinate. Practical experience also shows that foreign courts now largely disallow children from overseas jurisdictions to be brought to India, apprehending that children will not be returned to the country of their residence.

In the totality of the emerging scenario, it is now practically seen that, in the absence of any Indian legislation on the subject, there is no uniform pattern of decisions to resolve issues of custody and contact which arise when parents are separated and live in different countries. The recent decision quoted above and another child custody dispute in the Supreme Court of India where a US Court declined the return of children to India despite the Supreme Court's directions show that the time has now come for some international perspective in this regard. In January 2005, the British Government appointed Lord Justice Thorpe as Head of International Family Law in the UK judicial system for promoting development of international instruments and conventions in the field of family law with greater international judicial collaboration. Pakistan has signed a judicial protocol between the President of the Family Division of

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the High Court of London and the Chief Justice of the Supreme Court of Pakistan for co-operation between judicial authorities of the two countries on such issues.

In the larger interest of children at risk, the conflict of jurisdiction of Courts must take a back seat. It is, therefore, the need of the hour that the Indian legislature consider enacting some legislation to protect the rights of the abducted child to resolve the clash between the rule of domicile and the nationality rule. Maybe, until this is done, the Supreme Court of India could well lay down some uniform guidelines to be consistently followed in inter-parental child abduction from foreign jurisdictions. India cannot be promoted as a haven for parking removed children.

Enforcement of judgments and orders of foreign courts in India arising in family and matrimonial matters in overseas jurisdictions

With the ever-increasing multifold population of Indians migrating and settling in foreign jurisdictions, the link with their home country does not sever. Family ties, connections of property and movable assets, and the invariable link with some Indian end for any reason whatsoever often lead to cross-border litigation in human relationship matters. Situations abound when a non-resident Indian invokes the jurisdiction of the foreign Court where he is resident and convinces the overseas Court to pass favourable orders in such matters which are thereafter sought to be executed in the Indian jurisdiction through the Courts of law in India.

Indian law reports contain a number of judgments on matters relating to marriage, divorce, maintenance, succession, settlement of matrimonial property, child custody, parental abduction of children from foreign jurisdictions in matrimonial disputes and cases relating to adoption. These foreign court orders, once passed, are sought to be enforced or executed in India through the medium of the Courts. Since there exists no separate provision for recognition of foreign matrimonial judgments or other foreign decisions in related matters in the Hindu Marriage Act 1955, Special Marriage Act 1954, Hindu Succession Act 1956, Hindu Adoption and Maintenance Act 1956, Hindu Minority and Guardianship Act 1956 or in any other Indian legislation relating to family matters, the only recourse lies in s 13 of the Indian Code of Civil Procedure (CPC) which is the general provision of law relating to conclusiveness of judgments by foreign Courts.

In view of the aforestated position, the provisions of s 13 CPC are also fully applicable to matrimonial matters decided by foreign Courts. In such a situation, the precedents giving instances of such reported matters are therefore available only in the shape of judicial pronouncements of Indian Courts which have from time to time rendered a laudable service in interpreting foreign court orders in the best interests of human relationships rather than executing them *simpliciter* in letter and spirit. The Indian judiciary in such a pivotal role is extremely humane and considerate in family matters by implementing the

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foreign court orders in a practical way rather than a mechanical execution of the order or judgment of the overseas Court. Perhaps this openness and fluidity are possible since the Indian Courts are not strictly bound by a foreign court order in family matters but when asked to implement or enforce the same, the Indian Courts apply principles of good conscience, natural justice, equity and fair play, thereby rendering substantial justice to parties in litigation. This can be best seen in decisions of some Indian Courts which have resulted from the Court being asked to implement or execute a court order or judgment arising from a foreign jurisdiction.

A very commonly arising issue pertains to recognition and indirect implementation of divorce decrees of foreign Courts produced in India by spouses residing in foreign jurisdictions. In this regard, different views have been expressed by different Indian Courts at different points of time. Consequently, the Supreme Court of India in 1991 laid down fresh comprehensive guidelines for the recognition of foreign matrimonial judgments by the Courts in India. It may be pertinent to point out that under Art 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The Apex Court in *Y Narasimha Rao v Y Venkata Lakshmi*,[10] made it clear that Indian Courts would not recognise a foreign judgment if it had been obtained by fraud, which need be not only in relation to the merits of the matter but also in relation to jurisdictional facts. By this ruling, the Supreme Court on the facts of the case declared a divorce decree passed by a US Court to be unenforceable in India. Interpreting s 13 CPC the Court laid down broad principles to be followed by Indian Courts with special emphasis on matrimonial judgments.

Likewise in *Neeraja Saraph v Jayant Saraph*,[11] on the facts of the case, the Apex Court came down heavily on the erring non-resident husband residing in a foreign jurisdiction who had abandoned his Indian wife without providing for any maintenance to her.

It will be noted that the proposed guidelines in both the above-mentioned Supreme Court rulings are meaningful and if implemented can mitigate the plight of wives dumped in India by foreign husbands. Although the Apex Court has clearly stated the need for suitable legislation on the subject, as yet no Indian law has been enacted to protect the rights of deserted and abandoned spouses in India. In essence, therefore, the judicial verdicts of courts of law are the only available law in India to come to the rescue of hapless Indian spouses who protest against the uncontested foreign divorce decrees invariably obtained in default by spouses from overseas jurisdictions. Thus, some codified law in India on the subject is undoubtedly now an absolute necessity.

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[10] *Y Narashimha Rao v Y Venkata Lakshmi*, Judgments Today 1991 (3) SC 33.

[11] *Neeraja Saraph v Jayant Saraph*, Judgments Today 1994 (6) SC 488.

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A reading in totality of the matters in the overseas family law jurisdiction gives an indication that in such affairs, it is the judicial precedents which provide the best available guidance and judicial legislation on the subject. With the large number of non-resident Indians now permanently living in overseas jurisdictions, it has now become important that some composite legislation is enacted to deal with the problems of non-resident Indians to prevent them from importing judgments from foreign Courts to India for implementation of their rights. The answer therefore lies in giving them a law applicable to them as Indians rather than letting them invade the Indian system with judgments of foreign jurisdictions which do not find applicability in the Indian system. Hence, it is the Indian legislature which now seriously needs to review this issue and come out with composite legislation for non-resident Indians in family law matters. Until this is done, foreign Court judgments in domestic matters will keep cropping up and Courts in India will continue with their salutary efforts in interpreting them in harmony with the Indian laws and doing substantial justice to parties in the most fair and equitable way. However, in this process, the Indian judiciary has made one thing very clear: the Indian Courts would not simply mechanically enforce judgments and decrees of foreign Courts in family matters. The Indian Courts have now started looking into the merits of the matters and deciding them on the consideration of Indian law and the best interest of the parties rather than simply implementing the orders without examining them. Fortunately, we can hail the Indian judiciary for these laudable efforts and until such time when the Indian legislature comes to the rescue with appropriate legislation, we seek solace with our unimpeachable and unstinted faith in the Indian Judiciary which is rendering a yeoman service.

(c) Dowry and the law: a social menace

The evil of dowry, ie any property or valuable security given or agreed to be given by parties to the marriage or to their parents and given before or at any time after the marriage in connection with or in consideration of the marriage, is widely rampant in India. The Dowry Prohibition Act 1961 was enacted to prohibit the giving and taking of dowry, but this social menace in the institution of marriage is a deep-rooted community practice which continues despite stringent court verdicts. The practice by which dowry seekers attempt to justify it by quoting examples from Hindu scriptures has percolated to all religions in India though it has no customary or religious sanctity attached to it. Both the Dowry Prohibition Act and s 498-A of the Indian Penal Code (IPC) deal with dowry-related harassment of a married woman. Unfortunately, sometimes dowry leads to death by hanging or burning of a helpless girl tortured for the greed of money. Dowry deaths by burning or suicide have become a ponderous point. Section 304-B was introduced in IPC by the Dowry Prohibition Amendment Act 1986 and s 113-B of the Indian Evidence Act 1872 was also amended in 1986 to reinforce the statutory presumptions of dowry deaths. The decisions of the Supreme Court of India in *Vidhya Devi v State of Haryana*,[12] *Surinder Kaur v State of Haryana*,[13] and *Kunhiabdulla v*

[12] *Vidhya Devi v State of Haryana*, All India Reporter 2004 SC 1757.

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State of Kerala,[14] show that dowry deaths by suicide result in conviction of only one person whereas dowry deaths by burning result in convictions of all concerned. This anomaly of law does not mitigate the crime. Therefore, if a married woman commits suicide on account of the dowry menace, the law and the law courts ought to be sensitised to the crime of the silent sufferer. In societal terms, the menace of dowry cannot be uprooted until the masses are educated in the ills of this malpractice and awareness comes from within. At the same time, the law must come down with a heavy hand on dowry seekers and provide deterrent punishment as an example for others who follow it. Harsher and more stringent penalties in law must be further advocated.

(d) Uniform Civil Code – an aspiration or an illusion?

Article 44 of the Constitution of India requires the State to secure for the citizens of India a Uniform Civil Code throughout the territory of India. As has been noticed above, India is a unique blend and merger of codified personal laws of Hindus, Christians, Parsis and, to some extent, of Muslims. However, there exists no uniform family related law in a single statutory book for all Indians which is universally acceptable to all religious communities in India.

Indian case-law: directions to enact a code

The Supreme Court of India for the first time directed the Indian Parliament to frame a Uniform Civil Code in 1985 in the case of *Mohammad Ahmed Khan v Shah Bano Begum*.[15] In this case a penurious Muslim woman claimed maintenance from her husband under s 125 of the Code of Criminal Procedure after her husband pronounced triple Talaq (divorce by announcing the word 'Talaq' three times). The Apex Court held that the Muslim woman had a right to receive maintenance under s 125 of the Code and also held that Art 44 of the Constitution had remained a dead letter. To undo the above decision, the Muslim Women (Right to Protection on Divorce) Act 1986, which curtailed the right of a Muslim Woman to maintenance under s 125 of the Code, was enacted by the Indian Parliament.

Thereafter, in the case of *Sarla Mudgal v Union of India*,[16] the question which was raised was whether a Hindu husband married under Hindu Law can, by embracing the Islamic religion, solemnise a second marriage. The Supreme Court held that a Hindu marriage solemnised under Hindu Law can only be dissolved under the Hindu Marriage Act and conversion to Islam, as also marrying again, would not by itself dissolve the Hindu marriage. Further, it was held that a second marriage solemnised after converting to Islam would be

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[13] *Surinder Kaur v State of Haryana*, All India Reporter 2004 SC 1747.
[14] *Kunhiabdulla v State of Kerala*, All India Reporter 2004 SC 1731.
[15] *Mohammad Ahmed Khan v Shah Bano Begum*, All India Reporter 1985 SC 945.
[16] *Sarla Mudgal v Union of India,* All India Reporter 1995 SC 1531.

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an offence of bigamy under s 494 of the Indian Penal Code. In this context, the views of Mr Justice Kuldip Singh as follows are pertinent:

> 'Where more then 80 percent of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of the "Uniform Civil Code" for all the citizens in the territory of India.'

Thus, the Supreme Court reiterated the need for Parliament to frame a Common Civil Code which will help the cause of national integration by removing contradictions based on ideologies. Thus, the Directive Principle of enacting a Uniform Civil Code has been urged by the Apex Court repeatedly in a number of decisions as a matter of urgency. Unfortunately, in a subsequent decision reported as *Lily Thomas v Union of India*,[17] the Apex Courts, dealing with the validity of a second marriage contracted by a Hindu husband after his conversion to Islam, clarified that the Court had not issued any directions for the codification of a common civil code and that the Judges constituting the different Benches had only expressed their views on the facts and the circumstances of those cases. Even the lack of will to do so by the Indian Government can be deciphered from the recent stand stated in the Indian press. It has been reported in the *Asian Age*, dated 5 August 2006, by the Press Trust of India (the Official Government News Agency) that the Indian Government does not intend to bring legislation to ensure a Uniform Civil Code because it does not want to initiate changes in the personal laws of minority communities. However, this ought not to deter the efforts of the Supreme Court of India in issuing mandatory directions to the Central Government to bring a Common Civil Code applicable to all communities irrespective of their religion and practices in a secular India. Hopefully, the Apex Court may review its findings in some other case and issue mandatory directions to the Central Government to bring a Common Civil Code applicable to all communities irrespective of their religion.

Secularism and the Uniform Civil Code

The preamble of the Indian Constitution resolves to constitute a 'secular' Democratic Republic. This means that there is no State religion and that the State shall not discriminate on the ground of religion. Articles 25 and 26 of the Constitution of India as enforceable fundamental rights guarantee freedom of religion and freedom to manage religious affairs. At the same time Art 44 which is not enforceable in a Court of Law states that the State shall endeavour to secure a Uniform Civil Code in India. How are they to be reconciled? What will be the ingredients of a Uniform Civil Code? Since the personal laws of each religion contain separate ingredients, the Uniform Civil Code will need to strike a balance between protection of fundamental rights and religious principles of different communities. Marriage, divorce, succession, inheritance and maintenance can be matters of a secular nature and the law can regulate

[17] *Lily Thomas v Union of India*, Supreme Court Cases 2000 (6) 224.

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them. India needs a codified law which will cover all religions in relation to the personal laws of different communities.

Critics of the Uniform Civil Code think that the true principles of Muslim Law remain eclipsed by its extensive alleged misreading over the years. It is suggested by Tahir Mahmood,[18] an eminent scholar, that 'an Indian Code of Muslim Law based on an eclectic selection of principles from the various schools of Shariat is the ideal solution to all the contemporary problems of Muslim Law'. In another report dated 11 May 2006 in *The Hindu*, it has been reported that the Supreme Court of India dismissed a Public Interest Litigation Petition challenging the legality of the customs of polygamy, talaq and divorce practised by Muslims under personal laws. The plea for a direction to the Central Government to make Uniform Marriage Laws for all communities was rejected on the ground that it is for Parliament to change or amend the law. Thus, the debate is endless and the issue remains unresolved.

To sum up, it can be concluded that for citizens belonging to different religions and denominations, it is imperative that for promotion of national unity and solidarity a Unified Code is an absolute necessity on which there can be no compromise. Different streams of religion have to merge to a common destination and some unified principles must emerge in the true spirit of secularism. India needs a unified Code of Family Laws under an umbrella of all its constituent religions. Whether it is the endeavour of the State, the mandate of the Court or the will of the people is an issue which only time will decide for a true Indian Secular Democratic Republic.

(e) Judicial activism in family laws: a turning point

A series of decisions by the Supreme Court of India in the areas of family laws in the recent past has gone to show that the Apex Court is motivating a lot of positive and well meaning reforms which have become necessary over a period of time. Three recent decisions of the apex Court can be cited in support of this proposition:

(a) In *In Re: Enforcement and Implementation of Dowry Prohibition Act, 1961*[19] the Apex Court directed the Indian Central and State Governments to implement all the interim directions issued by the Supreme Court earlier and take effective measures to frame rules and enforce the provisions of the Dowry Prohibition Act 1961 by devising measures to create honest, efficient and committed machinery for the purposes of the implementation of this Act meant to eradicate the social evil of dowry.

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[18] In his article 'Muslim Personal Law: Clearing the Cobwebs' *The Hindu*, 30 July 2006.

[19] *In Re: Enforcement and Implementation of Dowry Prohibition Act, 1961*, Judgments Today 2005 (5) SC 71.

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(b) In *Sushil Kumar Sharma v Union of India and others*,[20] the Apex Court upholding the constitutional validity of s 498A of the Indian Penal Code held that the object of s 498A is prevention of dowry menace and to check cruelty and harassment of women and therefore, the provision does not offend the Constitution of India.

(c) In *St Theresa's Tender Loving Care Home v State of Andhra Pradesh*,[21] it was held that the working of the homes run by State Governments for abandoned and destitute children offering them for adoption needs to be seriously improved and the Central and State Governments would do well to look at these problems with the humanitarian approach and concern they deserve.

However, the Supreme Court has also tested various aspects of personal laws on the touchstone of fundamental rights. In *Gita Hariharan v Reserve Bank of India*,[22] the Supreme Court read down s 6 of the Hindu Minority and Guardianship Act 1956 to mean that the mother is also a natural guardian, and irrespective of whether the father was unfit or not, the mother should also be given equal rights as a natural guardian. In *John Vallamattom v Union of India*,[23] s 118 of the Indian Succession Act was struck down as unconstitutional as it was held to be discriminatory against Christians in imposing unreasonable restrictions on the donation of their property for religious or charitable purposes by will. In *Danial Latifi v Union of India*,[24] a Constitutional Bench of the Supreme Court gave a categorical finding that, in view of their interpretation of the Muslim Women (Protection of Rights on Divorce) Act 1986, the provisions of the Act were not in violation of Arts 14 and 21 of the Constitution, the Fundamental Rights of which guarantee equality of law and right to life and personal liberty.

The views of the Indian Apex Court on the issue of registration of marriages, inter-caste marriages, child marriages, Dowry Prohibition Act, irretrievable breakdown of marriage, Uniform Civil Code and a secular approach have already been referred to earlier. A legislative setup which is slow to respond to societal changes and a proactive judiciary which is keen to motivate reforms in law is therefore clearly visible on the Indian horizon. Even in matters affecting the environment, pollution and the health of people, the role of the judiciary in India has been very constructive. The vibrant, dynamic and open jurisprudential system in India is amenable and flexible to the changing needs of people. We could therefore well have reform in family law through the views of the court even if there is opposition from religious communities in respect of personal laws. If a Uniform Civil Code does not come as a result of legislation, decisions of Courts will always suggest reforms to improve the plight of

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[20] *Sushil Kumar Sharma v Union of India and others*, Judgments Today 2005 (6) SC 266.
[21] *St Theresa's Tender Loving Care Home v State of Andhra Pradesh*, Judgments Today 2005 (9) SC 11.
[22] *Gita Hariharan v Reserve Bank of India*, Supreme Court 1999 (2) 228.
[23] *John Vallamattom v Union of India*, All India Reporter 2003 SC 2902.
[24] *Danial Latifi v Union of India*, Supreme Court Cases 2001 (7) 740.

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children and women who are affected the most. The Indian judiciary indeed deserves to be hailed in this regard for its yeoman efforts for the welfare of Indians.

IV CONCLUSION

A net analysis of the various propositions and viewpoints discussed above drives home the ideal solution that for Indians there is needed one indigenous Indian law applicable to all its communities which coexist democratically. Analytically speaking, the answers to the social issues examined above are within the system. Codification of a Unified Civil Code may be the ultimate solution. Other measures will only tide over time. Judicial verdicts will keep the momentum going. Accommodating personal laws of all religions under such a Code is an uphill task. It may take time. The legislature will ultimately have to perform this onerous duty of compiling the Code. Religion will have to keep pace with the law. Unity in India exists in its diversity. Times have moved ahead, but personal laws have not kept pace. The Courts in India perform a Herculean task in carving out solutions on a case-by-case basis. The executive and the legislature in India however now need to contribute to provide the much needed solutions. In the e-age today, the path to progress must be chartered with harmony at home. India itself is a confluence and not a clash of civilisations. Indians are vibrant, amenable to change and have an astonishing ability to adapt to their environment. As the largest democracy in the world, India projects a role model in various aspects of family laws. Maybe with further changes and amendments in some aspects, a better role model to emulate may emerge in the Indian subcontinent.

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India (Part 2)

WOMEN'S INHERITANCE ACCORDING TO THE 2005 AMENDED HINDU SUCCESSION ACT

*Florence Laroche-Gisserot**

Résumé

Le Hindu Succession Act de 1956 avait fait un pas important vers l'égalité garçons-filles mais n'avait pas été jusqu'au bout de celle-ci. L'amendement de 2005 y remédie totalement: la 'joint family' de l'école Mithaksara est remodélée et les filles sont désormais dès leur naissance partenaires comme les fils. La règle est d'application immédiate, même si la fille est déjà mariée. Cette mesure s'imposait mais va rendre les liquidations successorales encore plus complexes et probablement accélérer le déclin des "joint families". L'autre mesure essentielle élimine une controverse issue d'une rédaction maladroite de l'Hindu Succession Act et qui conduisait à douter que ce texte fut applicable à la terre agricole. L'ambiguité, largement exploitée dans le nord du pays au détriment des femmes, cesse donc. Il reste bien sur à appliquer les nouvelles règles; celles de 1956 ne le sont souvent pas encore ce qui génère des doutes.

I INTRODUCTION

The ancient traditional Hindu succession system was certainly not woman-friendly or daughter-friendly.[1] Sons, grandsons, great-grandsons were granted the whole heirloom and in case of no male heir even the widow prevailed over the daughter. Naturally the daughters owned some property, the so-called Stridhana, a tough and unclear question in ancient Hindu law,[2] but basically it consisted of presents given by parents or relatives on special occasions such as marriage; usually these consisted only of movables such as items of jewellery and clothes that would be passed on, after death, to

* Professor, Paris-Evry University, France.

[1] Only the Mithaksara school will be analysed in this chapter as it prevails in most areas about the Hindu system: D Announssamy *Le droit indien en marche* (Société de législation comparée, Paris, 2001) 285; SA Desai *Hindu law* (Butterworths, New Delhi, 2001) esp vol 1 and vol 2, 277; R Tripathir *Handbook on Hindu law* (Sagar Law House, Allahabad, 2003) ch 2; *Mayne's* revised by Justice Alladi Kuppuswani *Hindu law and usage* (Bharat Law House, New Delhi, 2001) 1048.

[2] PC Jain 'Women's property rights under traditional Hindu law and the Hindu Succession Act 1956; some observations' (2003) 45 *Journal of the Indian Law Institute* 509.

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daughters or daughters-in-law.[3] If a woman (a widow, for instance) had inherited land or other immovables, such property had to be reverted to the heirs of the deceased, not to her own heirs. This was corrected very little by testamentary provisions as drawing up a will was not part of the Indian custom.[4]

Things were made worse by the fact that in India the bulk of property is not held by individuals but by joint families (coparcenaries) as the ancestors' assets. Typically, in a joint family, the coparceners were all the males descended from a common ancestor. In no case could a woman be a coparcener, even though she worked as hard as everyone else for the community. It is well known that joint families are close clusters: even in the case of an outside job, pay cheques are handed over to the head of the family and money is given back according to one's needs. However, since 1930, especially if they have secured high level jobs, as a result of their qualifications, degrees and training, coparceners may now have separate assets; what is bought with this extra money remains personal. Every coparcener is entitled to ask for partition (they cannot sell their share). But usually partitions happen only when, due to too many coparceners, the whole thing is unmanageable; the joint property is split between brothers and they start new joint families with their own descendants. This is how, as scholars pointed out, in a joint family, devolution takes place through survivorship (birth and death) as one never knows how many partners will remain alive in the event of partition: if your brother has twin boys, your share decreases; if your uncle dies, your share increases.

In 1937 an important Act was passed which entitled widows of coparceners to inherit from their husbands but it was made clear that it was mainly for maintenance purposes, hence a life property with a limited right to interfere in the management of the common assets. Things changed with the Hindu Succession Act 1956 (HSA):[5] in relation to individual assets daughters were entitled to equal shares as sons and for joint assets a kind of compromise was set up that did not make female issue coparceners but provided some compensation for them as heirs. However, this specific persistent gender inequality turned out all the more controversial as most Central and Southern States enacted amendments to HSA making daughters full coparceners.

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3 If not grabbed or pledged by in-laws; on dowry issues see W Menski (ed) *South Asians and the dowry problem* (Trentham Books, London, 1998) 237; Laroche-Gisserot 'De la compensation matrimoniale à la dot dans le mariage indien moderne' (2006) *Les Annales* (à paraître n 3).

4 D Annoussamy *Le droit indien en marche* (Société de législation comparée, Paris, 2001) 292.

5 The HSA applies to Hindus, Sikhs, Jaïns and Buddhists (about 86 per cent of India's population); it has special provisions for Hindu matrilineal communities customarily ruled by other systems; the Christians are ruled either according to their residence (Goa: Portuguese Civil Code, Cochin, Travancore: Cochin Christian Succession Act) or by the 1925 India Succession Act (as are the Parsis); the Muslim communities are ruled by the Sharia. A few gender differences remain inside the HSA: for instance, the mother is first class heir of a son and not of a daughter; if a Hindu female dies with no children or husband, assets go to the husband's heirs except those inherited from parents which go back to her father.

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Nevertheless, on the contrary, in Northern States a strong attempt was made to remove, through court orders, agricultural land from the HSA jurisdiction and get back to gender-biased state laws.

Eventually the central authorities made it quite clear that equality should prevail at least regarding joint families and invited every reluctant state to join the central-southern block and amend the HSA on a state level. As nothing happened, the Indian Government decided to move on and, based on a Law Commission report, a Bill was presented to Congress in December 2004. Obviously deficient in some focal points, it was thoroughly amended and the final Act goes much further than the initial step.[6]

Roughly speaking women get everything they were claiming. But it is obvious that some changes are clear-cut and easy to figure out whereas others are less simple to assess. To the first category belongs the suppression of s 23 of the HSA, known as the dwelling issue; this typical gender-biased provision provided that when a Hindu person (male or female) died leaving a house (that could be part of an agricultural tenancy) occupied by members of the family, the right of female heirs to collect their share of the house through selling it or otherwise would not arise until the male heirs agreed on it. Instead of money, female heirs could live in the house but this applied only to an unmarried daughter, a widow, a divorced woman or a wife deserted by her husband.[7] This provision underlined the fact that a married woman did not belong to her own family anymore and its suppression was sought for a long time.

Reshaping the Mithaksara coparcenary was tougher business: the joint property principle could be abolished as it had been done in Kerala or it could be maintained with daughters being partners from now on. Both solutions were disruptive for coparceners especially if applied to married daughters. Obviously, the radical approach prevailed; the 1956 compromise about coparcenary is dead and the main gender inequality in the Hindu inheritance system disappears at once. But the agricultural land problem that had fuelled controversy in northern India and known as the 'Land Acts' issue was still unsolved. So the ambiguous provision was very quietly removed from the HSA. Implementing these new solutions, especially the last one, will not be an easy task. Most Indian scholars think that the HSA is on the whole poorly effective in promoting gender equality and even the unclear possibility of making state laws occasionally prevail acted as a kind of safety valve. So, even if we can consider the reshaping of the ancient misogynist Mithaksara coparcenary as the most dramatic achievement, the agricultural land issue may well reveal itself the tougher.

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[6] On the new Act: PK Das *New Law on Hindu Succession Act: Property rights of women and daughters under the Hindu Succession (Amendment) Act* (Saujanya Books, Delhi, 2005) 259.

[7] This provision was very unfair for an unhappy wife compelled to ask for divorce or remain with her husband as she had nowhere to go. For a widow, the unfairness was just the same though opposite: she had to remain in the house whereas she might wish to live on her own.

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II MAIN ACHIEVEMENT: RESHAPING THE MISOGYNIST MITHAKSARA COPARCENARY

The HSA contained some provisions eager to deal with some past unfairness and to find workable solutions when getting to the core of Hindu traditions. The 1956 compromise (a) has been overridden by the 2005 amendment (b).

(a) The 1956 compromise

In the first place, widows who in 1937 had gained a life interest in their husbands' assets for maintenance purposes from now on were to be considered as full owners of those assets including the joint assets, which meant the right to partition and sell the land. This gave way to a lot of litigation when the widow started selling the common land; indeed this was often challenged by the husband's male relatives and coparceners. Widows usually got strong support from the courts.[8]

The most delicate problem was to decide on coparcenaries: would the daughters become full partners? This was suggested and seriously considered but eventually not settled in this way. According to the HSA, females belonging to first class heirs (daughters, widow, mother) are not partners but they will get a compensation as an heir: whenever a coparcener died, a fictitious partition was achieved; shares were assessed and divided but only to carve out the share of the deceased. It was not a real partition. The share, as carved out, was distributed in equal parts to first class heirs and the joint family was supposed to receive their share afterwards especially if a lump sum of money had been given to the daughters in lieu of the share. However, scholars thought[9] that this was likely to end up, most of the time, in disruption to the community.

But, though not obviously, this arrangement remained strongly gender-biased. Indeed, when the so-called notional partition occurred to carve out the father's share and have it transferred to children, it has not been emphasised enough that the sons would get richer as surviving partners as well as heirs. We know that in the joint family devolution does not occur through succession but through survivorship. This is the reason why a coparcener has no idea of his prospective share until partition because it depends on births and deaths. Hence, when the father died his sons automatically had an increased share in the coparcenary; but not the daughters.[10] However, the son collected his share as heir as well. So sons received two grants as coparcener and heir whereas daughters received one grant only as heirs. And that is the reason why the compromise had to be reviewed.

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8 See, for example, a Supreme Court ruling in 1996 AIR 146.

9 See D Annoussamy *Le droit indien en marche* (Société de législation comparée, Paris, 2001), 279.

10 Kusum 'Towards gender-just property laws' (2005) 47 *Journal of the Indian Law Institute* 95.

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(b) The 2005 solution

The new s 6 of the HSA bridges the gap left by the 1956 compromise. It provides that daughters have by birth full coparcener's rights and liabilities on the same level as sons; and it is twice repeated (s 6-a and 6-b) in the new provision. It means that, since 9 September 2005, every joint family has to include as additional partner's daughters and daughters' daughters automatically.

Moreover, the new Act does what the former state level laws had not done, i e that daughters already married at the time of the enforceability of the new regulations are granted these new rights as well as unmarried daughters. This is a real breakthrough and will not go unnoticed. Indeed every Hindu knows that giving a dowry to daughters was one of the Mithaksara coparcenary obligations. Hence the idea that the daughter may have been given a compensation for her non-partner status by means of a dowry and consequently that the new Act should not apply to previously married daughters. This suggested restriction was actually inconsistent: the dowry should not be a compensation for having fewer or no rights at all in one's family interests. Doing so would be to admit officially that the Indian daughter, estranged from her own kinship, has to bring money to fit into a new home and family. Though dowry practices are of very little comfort, because most of the time in-laws will try to grab it or take control of it, this goes legally against the Dowry Prohibition Act 1961.[11] Actually dowries should not fit into the coparcenary birthrights but be considered as a pre-mortem share possibly collected by the daughter and later on be deducted from the daughter's total share of the deceased parent's heirloom. Indeed, what was at stake in this controversy could be more than just inheritance issues and have a close link with dowry issues: many Indian scholars feel that the main explanation of the well-known dowry abuses is the deprivation of a daughter's rights in her family assets devolution; the dowry buys the bride a kind of share as a potential widow in her husband's family heirloom; consequently the best way to curb these abuses would be to enhance equal rights among children in families so that the married daughter should not need a widow's allotment.[12] So it would have been a real mistake to make dowry issues interfere – even in a transitory way – with the new Act.

Would the total abolition of Mithaksara joint property (as in Kerala) have been a better solution? Some Indian scholars considered this difficult to work out as it would have had to be safeguarded by restrictions on testamentary freedom because fathers would have drawn up wills to disinherit daughters.[13] However,

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[11] See W Menski (ed) *South Asians and the dowry problem* (Trentham Books, London, 1998), 97; Laroche-Gisserot 'De la compensation matrimoniale à la dot dans le mariage indien moderne' (2006) *Les Annales* (à paraître n 3).

[12] Madhu Kishwar (founder of Manushi review) *Off the beaten track: Rethinking gender justice for Indian women* (Oxford University Press, Delhi, 1999) esp ch 2.

[13] B Agarwal 'Landmark step to gender equality', *The Hindu*, 25 September 2005, 1 (the author was closely associated with the parliamentary process).

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we are left with the fact that inheritance settlements of deceased Hindu coparceners will not be made easier by the new amendment; two sets of operations have still to be conducted with the same persons but separately: the management of the coparcenary after the father's death has to be reorganised with the remaining partners and the share of the deceased has to be transferred (and that involves partners as well). As in the 1956 Act, this devolution does not operate any longer through survivorship to actual partners but to intestate or testamentary heirs. As before the notional partition has to take place and, if devolution operates intestate, first class heirs (children, widow, mother) will collect equal shares. The new s 6 insists on the fact that daughters and sons must collect equally which was already the 1956 solution (this operation should lead to the deduction of a possible dowry). One can consider that, in an increased way because of new added partners, the disruptive effect of such assessments and allotments will give way to partition and that de facto the old Mithaksara coparcenary arrangements will decline and in the long run disappear.

As on the contrary, agriculture will remain for a while the occupation of most Indians, it is important to assess the effect of the new Act regarding the quiet suppression of the land property provision in the HSA.

III AGRICULTURAL LAND BACK INTO THE HSA

Section 4(2), which is suppressed by the 2005 Amendment Act, was an unclear provision which had given way to a lot of litigation and had even underlined the contrast between the (moderately) gender-equality oriented Southern India and the more misogynist Northern India. Constitutional issues were involved as well. The debate was very unfortunate (a) but the clarification could be very difficult to implement (b).

(a) An unfortunate debate

After independence most states enacted Land Acts to abolish and dismantle the old Zamindari system (a sort of feudal system). That is why some tenants paying rent became full owners; ceilings were fixed to prevent the comeback of Zamindars, and other provisions prevented fragmentation of holdings to consolidate this new class of owners. In most Northern States these Land Acts contain provisions for devolution of land through inheritance as well and they are strongly gender-biased. So what happens in the case of a conflict between these provisions and the HSA? For some scholars it is against the Indian Constitution that the HSA should rule agricultural land which is under state jurisdiction. But as intestate devolution is under federal jurisdiction the assumption is far from correct. Some court orders in the north favoured the

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anti-HSA solution and it was often said that this Act does not apply to agricultural land.[14] But it was never ruled that way by the Supreme Court.

What fuelled controversy was the fact that the above related s 4(2) of the HSA was supposed to deal with these possible conflicts in a very unclear way. It provided that the HSA will not prevail over provisions of local Acts if they fix ceilings, prevent fragmentation of holdings or provide for the 'devolution of tenancy rights'. Obviously it meant that the HSA prevailed over other provisions that might be in those land Acts. But an additional controversy arose about the correct meaning of 'devolution of tenancy rights'. For some scholars and judges 'tenancy' means any kind of title allowing people on the land to cultivate it either by full ownership or by renting. For others it was obvious that tenants were only people paying rent. These two constructions led to opposite solutions. If tenancy included ownership, the provisions of local acts regarding the devolution of land through inheritance obviously prevailed over the HSA; they were 'saved' by the above provision and equality was simply ruled out; if not it was just the other way round. The HSA was written in English and the inconvenience of this has been underlined. Regarding this specific issue the difficulty was very serious. Some Indian judges looked up the meaning in English dictionaries and found out that tenancy means both renting and full property! So far it seemed that most courts had chosen the restrictive construction that allowed the HSA to apply to most land cases.[15] But nothing was final and things remained confused. This is why the new Act is probably not welcome everywhere.

(b) Implementing the solution

The first cause of concern is that the suppression of the controversial provision went almost unnoticed; it was introduced after the Bill's presentation through amendments and was voted on on the quiet;[16] experience teaches that such unnoted and uncommented changes on sensitive issues give way to court battles (and maybe more so in common law countries).

Moreover the new rule will have to coexist with the fact that agricultural land legal statutes and distribution remain outside constitutional challenges and are ruled on locally. In some states, regulations are openly discriminatory as in Uttar Pradesh (one-sixth of the Indian population). Land ceiling legislation is a good example: adult daughters are not taken into account for the definition of the family; both spouses' holdings are added whereas there is no community of property in India. Practices may be just as unfair: if surplus forfeiture occurs, it will usually be done in consultation with the husband and will lead to taking away the wife's land; redistribution will be carried out in order to favour

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14 SA Desai *Hindu law* (Butterworths, New Delhi, 2001) vol 2, s 4; see Allahabad High Court rulings 1970 AIR 238; 1973 AIR 407; 1975 AIR 125.

15 See Bombay High Court 1994 AIR 247; see also Punjab High Court 1964 AIR 272 and although unclear (based on application of personal law provided by the specific land Act) SC 1978 AIR 793.

16 See B Agarwal 'Landmark step to gender equality', *The Hindu*, 25 September 2005.

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male-headed households despite official recommendations.[17] In a lot of cases tenancy registration practices only lead to registering the woman's land under her husband's or son's name and this does not encourage women to claim their rights. Whereas in the South comprehensive data show that owning land or a house seriously decreases the risk of domestic violence against women, some regional split and resistance are very likely to occur.[18]

IV CONCLUSION

It is obvious that the 2005 Act is a landmark in gender equality. Will it only benefit a few women, with many others being submitted to the pressure of custom? What we know about the actual implementation of the 1956 Act may lead to pessimism. It has been reported that even a lawyer or a judge will advise his wife not to claim her share in her father's heirloom because he expects his own sisters will do the same.[19] If in educated circles the law is not implemented, what can we expect for illiterate women or for those who live secluded lives in rural areas? The existence of early marriage and virilocal residence powerfully acts against women. As they leave their birthplace and family, what use will they have of land or property so far away from effective control? But obviously in modern India males of every strata migrate for jobs and do not give up claims on family assets. Why should women give up their claims? The answer is definitely beyond the mere changing of the law.

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17 B Agarwal *A field of one's own* (Cambridge University Press, Delhi, 1994).

18 Ibid; it is important to consider that this regional split started a long time ago: dowry cases are more frequent in Northern India and the sex ratio is more strongly biased against girls than in Southern India (Laroche-Gisserot 'De la compensation matrimoniale à la dot dans le mariage indien moderne' (2006) *Les Annales* (à paraître n 3)).

19 See D Annoussamy *Le droit indien en marche* (Société de législation comparée, Paris, 2001) 291.

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India

INTER-COUNTRY PARENTAL CHILD REMOVAL AND THE LAW

*Anil Malhotra and Ranjit Malhotra**

Résumé

Le monde est beaucoup plus petit qu'il ne l'était il y a dix ans. Les voyages internationaux et intercontinentaux sont plus faciles et abordables que jamais. Il en résulte une augmentation des relations entre personnes de nationalités et de cultures différentes. Le monde dans lequel nous-mêmes et nos enfants vivons, est devenu terriblement complexe, rempli de possibilités mais aussi de risques. La mobilité internationale, l'ouverture des frontières, la migration transfrontalière et la disparition de certains tabous interculturels, représentent des avantages mais ils créent aussi un nouveau type de risques pour les enfants en situation transfrontalière. Pris dans le feu croisé de relations brisées avec leur lot de disputes sur la garde et le déménagement, les risques de l'enlèvement international planent lourdement, en contexte international, sur les problèmes chroniques du maintien du droit d'accès et de contact, sans compter les batailles difficiles pour garantir le paiement des aliments pour les enfants qui sont dans de telles situations. Sur une population de plus d'un milliard d'Indiens, vingt-cinq millions sont des non-résidents qui, en émigrant vers d'autres juridictions, ont engendré une nouvelle génération de conflits conjugaux et familiaux.

Avec le nombre sans cesse croissant d'Indiens résidant à l'extérieur du pays et l'augmentation des problèmes qui se traduisent en conflits familiaux, le déplacement international d'enfants vers l'Inde doit désormais se régler avec une plateforme internationale. Ce n'est plus un problème local. Le phénomène est global. Des mesures doivent être prises de concert afin de résoudre ces conflits par la collaboration entre les tribunaux. Tant que l'Inde ne devient pas signataire de la Convention de La Haye, cela pourrait bien être impossible. Le temps est maintenant venu de constater que les tribunaux ne peuvent plus étirer leurs limites pour s'adapter à l'infini aux décisions des nombreux tribunaux étrangers. Pour en arriver à une approche juridique uniforme, il est important que l'Inde se dote d'une législation claire, authentique et universelle en matière de droit de garde et que celle-ci adhère aux principes de la Convention de La Haye. Les vues et les interprétations opposées en la matière, pourraient bien devenir un obstacle au règlement efficace du nombre croissant d'affaires d'enlèvement international. En

* Anil Malhotra has been a practising Advocate in India since September 1983. On 29 January 2007, Ranjit Malhotra was the first Indian lawyer to be awarded the prestigious Felix Scholarship to read for the LLM degree at the SOAS, University of London. He specialises in private international law. Both authors were elected to the International Academy of Matrimonial Lawyers on 29 January 2007.

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Inde, nous souhaitons donc une adoption et une mise en œuvre rapide des principes de la Convention de La Haye en matière de déplacement illicite d'enfants. Ne tardons pas à ouvrir la voie qui permettra de résoudre ces conflits.

I INTRODUCTION

The world is a far smaller place now than it was a decade ago. Inter-country and inter-continental travel is easier and more affordable than it has ever been. The corollary to this is an increase in relationships between individuals of different nationalities and from different cultural backgrounds. Logically, the world in which we and our children live has grown immensely complex. It is filled with opportunities and risks. International mobility, opening up of borders, cross-border migration and dismantling of inter-cultural taboos are all positive developments but are nevertheless fraught with a new set of risks for children caught up in cross-border situations. Caught in the crossfire of broken relationships with ensuing disputes over custody and relocation, the hazards of international abduction loom large over the chronic problems of maintaining access or contact internationally with the uphill struggle of securing cross-frontier child support. In a population of over a billion Indians, 25 million are non-resident Indians who, by migrating to different jurisdictions, have generated a new crop of spousal and family disputes.

(a) Definition of child removal

Families with connections to more than one country face unique problems if their relationship breaks down. The human reaction in this already difficult time is often to return to one's family and country of origin with the children of the relationship. If this is done without the approval of the other parent or permission from a court, a parent taking children from one country to another may, whether inadvertently or not, be committing child removal or inter-parental child abduction. This concept is not clearly defined in any relevant legislation. As a matter of convention, it has come to mean the removal of a child from the care of the person with whom the child normally lives.

A broader definition encompasses the removal of a child from his or her environment, where the removal interferes with parental rights or right to contact. Removal in this context refers to removal by parents or members of the extended family. It does not include independent removal by strangers. The Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980, with 80 contracting countries today as parties, however, defines removal or detention wrongful in the following words:

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'Article 3

The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

Child removal does not find any specific definition in the Indian statute books and, since India is not a signatory to the Hague Convention, there is no parallel Indian legislation enacted to give the force of law to the Hague Convention. Hence, in India, all interpretations of the concept of child removal are based on judicial innovation in precedents of case-law decided by Indian courts in disputes between litigating parents of Indian and/or foreign origin.

(b) Global solutions and remedies

The Hague Convention on Civil Aspects of International Child Abduction came into force on 1 December 1983 and now has 80 contracting nations. The objects of the Convention were:

(a) to secure the prompt return of children wrongfully removed to or retained in any contracting state; and

(b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.

It operates as an effective deterrent providing a real and practical means of restoring the status quo prior to the abduction, prevents abductors from reaping the benefits of an act opposed to the interests of children, upholds the right of the child to maintain contact with both parents and introduces harmony where previously chaos prevailed. The Permanent Bureau of the Hague Conference on Private International Law at The Hague, Netherlands, renders a superb service by monitoring and helping the development of services to support effective implementation and consistent operation of the Hague Conventions and review their operations. Since there is no centralised system of enforcement or interpretation, the Secretariat of the Hague Conferences guides nations in post-Convention services. In terms of the Hague Convention on Civil Aspects of International Child Abduction, the Secretariat has published guides to good practice in three parts, namely Central Authority Practice,

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Implementing Measures and Preventing Measures which are all approved by contracting states. The Secretariat thus helps to create an international medium of consenting states who contract with each other to return children who are wrongfully removed.

(c) Why should India be interested in joining the 1980 Convention?

The Hague Convention on the Civil Aspects of International Child Abduction is a remarkable document, which has had significant impact on child protection policies in much of the world. In a civilised society, where globalisation and free interaction is part of a rapidly changing set up, India is emerging as a major destination in the developing world. Non-resident Indians have achieved laurels in all walks of life. But, back home, the problems on the family law front are largely unresolved. Times have changed but laws are still the same. Marriage, divorce, custody, maintenance and adoption laws in India are in need of reform. Child removal is often treated as a custody dispute between parents for agitating and adjudicating rights of spouses while spontaneously extinguishing the rights of the child. Therefore, from an international perspective, four major reasons can be identified to establish and support the necessity of India's signing the Convention.

First, India is no longer impervious to international inter-parental child removal. In the absence of the Convention principles, the Indian courts determine the child's best interest by dealing with any child removal like any custody dispute. In this process, the litigation is a fight of superior rights of parties and the real issue of the welfare of the child becomes subservient and subordinate. Clash of parental interests and rights of spouses determine the question of custody. The overpowering parent wins by establishing his rights and the resultant determination of the best interest of the child is a misnomer and a misconception. Such a settlement is not truly in the best interest of the removed child.

Secondly, such a determination in India plays into the hands of the abducting parent and usurps the role of the court which is best placed to determine the long-term interests of the child, namely the court of the country where the child had his or her home before the wrongful removal or retention took place. By contrast, the advantage of the Hague Convention approach is that it quickly restores the position to what it was prior to when the wrongful removal or retention took place and supports the proper role played by the court in the country of the child's habitual residence. The correct law to be applied to the child would be that of the country of the child's origin and so would be the court of that country. In India, determination of rights as per the Indian law of a foreign child removed to India by an offending parent may often be clouded, may not be in the best interest of the child and ought to be determined by the law and the court of the child's origin.

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Thirdly, the fact that India is not a party to the Hague Convention may have a negative influence on a foreign judge who is deciding whether a child living with a parent in a foreign country should be permitted to spend time in India to enjoy contact with an Indian parent and extended family. Without the guarantee afforded by the Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign judge may be reluctant to give permission for the child to travel to India. As a logical corollary of this principle, membership of the Hague Convention will bring the prospect of achieving the return to India of children who have their homes in India but have been abducted to one of the 80 states that are parties to the Convention.

Fourthly, the Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries. The Convention avoids the problems that may arise in courts of different countries who are equally competent to decide such issues. The recognition and enforcement provisions of the Convention avoid the need for re-litigating custody and contact issues and ensure that decisions are taken by the authorities of the country where the child was habitually resident before removal.

It is thus hoped that India will give a serious consideration to joining the 1980 Hague Convention due to the convincing grounds cited above.

(d) The UK judicial initiative

In January 2005, Lord Justice Thorpe at the Royal Courts of Justice, London was appointed Head of International Family Law for England and Wales (a newly created title within the UK judicial system). The appointment confirms the increasing importance attached to the development of international instruments and conventions in a field of family law and to the value of international judicial collaboration, particularly in the extension of the global network of liaison judges specialising in family law. This may prompt some other jurisdictions in the world, whether or not they are signatories to the Hague Convention on Civil Aspects of International Child Abduction 1980, to make similar appointments. In relation to wrongful removal or retention of children, as between the UK and Pakistan, a protocol has been agreed between the President of the Family Division of the High Court of London and the Chief Justice of the Supreme Court of Pakistan for co-operation between the judicial authorities of the two countries and providing agreed procedures for dealing with such cases. India, however, has not taken any steps in such regard.

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II GENERAL POSITION OF INDIAN LAW ON THE PROPOSITION OF INTER-PARENTAL AND INTER-COUNTRY CHILD REMOVAL

(a) Introduction

International child abduction law in India stands substantially modified as a result of the Supreme Court judgment in *Dhanwanti Joshi v Madhav Unde*[1] handed down on 4 November 1997. It deals with the provisions and case-law analysis relating to the Hindu Minority and Guardianship Act 1956, read with the Guardian and Wards Act 1890. The two enactments principally govern the law relating to child custody in India.

Under Indian law, the prime consideration is the welfare of the child, though s 6(a) of the Guardian and Wards Act 1890 says that the custody of a minor who has not attained the age of 5 shall ordinarily be with the mother.

The Court held:[2]

> 'So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the Court to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign Court as only a factor to be taken into consideration as stated in *McKee v McKee,*[3] unless the Court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare, as explained in *Re L*.[4] As recently as 1996–1997, it has been held in *Re P (A minor) (Child Abduction: Non-Convention Country)*[5] that in deciding whether to order the return of a child who has been abducted from his or her country of habitual residence – which was not a party to the Hague Convention, 1980 – the Courts' overriding consideration must be the child's welfare. There is no need for the Judge to attempt to apply the provisions of Article 13 of the Convention by ordering the child's return unless a grave risk of harm was established …'

From the above mandate of law, it is clear that courts in India now would not exercise a summary jurisdiction only to return the children to the foreign country of their habitual residence.

It was also held (at para 21) that orders relating to the custody of children are by their very nature not final, but interlocutory in nature, and subject to modification at any future time upon proof of a change of circumstances requiring change of custody; but such change in custody must be proved to be in the paramount interests of the child. This was the position of law laid down

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1 JT 1997 (8) SC 720.
2 Ibid 733–734, para 31.
3 [1951] AC 352.
4 [1974] 1 All ER 913, CA.
5 [1996] 3 FCR 233, CA by Ward, LJ, 1996 (Current Law) (Year Book) 165–166.

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by the Supreme Court of India in *Rosy Jacob v Jacob A Chakramakkal*,[6] which has since been explicitly reaffirmed in the above-mentioned 1997 ruling.

It was further held that the custody order of a foreign court is only one of the factors which will be taken into consideration by a court of law in India. The court will draw up an independent judgment on the merits of the matter with regard to the welfare of the children. Lastly, superior financial capacity cannot be a sole ground for removing children from their mother's custody.

(b) Further case-law

The tenor of law laid down in the above-mentioned judgment of *Dhanwanti Joshi*[7] has more recently been reaffirmed by the Supreme Court of India in *Sarita Sharma v Sushil Sharma*.[8] The facts of this case are outlined in brief below.

The parents of the children were living in the United States. The children were placed in the custody of their father, while their mother was given visiting rights. In exercise of her visiting rights, on 7 May 1997 the mother picked up the children from the father's residence. She was to return the children next morning. The next morning, the father discovered that the children had not been brought back to school. Eventually, the mother, without obtaining any US court order, flew to India with the children. The father filed a petition for the issue of a writ of habeas corpus at the Delhi High Court on 9 September 1997. To seek the release of any individual in illegal custody, a habeas corpus petition can be filed in any High Court in India under Art 226, or under Art 32 of the Constitution of India if the jurisdiction of the Supreme Court of India is to be invoked directly. The wife's contention was that, by virtue of the orders dated 5 February 1996 and 2 April 1997 passed by the courts in the United States, both she and the father were appointed as possessory conservators. Hence, both the children were in her lawful custody.

The Delhi High Court held that, in view of the interim orders passed by the United States Court, the wife had committed a wrong in not informing that Court and not seeking its permission to remove the children from the jurisdiction of that Court. The Delhi High Court took note of the fact that a competent court having territorial jurisdiction had passed a decree of divorce and had ordered that only the father should have the custody of the children. The Delhi High Court allowed the petition and directed the wife to restore the custody of the two children to the father. It was also declared that it was open to the father to take the children to the United States without any hindrance. The wife appealed to the Supreme Court of India.

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6 1973 (1) SCC 840.
7 JT 1997 (8) SC 720.
8 JT 2000 (2) SC 258.

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The Supreme Court (at 263, para 4) noted from the record that there were serious differences between the two warring spouses. The husband was an alcoholic and had been violent towards the wife. The conduct of the wife was also not very satisfactory. The Court framed the following issues:

> 'The question is whether the custody became illegal, as she had committed a breach of the order of the American Court directing her not to remove the children from the jurisdiction of that Court without its permission. After she came to India a decree of divorce and the order for the custody of the children have been passed. Therefore, it is also required to be considered whether the mother's custody became illegal thereafter.'

The Court held (at 264 and 265, para 6):

> 'Therefore, it will not be proper to be guided entirely by the fact that the appellant Sarita had removed the children from [the] USA despite the order of the Court of that country. So also, in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children. We have already stated earlier that in [the] USA respondent Sushil is staying along with his mother aged about 80 years. There is no one else in the family. The respondent appears to be in the habit of taking excessive alcohol. Though it is true that both the children have the American citizenship and there is a possibility that in [the] USA they may be able to get better education, it is doubtful if the respondent will be in a position to take proper care of the children when they are so young. Out of them one is a female child. She is aged about five years. Ordinarily, a female child should be allowed to remain with the mother so that she can be properly looked after. It is also not desirable that two children are separated from each other. If a female child has to stay with the mother, it will be in the interest of both the children that they both stay with the mother. Here in India also proper care of the children is taken and they are at present studying in good schools. We have not found the appellant wanting in taking proper care of the children. Both the children have a desire to stay with the mother. At the same time it must be said that the son, who is elder than the daughter, has good feelings for his father also. Considering all the aspects relating to the welfare of the children, we are of the opinion that in spite of the order passed by the Court in [the] USA it was not proper for the High Court to have allowed the Habeas Corpus writ petition and directed the appellant to hand over custody of the children to the respondent and permit him to take them away to [the] USA. What would be in the interest of the children requires a full and thorough inquiry and, therefore, the High Court should have directed the respondent to initiate appropriate proceedings in which such an inquiry can be held …'

Furthermore, the Supreme Court (at 264, para 5) reaffirmed para 31 of the judgment in *Dhanwanti Joshi's* case[9] (reproduced above). *Sarita Sharma's* case is the second ruling of its kind handed down by the Supreme Court of India altering the earlier dicta on child abduction law.

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[9] 1997 (8) SC 720.

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Much more recently, the Supreme Court of India dismissed a habeas corpus petition instituted by a mother seeking custody of her two minor children, where earlier contested custody orders had been passed by the Family Court awarding custody to the paternal grandmother of the minor children in question. In this particular case, *Saihba Ali v State of Maharashtra*,[10] the wife directly filed the habeas corpus petition in the Supreme Court of India under Art 32 of the Constitution of India. The facts of the case are as follows.

The father of the minor children was serving a jail term in the United States. The mother contended that, under the terms of an order of a competent court of the United States, she being the mother and natural guardian had been granted the custody of her two minor children. Consequently, the mother petitioned for custody of her minor children along with their passports and travel documents.

The fourth respondent, the paternal grandmother of the children, by virtue of her defence, brought to the apex court's notice that the children were in her custody under the terms of an order passed by the competent Family Court in Nagpur. The Court also noted the fact that the writ petitioner, ie the mother, was a party to the said Family Court proceedings. Subsequently, the mother preferred an appeal before the Nagpur Bench of the Bombay High Court, which was later withdrawn. Counsel for the respondent grandmother contended that the Family Court order had assumed finality as to the custody of the children. Hence, the habeas corpus petition was not maintainable. She also contended that the Family Court, while granting the custody of minor children to her, had held the US custody order to be one without jurisdiction and not a decree; due notice of it should have been taken by the Indian courts under s 13 of the Civil Procedure Code 1908.

The court accepted the submissions of the respondent paternal grandmother. The apex court held that the Indian Family Court order was an order passed by a competent court of jurisdiction. The apex court further held that the children were in legal custody, until the order was set aside by the superior courts. The court firmly concluded that the habeas corpus petition was not maintainable. The court was sympathetic to the mother, who had led a 5-year sustained campaign to reaffirm the visiting rights initially given to her by the Nagpur Family Court. But it also recognised the fact that the petitioner mother had remarried, and had had another child from the remarriage.

However, the Supreme Court, in order to carry out complete justice, passed orders in the interest and welfare of the minor children by liberalising the visitation rights of the petitioner mother earlier granted to her by the Court, to enable her to take her children out for an extended period of time on every weekday and at weekends. The tenor of the law laid down in this ruling is identical to that laid down in the above-mentioned cases of *Dhanwanti Joshi*[11]

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10 JT 2003 (6) SC 79.
11 JT 1997 (8) SC 720.

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and *Sarita Sharma*.[12] Though there is no mention at all of these two judgments or the earlier position of relevant case-law, in essence, the welfare of the minor children seems to be the paramount consideration in deciding custody rights of children in cases of broken marriages.

Clearly, in the above case, scant regard has been given to the foreign court custody order obtained by the mother, as it was held to be without jurisdiction. This ruling yet again fortifies the view that the courts in India will independently come to their own judgment in the given circumstances of the case, irrespective of foreign court child custody orders.

Before the above-mentioned 1997, 1999 and 2003 rulings were handed down by the Supreme Court of India, there was case-law to the contrary allowing enforcement of foreign court custody orders on the principle of comity on a case-by-case basis. Such orders were normally enforced by initiating habeas corpus proceedings in the High Court under Art 226 of the Constitution of India where the child was located within the territorial jurisdiction of the High Court or directly in the Supreme Court of India under Art 32 of the Constitution of India.

It is pertinent to mention that Art 137 of the Constitution of India provides for review of judgments or orders made by the Supreme Court of India. Further, Art 141 of the Constitution of India mandates that the law declared by the Supreme Court of India shall be final and binding on all courts within the territory of India.

Hence, the Supreme Court of India from time to time may change the law on any aspect of judicial interpretation, and this will bind all other courts in India. Therefore, the above recent views of the apex court lay down the current position of applicable law in matters of enforcement of foreign court child custody orders when sought to be implemented in India.

(c) Earlier contrary case-law

There is ample earlier case-law contrary to the law recently laid down in *Dhanwanti Joshi* and *Sarita Sharma*. One such Supreme Court of India ruling, *Surinder Kaur Sandhu v Harbax Singh Sandhu*,[13] as noted in *Sarita Sharma* (262, para 5), read:

> 'We may add that the spouses had set up their matrimonial home in England where the wife was working as a clerk and the husband as a bus driver. The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that, in these circumstances, the English Court had jurisdiction to decide the question of his custody. The modern theory of conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which

[12] JT 2000 (2) SC 258.
[13] AIR 1984 SC 1224.

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> has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the Courts of that State to assume jurisdiction to enforce obligations which were incurred therein by the spouses. (*See International Shoe Company v State of Washington*[14] which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case). It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy.'

In *Sarita Sharma* the Supreme Court also noted the earlier law laid down in *Elizabeth Dinshaw v Arvand M Dinshaw*.[15] In this ruling the apex court had exercised summary jurisdiction regarding the return of the minor child. In *Dinshaw* it was also stressed that the interest and the welfare of the minor child is the predominant criterion in child custody matters. The earlier law laid down in *Sandhu*[16] and *Dinsha*w[17] stands substantially modified with the recent mandate of law in *Dhanwanti Joshi*,[18] *Sarita Sharma*[19] *and Sahiba Ali*.[20]

Thus, it can be safely concluded that the exclusive emphasis of the apex court's verdict now is to safeguard the welfare of the children. Mere mechanical implementation of an order of the foreign court is no longer the final response of the court. Hence, irrespective of the dictate of a court of overseas jurisdiction, the Supreme Court of India still rightly insists on a proper evaluation of the best interests of the children of a broken marriage.

(d) Visiting rights cannot be denied

The Supreme Court of India, in a recent ruling in *N Nirmala v Nelson Jeyakumar*,[21] held that depriving a mother of visiting rights was not justified.

[14] 90 L Ed 95 (1945): 326 US 310.
[15] AIR 1987 SC 3.
[16] AIR 1984 SC 1224.
[17] AIR 1987 SC 3.
[18] 1997 (8) SC 720.
[19] JT 2000 (2) SC 258.
[20] JT 2003 (6) SC 79.
[21] JT 1999 (5) SC 223.

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This appeal was about the custody of a minor daughter. The respondent father was permitted to retain custody as legal guardian. A single judge of the High Court confirmed the custody of the minor daughter with the father but gave visiting rights to the appellant mother.

Against this order, passed by the Single Bench of the High Court, the appellant mother, in search of an order of custody, went on a further appeal before a Division Bench of the High Court, which by the impugned judgment dismissed the appeal and deprived the appellant mother of her visiting rights, to which there were no cross-objections on the part of the husband respondent. The matter went on further appeal to the Supreme Court on this judgment being questioned by the mother.

The apex court held in the above-mentioned judgment (at 223–224, para 3) as follows:

> 'In our opinion, such a further adverse order against the appellant was not justified. The interest of justice will be served if the order of the learned Single Judge continuing the custody of the minor child with the respondent and as confirmed by the Division Bench is maintained subject to the modification that visiting right which was denied to the appellant by the Division Bench be continued ….'

Consequently, the apex court held that depriving the mother of her visiting rights was not justified. Hence, the spirit of the final judicial view is again in the best interest of the child, who was held entitled to receive the love and care of both parents.

(e) Orders relating to custody of children are interlocutory in nature

Justice Mukul Mudgal of the Delhi High Court, in the case of *Leeladhar Kachroo v Umang Bhatt Kachroo*,[22] reiterated the earlier position of law as follows:

> 'In Jaiprakash Khadria v Shyam Sunder Agarwalla & Anr,[23] it was held as under:
>
> > "Orders relating to custody of children are by their very nature not final but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interest of the child."'

[22] 2005 (2) Hindu Law Reporter 449, 457 para 21.

[23] II (2000) CLT 212 (SC); (2000) 6 SCC 598.

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(f) Habeas corpus can also be issued by a person who is not a citizen of India

It is well established that a writ of habeas corpus can be issued to secure the custody of a minor child. This can be sought even by a person who is not a citizen of India, as was recently held in *Miss Atya Shamim v Deputy Commissioner/Collector, Delhi (Prescribed Authority under Citizenship Act)*.[24] The Jammu and Kashmir High Court in this ruling reaffirmed *Dinshaw*[25] where the Supreme Court of India had issued a writ at the instance of a person who was not an Indian citizen.

III RELEVANT LEGISLATION AND FORUM FOR CUSTODY PROCEEDINGS

As far as the forum for securing the return of the children is concerned, it is important to mention that India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980. Under Art 226 of the Constitution of India, a parent whose child has been abducted can petition the State High Court to issue a writ of habeas corpus against the abducting spouse for the return of the child. Alternatively, a habeas corpus petition seeking recovery of the abducted child can be directly filed in the Supreme Court of India under Art 32 of the Constitution of India.

With respect to the relevant legislation, the mother could well seek recourse to the provisions of the Hindu Minority and Guardianship Act 1956 (HMGA 1956), which is an Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus. The provisions of HMGA 1956 are supplemental to the earlier Guardians and Wards Act 1890. HMGA 1956, like the Hindu Minority Act 1955, has extra-territorial application. It extends to the whole of India except the State of Jammu and Kashmir. Under s 4(a) of the HMGA 1956, 'minor' means a person who has not reached the age of 18 years. A 'guardian' in s 4(b) is defined as a person having the care of the person of the minor or of his property or both and includes a natural guardian, a guardian appointed by will of the minor's natural parents, a guardian appointed or declared by a court and a person empowered to act as such under any enactment.

(a) India and the Hague Convention on Civil Aspects of International Child Abduction 1980

Currently, India is not a party to the Hague Convention on Civil Aspects of International Child Abduction 1980. Other than the statutory provisions of law quoted above in which matters of child custody are argued in different courts in

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24 AIR 1999 J&K 140.
25 AIR 1987 SC 3.

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different proceedings, the principles of the Hague Convention cannot be enforced in Indian courts. Different recent decisions indicate a trend that Indian courts generally tend to decide the inter-parental child custody disputes on the paramount consideration of the welfare of the child and the best interest of the child. A foreign court custody order is only one of the considerations in adjudicating any such child custody dispute between parents. Foreign court orders of child custody are no longer mechanically enforced and normally the courts go into the merits of the matter to decide the best interest of the child irrespective of any foreign court custody order. Hence, the position of law in India varies from case to case and there is no uniform precedent which can be quoted or cited as a universal rule.

(b) The position of Indian law on child abduction

Under Art 214 of the Constitution of India, there shall be a High Court for each state in India and under Art 124 there shall be a Supreme Court of India. Under Art 141, the law declared by the Supreme Court shall be binding on all courts within India. However, the Supreme Court may not be bound by its own earlier views and can render new decisions. Part III of the Constitution secures 'fundamental rights' to citizens, which can be enforced directly in the respective High Courts of the states or directly in the Supreme Court of India by issue of prerogative writs under Arts 226 and 32 respectively of the Constitution of India.

The High Courts and the Supreme Court in India entertain petitions for issuance of a writ of habeas corpus for securing the custody of the minor at the behest of a parent who lands on Indian soil alleging violation of a foreign court custody order or seeks the return of children to the country of their parent jurisdiction. Invoking of this judicial remedy provides the quickest and most effective solution.

Different High Courts within India have from time to time expressed different views in matters of inter-parental child custody petitions when their jurisdiction has been invoked by an aggrieved parent seeking to enforce a foreign court custody order or implementation of their parental rights upon removal of the child to India without parental consent. The Supreme Court of India too has rendered different decisions with different viewpoints on the subject in the past three decades. A quick summary of Indian law laying down this position is as follows:

(1) In *Surinder Kaur v Harbax Singh Sandhu*,[26] it was held that the provisions of HMGA 1956 cannot supersede the paramount consideration as what is conducive to the welfare of the child while exercising summary jurisdiction in returning the minor children to the foreign country of their origin.

[26] 1984 Hindu Law Reporter 780, Supreme Court.

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(2) In *Elizabeth Dinshaw v Arvand M Dinshaw*,[27] the Court again exercising summary return of a removed child upheld the right of a foreigner mother to directly invoke the jurisdiction of the Supreme Court to seek the custody of a minor child from his father on the principle that the matter is to be decided not on the considerations of the legal rights of the parties but on the sole and predominant criterion of the best interest of the minor child.

(3) In *Kuldeep Sidhu v Chanan Singh*,[28] in a criminal writ petition exercising summary return, it was held that the welfare of the children who were Canadian citizens would override any consented custody arrangement and the children have a right to be brought up in the culture and environment of the country of their birth.

(4) In *Amita Gautam v Ramesh Gautam*,[29] following the above decisions, it was held that the orders of the Canadian Court granting interim custody to the mother must be honoured by restoring forthwith the custody of the minor to the mother who had been removed from Canada to India by the father without authorisation.

(5) In *Sarvajeet Kaur Mehmi v State of Rajasthan*,[30] the custody of the minor child was given to the mother without hearing the father in view of the orders passed by the High Court of Justice (Family Division), UK, requesting the courts in India to pass necessary orders and issue directions seeking the return of the minor back from India to the UK.

(6) In *Kala Aggarwal v Suraj Prakash Aggarwal*,[31] despite the children being brought to India from the United States in violation of US Court custody orders, the Court upholding the petition only granted access but declined to grant custody to the mother by concluding that the children's welfare was with the father until they attained majority.

(7) In *Jacqueline Kapoor v Surinder Pal Kapoor*,[32] following earlier precedents, the Court upheld the mother's petition seeking custody of her minor daughter in accordance with the orders of the competent court in Germany and directed that the child be handed over to the mother as the judgment of the German Court was binding on the father who had removed the child to India by deceitful means.

[27] All India Reporter 1987 Supreme Court 3.
[28] All India Reporter 1989 Punjab & Haryana 103.
[29] 1989 (2) Hindu Law Reporter Punjab & Haryana 385.
[30] 1987 (2) Hindu Law Reporter Rajasthan 607.
[31] 1993 (1) Hindu Law Reporter Delhi 145.
[32] 1994 (2) Hindu Law Reporter Punjab & Haryana 97.

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(8) In *Atya Shamim v Deputy Commissioner/Collector Delhi,*[33] a habeas corpus petition by a person who was not a citizen of India was held to be maintainable to secure the custody of a minor.

(9) In *Dhanwanti Joshi v Madhav Unde*,[34] the Supreme Court observed that the order of the foreign court will only be one of the facts which must be taken into consideration while dealing with child custody matters and India being a country which is not a signatory to the Hague Convention, the law is that the court within whose jurisdiction the child is removed will consider the question on its merits bearing the welfare of the child as of paramount importance. It is in this case that the Supreme Court changed the earlier view and did not exercise summary jurisdiction in returning the removed children to their parent country.

(10) The above observations by the Supreme Court of India were followed in its later decision in *Sarita Sharma v Sushil Sharma*.[35] Thereafter, in *Sahiba Ali v State of Maharashtra*,[36] the Supreme Court declined to grant the custody of her children to the mother but at the same time issued directions for the grant of visitation rights in the interest and welfare of the minor children.

(11) In *Paul Mohinder Gahum v State of NCT of Delhi*,[37] upholding a habeas corpus petition, the High Court held that the orders passed by foreign courts granting custody take a back seat in preference to what lies in the best interest of the minor rather than what a foreign court has directed.

(12) In *Eugenia Archetti Abdullah v State of Kerala*,[38] upholding the right of the US citizen, ie the petitioner mother before the Court in a habeas corpus petition, the custody of the children was handed over to the mother after holding that the High Court can exercise such jurisdiction under Art 226 of the Constitution of India.

(13) In *Leeladhar Kachroo v Umang Bhat Kachroo*,[39] upholding the order of a Canadian Court granting custody to the mother of her younger son and allowing him to go back to Canada, the Court held that it has the jurisdiction to order the travel out of the country of the minor child with one of the parents and the mere possibility of losing jurisdiction would not dissuade the Court from permitting the departure of the child with the parent in the interest of the child. Hence, the Court held that it was empowered to entrust the custody of a child to a parent who resides outside its jurisdiction, if it is conducive to the welfare of the child.

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[33] All India Reporter 1999 Jammu & Kashmir 140.
[34] 1998 (1) Supreme Court Cases 112.
[35] Judgments Today 2000 (2) Supreme Court 258.
[36] 2004 (1) Hindu Law Reporter 212.
[37] 2005 (1) Hindu Law Reporter 428.
[38] Hindu Law Reporter 2005 (1) (Kerala) 34.
[39] 2005 (2) Hindu Law Reporter, Delhi 449.

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(14) In *Paul Mohinder Gahun v Selina Gahun*,[40] it was held that, where the wife, husband and the minor girl child were all Canadian citizens and where the wife had stealthily come to India with the minor daughter, the Indian Guardian Court at Delhi had no jurisdiction to try and decide the petition of the mother for a guardianship order as their matrimonial home was in Canada where the child was ordinarily resident.

(15) In a judgment dated 3 March 2006 of the High Court of Bombay at Goa, reported as *Mandy Jane Collins v James Michael Collins*,[41] between a 62-year-old American father and 39-year-old British mother resident in Ireland were litigating over the custody of their 8-year-old minor daughter said to be illegally detained in Goa by the father, the Court declining to issue a writ of habeas corpus held that the parties could pursue their remedies in normal civil proceedings in Goa. The Court dismissing the mother's plea for custody concluded that the question of permitting the child to be taken to Ireland without first adjudicating upon the rival contentions of the parents in normal civil proceedings in Goa was not possible and directed that the status quo be observed. This in effect meant that the 8-year-old minor girl must continue to live in Goa without her mother or any other female family member in the father's house. In a challenge to this decision by the mother before the Supreme Court of India, the appeal was dismissed on 21 August 2006, leaving it open to the parties to move the appropriate forum for the custody of the child, which if done, was directed by the Supreme Court to be decided within a period of 3 months with earlier visitation rights continuing for the mother.

(16) In another matter reported as *Ranbir Singh v Satinder Kaur Mann*,[42] the Punjab and Haryana High Court declined to issue a writ of habeas corpus to the petitioner father residing in Malaysia who was seeking release of his 5-year-old son and 3-year-old daughter from their mother's custody in India. The High Court of Malaya at Kuala Lumpur had held that the petitioner was entitled to the legal guardianship of the said minor children. However, the High Court in India, declining to enforce the foreign judgment of the Malaysian High Court, held that the matter could be re-argued before the appropriate forum with regard to the custody of the children on the basis of evidence to be adduced by parties. The habeas corpus petition was dismissed with the observation that it would be open to either party to move for custody of the minor children under appropriate law before an appropriate forum.

The above is the consolidated case-law summary on inter-parental removal of children from foreign jurisdictions to India and the decisions in different courts in India as a non-Convention country.

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[40] 2007 (1) Recent Civil Reports (Civil), 129.
[41] 2006 (2) Hindu Law Reporter Bombay 446.
[42] 2006 (3) Punjab Law Reporter 571.

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(c) Position of foreign court orders in India

The principles governing the validity of foreign court orders are laid down in s 13 of the Indian Code of Civil Procedure (CPC). The CPC is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature in India. The principles in s 13 of the CPC have been affirmed in relation to the guidelines laid down by the Supreme Court of India on recognition of foreign matrimonial judgments.

It is reiterated, as discussed above, that Indian courts would not exercise summary jurisdiction to return the children to the country of habitual residence. The courts consider the question on the merits of the matter, with the welfare of the children being of paramount importance.

Section 14 of the CPC talks of a presumption as to foreign judgments. It provides that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

(d) The position of Indian law on shared residence orders

Under the relevant Indian statute law pertaining to child custody matters, that is HMGA 1956 supplemented with the provisions of the Guardians and Wards Act 1890, there exists no concept of shared residence orders. However, there is one recent judgment of the Kerala High Court, *Eugenia Archetti Abdullah v State of Kerala*,[43] where on the facts and circumstances of the case the Court handed down an order, which was close to a shared custody order. This was in a case where divorce and custody proceedings were pending in the United States and the mother was held to be entitled to custody of the children until a final decision was announced by the courts in the United States. The facts of the case are outlined below.

The petitioner wife, the respondent husband and the children were all US citizens. The petitioner wife had approached the Court with a habeas corpus petition seeking a direction that the respondents numbers 2 to 4 produce two infants named Roshan and Nishant before the Court and to hand over their custody with their passports to the petitioner, their mother. The two infant twins were less than 3 years old.

The petitioner and the respondent got married while in the United States after which they moved to Bahrain where the petitioner gave birth to the two children. Because of the shift of employment they went back to the state of Texas in the United States and settled there. According to the petitioner, their married life was not happy which led to domestic violence by the second

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[43] 2005 (1) Hindu Law Reporter (Kerala) 34.

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respondent (the husband). This resulted in a criminal case. Finally, the matter was settled. The respondent lost his employment in Texas and both of them with their children visited India and came to Kozhikode in the state of Kerala where the second respondent had his roots. While there, according to the petitioner, there was again ill-treatment by the second respondent and the petitioner was thrown out of the residential house and was forced to fly back to the United States without the children. According to her, the custody of the children by the respondent was an act of illegal custody and hence they were illegally detained. The petitioner wife had already moved a petition for custody of the children as well as for the dissolution of the marriage with the second respondent, in accordance with the family law applicable in the state of Texas in the United States.

In light of the facts and circumstances of the case, the Court, while granting custody of the children to the petitioner wife, laid down rigorous conditions, one of which was shared custody/visitation rights for a period of 7 days from the time of the court order to the time the petitioner wife left India. In this regard it is necessary to refer to para (e) of the guidelines, mentioned below, laid down in the judgment. Secondly, the judgment is relevant to the facts of the case in hand, because it allowed continued access/visitation rights to the respondent spouse to meet up with his minor children for 3 hours everyday, although quite limited and laying down contingency measures in the event of violation of the said conditions by the petitioner wife.

Paragraph 24 at 41 of the judgment above, stipulating the guidelines, reads as follows:

> ‘(a) The petitioner shall furnish a bank guarantee for 7,500 US dollars before she takes the children to the United States. The bank guarantee shall be in the name of the Registrar of the Court.
> (b) She shall also execute a bond for another amount of 7,500 dollars, undertaking to produce the children before this Court as and when ordered.
> (c) The petitioner shall also obtain an undertaking from the US Embassy or US Consulate in Madras that whenever this Court requires, with a notice of 15 days, she shall be present and shall produce the children at her own expenditure, and that in case of her failure, the Texas/US Administration including the Embassy will see that the directions of this Court in this regard are complied with and the children be produced before this Court.
> (d) She can take the children to Texas only on fulfillment of the aforesaid conditions and on expiry of the period mentioned (1) below.
> (e) The petitioner, shall, from tomorrow onwards, for 7 days, stay in Kozhikode so that the 2nd respondent shall have frequent visit to the children between 10 a.m. and 1.00 p.m. during the said seven days. Until she leaves India, the children shall be regarded as in the joint custody of both, so that the 2nd respondent shall have visitorial rights on the children.
> (f) The 2nd respondent shall entrust the passport of the children and their birth certificates with the Registrar of this Court within a week from today and the Registrar shall give appropriate receipt to him.

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(g) The petitioner shall send bi-monthly reports about the health of the children from the Senior Pediatrician of at least 20 years of practice, duly attested by a notary or the Indian Embassy/Consulate in US.
(h) The petitioner shall not remove herself or the children from her present address shown in this petition, ie:
[address deleted by authors for confidentiality]
(i) She shall not, except to take the children to India as per the order, if any, to be passed by this Court, take them beyond the State of Texas.
(j) In case of any default or violation of any of the conditions in this judgment by the petitioner, or in case of any emergency in respect of the children the second respondent is free to fly to Texas and for that he can obtain sufficient amount from out of the bank guarantee provided by the petitioner.
(k) Whenever the second respondent goes to Texas, the petitioner shall provide him the visitorial rights always to see the children and shall put them in his company.
(l) Even if the petitioner complies with all the conditions, we make it clear that she shall not take the children out of India for a period of three weeks from today.
(m) A copy of the passport of the petitioner and the children, duly attested by the Registrar of this Court with the seal of this Court, shall be regarded as a duly original passport for the purpose of their travel inside India.
(n) If the petitioner complies with the aforesaid conditions, the petitioner's passport as well as the passports and the birth certificate given to her as mentioned in direction (m) shall be returned to the Registrar.
(o) If the petitioner happens to leave without complying with the above directions, necessarily, she shall leave the custody of the children to the 2nd respondent.
(p) The petitioner shall not, except for going to Calicut and Chennai, leave her present address in Ernakulam.
(q) This arrangement in terms of this judgment will be in force until the Family Court at Texas, where the petitioner has instituted a lis, passes any interim or final order, as the case may be, regarding the custody of the children. We make it clear that any such order passed by the Court at Texas will override the directions contained in this judgment.

Writ petition is disposed of as above.'

In another reported case of the Delhi High Court, *Leeladhar Kachroo v Umang Bhat Kachroo*,[44] upholding the order of a Canadian Court granting custody to the mother of her younger son and allowing him to go back to Canada, the Court upheld the contention that it has jurisdiction to order travel out of the country of the minor child with one of the parents and the mere possibility of losing jurisdiction would not dissuade the Court from permitting the departure of the child with the parent in the interest of the child. Hence, the Court held that it was empowered to entrust the custody of a child to a parent who resides outside its jurisdiction, if it is conducive to the welfare of the child.

In the above mentioned case, the custody of the older son, who was residing with the father, was not in question and the case was confined to determining

44 2005 (2) Hindu Law Reporter Delhi 449.

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the custody of the younger son. However, it must be noted here that this is a particular reported case, looking in the round at the custody of two children, between the husband and the wife in two different countries. But, it does not talk of a situation looking at shared custody with respect to the same child.

In view of the fact that there is no statutory concept of a 'shared residence order' under Indian legislation, the Indian courts would view interpreting any such order of a foreign court in the light of the principle of the best interest of the child, maintaining the welfare of the child as of paramount consideration. Undoubtedly, access rights of the father can be enforced on the basis of a shared residence order and if such rights are violated, they can be enforced in an Indian court of law. However, this would be viewed as an enforcement of a private contractual arrangement between the parents. The court would still go into the welfare of the child to determine the rights of the child. Hence, the position would vary from case to case and there is no uniform principle which can be quoted as a universal rule.

(e) Value attached by the court to the wishes of the child

The court shall certainly consider the wishes of the parents and the minor child, but it is at the discretion of the court. As is evident from the case-law analysis, the paramount consideration is the welfare of the minor child.

Justice Mukul Mudgal of the Delhi High Court in the case of *Leeladhar Kachroo v Umang Bhatt Kachroo*[45] analysed some of the decided cases taking into consideration the wishes of the children in child custody matters. At 454, para 14 of the judgment, he reiterated the earlier position of law as follows:

> '(b) In *Indira Khurana v Prem Prakush*,[46] the learned Single Judge of this Court held as under:-
>
> > "10 . . . It goes without saying that when the grant of custody is concerned, ascertainment of wishes of the children, especially when they are at an age to make an intelligent preference is a relevant and germane consideration. In none of the cited cases, the question of visitation rights only was involved. In the cited cases, the Court was considering the grant of custody and while doing so, had also made provision for visitation rights. It is also significant that in these cases visitation rights were granted to the spouse who did not have the custody. This is because there should be very strong reasons to deny visitation rights to any of the spouse. These could be cases say where the grant of visitation rights could be injurious to the mental and physical health of the children.
> >
> > 11. The Guardian Judge while exercising his judicious discretion in granting visitation rights can ascertain the wishes of the children by meeting them. In fact, it would be desirable to do so. However, omission to do so in case of

45 2005 (2) Hindu Law Reporter 449.
46 60 (1995) DLT 633.

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visitation rights cannot be fatal especially when there is sufficient material on record available otherwise, supporting grant of visitation rights. This is so in the instant case. The memorandum of understanding had been entered into on the 6th day of December, 1993. The petitioner has not pointed out anything attributable to respondent after 6.12.1993, which would render grant of visitation rights to the respondent injurious to the mental and physical health of the children. The petitioner in terms of memorandum was willing to share the vacation and visitation rights to the respondent. Moreover the expression of wishes of children is very often conditioned by the persuasion of the party in whose exclusive custody the children have been. The Court, therefore, while ascertaining the mind of the children, has to be conscious of the fact that what the children say could be the reflection of the views of the estranged spouse induced by him/her."

(c) In *Shyam Sunder Trikha v Sunita*,[47] a learned Single judge of this Court held as under:-

"... The Court can only reiterate that the Guardian Judge, while ascertaining mind of the child during a meeting has been conscious and cautious of the fact that what the child is saying could be reflection of the views of the estranged spouse and as induced by him/her."

The above judgments in the cases *of Indira Khurana* (supra) and *Shyam Sunder Trikha* (supra)*,* in fact refer to the desirability of ascertaining the wishes of the children, I have also not discounted the possibility of the child being influenced by the parent he last stayed with. But even then in view of the overall circumstances of the case and taking into account the factors discussed hereinabove the impugned order has to be sustained except in relation to the enhancement of the amount of personal bond from Rs.2 lakhs to Rs.3 lakhs.'

In view of the position of the law quoted above, it is significant to note that the Indian courts would definitely ascertain the wishes and the feelings of the child before deciding on the issue of the custody of the child.

(f) No provision for mirror orders in India

In light of the prevailing child abduction law in India discussed above, it is not possible to obtain mirror orders, as this is only a concept known to the English and not to the Indian legal system. Since foreign court custody orders cannot now be mechanically enforced, it is suggested that, in the event of any litigation in the foreign country of habitual residence, a letter of request be obtained from the foreign court in which litigation is pending for incorporating safeguards and conditions to ensure the return of the minor child to the country of normal residence.

This letter of request should be addressed by the foreign court to the Registrar General of the High Court within whose jurisdiction the estranged spouse is residing with the minor child. It should also be specifically mentioned that the

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[47] 67 (1997) DLT 619; 1997 IV AD (Delhi) 198.

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passports of both the parent and the child should be deposited with the Registrar General of the State High Court to ensure that the child is not taken away from the jurisdiction of the court where he or she is confined.

(g) A possible solution

With the increasing number of non-resident Indians abroad and multiple problems leading to family conflicts, inter-parental child removal to India now needs to be resolved on an international platform. It is no longer a local problem. The phenomenon is global. Steps have to be taken by joining hands globally to resolve these conflicts through the medium of courts interacting with each other. Until India becomes a signatory to the Hague Convention, this may not be possible. It is no longer possible for the Indian courts to adapt to different foreign court orders arising in different jurisdictions. It is equally important that, in order to create a uniform policy of law, some clear, authentic and universal child custody law is enacted in India by adhering to the principles laid down in the Hague Convention. Divergent views emerging at different times may not be able to cope with the rising number of such cases, which appear from time to time for interpretation. We in India require an expeditious acceptance and implementation of the international principles of inter-parental child removal which are couched in the Hague Convention. Let us not delay the resolution of these disputes.

IV LAW IN THE MAKING: AN AFTERMATH

Borders divide jurisdictions but families reunite them. The chain to this link is the global citizen. However, this inter-nation cross-flow has, with the passage of time, generated a new crop of legal issues in the realm of private international law which comprises rules a court would apply whenever there is a case involving a foreign element. Such legal dilemmas of the diaspora baffle systems of law but do not defy solutions if nations make conscious efforts to resolve such complications.

As Reuters reports, while the British Parliament is working its way through the Human Fertilisation and Embryology Bill to legalise parentage from in vitro fertilisation births and recognise same-sex couples as legal parents of children conceived through the use of donated eggs, sperm or embryos, India has still to enact any concrete law arising from the surrogate tourism industry generated here.

A fugitive non-resident Indian (NRI) parent, declared a proclaimed offender in matrimonial proceedings in India, cannot even see or talk to his children removed to India. A foreign court refuses to permit NRI children to be taken to India and likewise local courts decline to implement foreign court orders directing the return of NRI children. These occurrences find daily mention but no straightforward resolution for the NRI in any Indian law. International

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parental child abduction, defined as the removal or retention of a child across international borders by one parent which is either in contravention of court orders or is without the consent of the other parent, is sadly an increasing phenomenon which causes acute emotional distress to the abducted child.

The Indian diaspora is 30 million and swelling. The acute problems associated with this have fortunately led the Government to begin the process of acceding to the Convention. However, before that is done and India becomes a member of about 80 contracting Convention nations, appropriate Indian legislation will have to be enacted for its implementation. In this way children removed to and from India will be reunited with their aggrieved parent and India will no longer be a sought-after destination for placing removed NRI children from foreign jurisdictions. Also, foreign courts will be encouraged to permit NRI children to freely visit India without fear of abduction.

The draft of the Indian Civil Aspects of International Child Abduction Bill 2007, meant to secure the prompt return of children wrongfully retained or removed to India, proposes to ensure that the rights of custody and access under laws of contracting states are respected by providing for prompt removal of wrongfully removed children. The salient and salutary features of this proposed law are as follows.

- The proposed law seeks to create a Central Authority for performance of duties under the Hague Convention for securing the return of removed children by instituting judicial proceedings in the relevant High Court.

- The appropriate authority or a person of a contracting country may apply to the Central Authority for the return of a removed child to the country of habitual residence.

- The High Court may order the return of a removed child to the country of habitual residence but may refuse to make such an order if there is grave risk of harm or if it would put the child in an intolerable situation. Consent or acquiescence may also lead to refusal for the return of a child by the Court.

- The High Court may refuse to return a child if the child objects to being returned upon the Court being satisfied that the child has attained an age and degree of maturity to take into account his views.

- The High Court before making an order of return may request the Central Authority to obtain from the relevant authorities of the country of habitual residence a decision or determination as to whether the removal or retention of the child in India is wrongful.

- The High Court upon making an order of return may direct that the person who has removed the child to India pay the expenses and costs incurred in returning the child to the country of habitual residence.

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The creditable sacrosanct feature in recognising and retaining the jurisdiction of the High Court to protect the paramount consideration, ie the best interest and the welfare of the child, by carving out exceptions for grounds of refusal has upheld the majesty of law vested in the Indian courts. But at the same time, this proposed law will be a big relief to the children who have been removed from their parents. The temptation to wrongfully remove will also be deterred. The cruel abduction of NRI children for the purposes of forced marriages will also be checked.

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CONFLICT OF LAWS IN INTERCOUNTRY ADOPTIONS: THE INDIAN PERSPECTIVE WITH SPECIAL REFERENCE TO THE POSITION AFTER INDIA RATIFIED THE HAGUE CONVENTION ON ADOPTIONS

*Ranjit Malhotra and Anil Malhotra**

Résumé

Cette contribution analyse les principes du conflit de lois et de la procédure en matière d'adoption internationale en Inde. Elle s'intéresse également à la législation qui doit être respectée par les étrangers et les indiens expatriés qui cherchent avec insistance à adopter des enfants indiens. Aujourd'hui, il n'y a pas de loi particulière régissant l'adoption d'enfants par des non hindous et des étrangers. Entre Hindous, l'adoption est permise par la loi. Au sein d'autres communautés, l'adoption est permise par la coutume. L'Inde a ratifié en juin 2003 la Convention de la Haye sur l'adoption internationale, mais jusqu'ici, les personnes désirant adopter un enfant en Inde qui résident à l'étranger en ont tiré peu de bénéfices tangibles.

Ces dernières années en Inde, une nouvelle problématique est apparue du fait de la complexité des lois et des procédures contraignantes en matière d'adoption internationale. Cette complexité a provoqué l'apparition des maternités de substitution, arrangements particulièrement utilisés par la communauté indienne expatriée. Cette problématique émergente est également discutée dans cette contribution.

I INTRODUCTION

This chapter analyses the conflict of laws position relating to intercountry adoption law and procedure in the Indian jurisdiction. It also looks at the relevant legislation to be complied with by foreigners and persons of Indian origin resident abroad permanently seeking to adopt children from India. At the outset, it is important to emphasise that at present there exists no exclusive general law on adoption of children governing non-Hindus and foreigners. Adoption is permitted by statute among Hindus, and by custom among some

* Ranjit Malhotra LLM (London), Advocate.
Anil Malhotra LLM (London), Advocate.

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other communities. In India, in the last few years a new dimension has also taken place on account of tedious and complicated intercountry adoption laws and procedures. This is giving rise to surrogacy arrangements, preferred especially by the non-resident Indian (NRI) community overseas. This new emerging issue is also discussed in this chapter.

At present, non-Hindus and foreigners can only be guardians of children under the Guardian and Wards Act 1890. In practice, foreign nationals and persons of Indian origin domiciled overseas wishing to adopt children from India first obtain guardianship orders from the District Court or the High Court, as the case may be, within whose territorial jurisdiction the child is residing. This is with a view to adopting formally under the legal system of the country of their habitual residence.

The Indian Ministry of Welfare, pursuant to certain guidelines issued by the Supreme Court of India in a public interest litigation petition, *Laxmi Kant Pandey v Union of India*,[1] framed guidelines governing intercountry adoptions. This case was monitored by the Supreme Court from time to time until 1991, when the court scrupulously reviewed the existing procedure and practices followed in intercountry adoptions. The main objective was to prevent trafficking of children and to protect the welfare of adopted children.

In the further supplemental judgment of *Laxmi Kant Pandey v Union of India*[2] the apex court pointed out that ordinarily the court, entertaining an application on behalf of a foreigner seeking to be appointed guardian of a child with a view to eventual adoption, should not insist on the foreigner making a deposit by way of security for due performance of the obligations undertaken by him or her. However, in appropriate cases, the court may exceptionally pass an order requiring him or her to make such deposit. The court has also observed that it is at that point of time that the execution of a bond would ordinarily be sufficient.

The apex court in the second supplemental judgment of *Laxmi Kant Pandey v Union of India*[3] once again, among other issues, clarified this aspect of the matter. The apex court held that the guardian judge need not insist on security or a cash deposit or bank guarantee, and it should be enough if a bond is taken from the recognised Indian placement agency which is processing the application. This agency may in turn take a corresponding bond from the sponsoring social or child welfare agency in the foreign country. Some directions issued in *Laxmi Kant Pandey* (both the 1984 and the 1986 judgments) were also modified.

More importantly, Justice Bhagwati[4] incorporated a vital note of clarification, as follows:

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1 AIR 1984 SC 469.
2 AIR 1986 SC 272.
3 AIR 1987 SC 232.
4 Ibid 240, para 12.

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> 'We would, therefore, direct that in the case of a foreigner who has been living in India for one year or more, the home-study report and other connected documents may be allowed to be prepared by the recognised placement agency which is processing the application of such foreigner for guardianship of a child with a view to its eventual adoption and that in such a case the Court should not insist on sponsoring of such foreigner by a social or child welfare agency based in the country to which such foreigner belongs nor should a home-study report in respect of such foreigner be required to be obtained from any such foreign social or child welfare agency, the home study report and other connected documents prepared by the recognized placement agency should be regarded as sufficient.'

After the implementation of the initial guidelines in 1989, it was felt necessary to revise them. Accordingly, a taskforce comprising a cross-section of representatives of adoption agencies under the chairmanship of former Chief Justice of India, Justice PN Bhagwati, was constituted on 12 August 1992. The taskforce submitted its report on 28 August 1993, and the Indian Government accepted its recommendations. Accordingly, the Government of India circulated revised guidelines in 1994 (hereinafter 'the Guidelines') to regulate matters relating to the adoption of Indian children. These guidelines were published by the Government in the Gazette of India on 20 June 1995. Subsequently, new further revised guidelines have come into place from 14 February 2006. The Central Adoption Resource Agency (CARA) has now submitted a draft of amended comprehensive guidelines to the newly created Ministry of Women and Child Development. These are called the Draft Guidelines on Adoption of Indian Children without Parental Care. These 2007 Guidelines have not been approved by the concerned Ministry as yet.

It may however be pertinent to point out that the apex court in *Anokha v State of Rajasthan*[5] has held that the above guidelines would not be applicable where the child is living with his or her biological parent(s) who have agreed that he or she is to be given in adoption to a known couple who may be of foreign origin. The court in such cases has to deal with the application under s 7 of the Guardian and Wards Act 1890 and dispose of the same after being satisfied that the child is being given in adoption voluntarily with the parents being aware of the implications of adoption, ie that the child would legally belong to the adoptive parents' family; that the adoption is not induced by any extraneous reasons such as the receipt of money etc; that the adoptive parents have produced evidence in support of their suitability; and finally that the arrangement would be in the best interest of the child.

Much more recently the Supreme Court of India has again reiterated the guidelines in case of adoption of children by foreign parents, as originally laid down in the case of *Laxmi Kant Pandey v Union of India.*[6] While emphatically following these guidelines in *St Theresa's Tender Loving Care Home and others v States of Andhra Pradesh*,[7] the apex court pointed out:[8]

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5 (2004) 1 Hindu Law Reporter 351.
6 AIR 1984 SC 469.
7 (2006) 1 Hindu Law Reporter 122.

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> 'While making the requisite and prescribed exercise it has to be kept in mind that the child is a precious gift and merely because he or she for various reasons is abandoned by the parents that cannot be a reason for further neglect by the society . . .'

II PRESENT PROCEDURE TO BE FOLLOWED IN INTERCOUNTRY ADOPTIONS UNDER GUIDELINES FOR ADOPTION FROM INDIA 2006

CARA Guidelines stipulate that every application from a foreigner wishing to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. Furthermore, the agency should be recognised by the CARA set up under the aegis of the Indian Ministry of Welfare. CARA is the principal monitoring agency of the Indian Government handling all affairs connected with national and intercountry adoptions.

No application by a foreigner to adopt a child should be entertained directly by any social or child welfare agency in India working in the areas of intercountry adoption or by any institution or centre to which the children are committed by the Juvenile Court. The reasons behind this directive have been summed up by MN Das:[9]

> 'Firstly, it will help to reduce, if not eliminate altogether, the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption, he might, in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency or individual procuring the child. Secondly, it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secured family life to the child and would be able to handle trans-racial, trans-cultural and trans-national problems likely to arise from such adoption, because, where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely. Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it.'

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8 Ibid 128, para 10.

9 *Guardians and Wards Act* (Eastern Law House, 14th edn, 1995) 80–81.

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III THE CENTRAL ADOPTION RESOURCE AUTHORITY

The Central Adoption Resource Authority (CARA) is an autonomous body under the Ministry of Women and Child Development, Government of India. Its mandate is to find a loving and caring family for every orphan/destitute/surrendered child in the country. CARA was initially set up in 1990 under the aegis of the Ministry of Welfare in pursuance of a Cabinet decision dated 9 May 1990. Pursuant to a decision of the Union Cabinet dated 2 July 1998, the then Ministry of Social Justice and Empowerment conferred the autonomous status on CARA with effect from 18 March 1999 by registering it as a society under the Societies Registration Act 1860. It was designated as the Central Authority by the Ministry of Social Justice and Empowerment on 17 July 2003 for the implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993). The Ministry of Women and Child Development has of late been mandated to look after the subject matters 'Adoption' and 'Juvenile Justice (Care & Protection of Children) Act 2000' pursuant to the 16 February 2006 notification of the Government of India regarding reallocation of the Business.

In-country adoption of Indian children is governed by In-country Guidelines 2004 while intercountry adoption procedure is governed by a set of guidelines last issued on 14 February 2006. These Guidelines are a follow-up of various directions given by the Supreme Court of India in *Laxmi Kant Pandey v Union of India*.[10] These Guidelines have been amended and updated from time to time keeping in mind the welfare of such children. While CARA is engaged in clearing intercountry adoptions of Indian children, its principal aim is to promote in-country adoption. In fact, CARA ensures that no Indian child is given for intercountry adoption without the child's having been considered by Indian families residing in India. CARA also provides financial assistance to various non-governmental organisations (NGOs) and government-run homes to promote quality childcare to such children and place them in domestic adoption.

IV PRESENT PROCEDURE TO BE FOLLOWED IN INTERCOUNTRY ADOPTIONS UNDER GUIDELINES FOR ADOPTION FROM INDIA 2006

The following procedures are stated in the Guidelines for Adoption from India 2006.

'Step I Enlisted Foreign Adoption Agency (EFAA)

- The applicants will have to contact or register with an Enlisted Foreign Adoption Agency (EFAA)/Central Authority/Government Dept in their country, in which they are resident, which will prepare the home study report

[10] Writ Petition Number 1171 of 1982 and other cases.

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(HSR) etc. The validity of the home study report will be for a period of two years. A report prepared before two years will be updated at referral.
- The applicants should obtain the permission of the competent authority for adopting a child from India. Where such Central Authorities or Government departments are not available, then the application may be sent by the enlisted agency with requisite documents including documentary proof that the applicant is permitted to adopt from India.
- The adoption application dossier should contain all documents prescribed in Annexure 2. All documents are to be notarized. The signature of the notary is either to be attested by the Indian Embassy/High Commission or the appropriate government department of the receiving country. If the documents are in any language other than English, then the originals must be accompanied by attested translations. A copy of the application of the prospective adoptive parents along with the copies of the HSR and other documents will have to be forwarded to the Recognised Indian Placement Authority (RIPA) by the Enlisted Foreign Adoption Agency (EFAA) or Central Authority of that country.

Step II Role of the Recognised Indian Placement Agency (RIPA)

- On receipt of the documents, the Indian Agency will make efforts to match a child who is legally free for intercountry adoption with the applicant.
- In case no suitable match is possible within 3 months, the RIPA will inform the EFAA and CARA with the reasons therefore.

Step III Child being declared free for intercountry adoption – Clearance by ACA

- Before RIPA proposes to place a child in an intercountry adoption, it must apply to the ACA for assistance for Indian placement.
- The child should be legally free for adoption. ACA will find a suitable Indian prospective adoptive parent within 30 days, failing which it will issue a clearance certificate for intercountry adoption.
- ACA will issue clearance for intercountry adoption within 10 days in the case of older children above 6 years, siblings or twins and special needs children as per the additional guidelines issued in this regard.
- In case the ACA cannot find suitable Indian parent/parents within 30 days, it will be incumbent upon the ACA to issue a Clearance Certificate on the 31st day.
- If ACA clearance is not given on the 31st day, the clearance of ACA will be assumed unless ACA has sought clarification within the stipulation period of 30 days.
- NRI parent(s) (at least one parent) holding an Indian Passport will be exempted from ACA Clearance, but they have to follow all other procedures as per the Guidelines.

Step IV Matching of the Child Study Report with Home Study Report of FPAP ('foreign prospective adoptive parents') by RIPA

- After a successful matching, the RIPA will forward the complete dossier as per Annexure 3 to CARA for issuance of a "No Objection Certificate" (NOC).

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Step V Issue of No Objection Certificate (NOC) by CARA

- RIPA shall make application for CARA "NOC" in the case of foreign/PIO ("person of Indian origin") parents only after an ACA Clearance Certificate is obtained.
- CARA will issue the "NOC" within 15 days from the date of receipt of the adoption dossier if complete in all respects.
- If any query or clarification is sought by CARA, it will be replied to by the RIPA within 10 days.
- No Indian Placement Agency can file an application in the competent court for intercountry adoption without a "No Objection Certificate" from CARA.

Step VI Filing of Petition in the Court

- On receipt of the NOC from CARA, the RIPA shall file a petition for adoption/guardianship in the competent court within 15 days.
- The competent court may issue an appropriate order for the placement of the child with FPAP.
- As per the Supreme Court directions, the concerned Court may dispose the case within 2 months.

Step VII Passport and Visa

- RIPA has to apply to the Regional Passport Office to obtain an Indian Passport in favour of the child.
- The Regional Passport Officer may issue the passport within 10 days.
- Thereafter the visa entry permit for the child may be issued by the Consulate/Embassy/High Commission of the country concerned.

Step VIII Child travels to adoptive country

- The adoptive parent/parents will have to come to India and accompany the child back to their country.'

As of now, all intercountry adoptions are governed by the 2006 Guidelines. The authors have learnt from official sources that the draft 2007 Guidelines are likely to be finalised very soon. Nonetheless, the importance of the basic documentation cannot be undermined in intercountry adoptions. The starting point of course is the home study report.

The importance of the home study report is paramount. In fact, it is like a clear-cut balance sheet of the prospective adoptive parents. It is a very handy document through the entire stage of the adoption process, especially when guardianship proceedings are instituted in the Court of the Guardian Judge, within whose jurisdiction the minor child is residing, and, secondly at the time of the visa interview at the relevant embassy or consulate to impress upon the visa/consular officer as to the positive aspects of the application, with a view to enhancing the chances of the success of the application.

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V THE HOME STUDY REPORT

Paragraph 2.14 of the earlier 1995 Guidelines categorically and emphatically enumerates the required contents of the home study report, which should include the following information listed below. Although this is the list of documentation stipulated in the earlier Guidelines of 1995, from the experience of the authors in handling family migration issues, we would still recommend compliance with the exhaustive documentation mentioned below for two clear-cut reasons mentioned in the preceding paragraph.

The home study report should include:

(1) social status and family background;

(2) description of the home;

(3) standard of living as it appears in the home;

(4) current relationship between the husband and wife;

(5) current relationship between the parents and children (if there are any children);

(6) development of any already adopted children;

(7) current relationship between the couple and the members of each other's family;

(8) employment status of the couple;

(9) health details, such as clinical tests, hearing condition, past illness, etc (medical certificate, etc);

(10) economic status of the couple;

(11) accommodation for the child;

(12) schooling facilities;

(13) amenities in the home;

(14) reasons for wanting to adopt an Indian child;

(15) attitude of grandparents and relatives towards the adoption;

(16) anticipated plans for the adoptive child;

(17) legal status of the prospective adoptive parents.

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VI PREFERENCE TO PARENTS OF INDIAN ORIGIN

Another significant issue in intercountry adoptions is locating prospective adoptive parents, preferably of Indian origin. The Supreme Court of India, in *Karnataka State Council for Child Welfare v Society of Sisters of Charity St Gerosa Convent*[11] held that the rationale behind finding Indian parents or parents of Indian origin is to ensure that the children should grow up in Indian surroundings so that they retain their culture and heritage. This is definitely an issue, which has a bearing on the question of the welfare of the children. The best interest of the children is the main and prime consideration.

The Gujarat High Court in a progressive judgment in *Jayantilal v Asha*[12] upheld the validity of guardianship orders in favour of two Norwegian couples who were appointed as guardians of Hindu children. The court held:[13]

> '. . . if the biological parents have died rendering the child an orphan then the society owes a duty to the child that at least a semblance of comfort and care which the biological parents could have provided will be provided to the child, if some people from howsoever distant a corner of this planet, come forth to do so. In such a case a petty contention like the change of religion or culture of the child can hardly stand in the way of the court in sanctioning inter-country adoption. Unfounded and imaginary apprehensions also are of little consequence and once the court is assured that there is no possibility of the child being abused which assurance can flow from the independent agencies which are ordained for the purpose then nothing can and need prevent the court from sanctioning an inter-country adoption.'

Thus, the procedure described above and the supervisory role of the court serves as a double check on intercountry adoptions. Not only does this dual process ensure a check against suspected child abuse, but at the same time it also removes hyper-technical objections to facilitate the conclusion of the adoption process and to enable the adopted child to leave the country with his or her adoptive parents without further bureaucratic delays.

The Allahabad High Court in *Jagdish Chander Gupta v Dr Ku Vimla Gupta*[14] held that, under s 9 of the Guardian and Wards Act 1890, the application for guardianship of a minor shall be made to the district court having jurisdiction in the place where the minor ordinarily resides. The supervisory role of the court in placing the welfare of the minor as the primary consideration is best reflected in the following words of the court:[15]

> 'It should not be lost sight of and must be emphasised that in custody cases, a child has not to be treated as a chattel in which its parents have a proprietary interest. It is a human being to whom the parents owe serious obligations. One's

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[11] AIR 1994 SC 658.
[12] AIR 1989 Gujarat 152.
[13] Ibid 156, para 12.
[14] (2004) 1 Hindu Law Reporter 282.
[15] Ibid 285, para 16.

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own self interest sometimes clouds his perception of what is the best for those for whom he or she is responsible. It takes a very high degree of selflessness and maturity – which is for most of the people probably an unattainable degree – for a parent/proposed guardian to acknowledge that it might be better for the child to be brought up by someone else.'

VII RATIFICATION OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION BY THE GOVERNMENT OF INDIA ON 6 JUNE 2003

The Government of India has also ratified the Hague Convention on Intercountry Adoption on 6 June 2003. Although the Government has ratified the Hague Convention in this regard, in practice the same has not been publicised, and, from the practical point of view, not many tangible benefits are forthcoming at all to people residing abroad seeking to adopt children from India. In fact, one of the authors of this chapter at the Annual National Meet on Adoption organised in New Delhi on 3–4 May 2007 by the CARA, now falling under the newly created Ministry of Women and Child Development, strongly advocated the emergent need for setting up a committee or a task force to commission a comprehensive report to look at the potential benefits on India signing the Hague Convention on adoptions. If such a report is prepared, it can well be officially circulated to the foreign embassies and missions in India. This is, of course, with a view to creating awareness and publicising the advantages of India signing the Hague Convention on adoptions to prospective adoptive parents of foreign origin and persons of Indian origin domiciled overseas.

VIII DOCUMENTS REQUIRED FROM FOREIGN ADOPTIVE PARENTS AND OVERSEAS SOCIAL OR CHILD WELFARE AGENCY FOR INTERCOUNTRY ADOPTION APPLICATIONS

Experience of dealing with CARA and/or the concerned Ministry suggests that the documentation should be compiled meticulously in order to avoid bureaucratic delays. The following documents must be submitted by the foreign adoptive parents; it will be noted that the Indian requirements are quite similar to those prescribed in various appendices of RON 117 issued by the British Home Office:

(1) home study report;

(2) recent photographs of the adoptive family;

(3) marriage certificate of the foreign adoptive parents;

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(4) declaration concerning the health of the foreign adoptive parents;

(5) certificate of medical fitness of the foreign adoptive parents duly certified by a medical doctor;

(6) declaration regarding financial status, together with supporting documents including employer's certificate, wherever applicable;

(7) employment certificate of the foreign adoptive parents, if applicable;

(8) income tax assessment order(s) of the foreign adoptive parents;

(9) bank references for the foreign adoptive parents;

(10) particulars of properties owned by the prospective adoptive parents;

(11) joint declaration tendered by the foreign adoptive parents stating willingness to be appointed guardians of the child;

(12) undertaking from the social or child welfare enlisted agency sponsoring the foreigner to the effect that the child would be legally adopted by the foreign adoptive parents according to the law of the country within a period not exceeding 2 years from the time of arrival of the child;

(13) undertaking from the foreign adoptive parents to the effect that the child would be provided with the necessary education and upbringing according to status of the adoptive parents;

(14) undertaking from the recognised foreign social or child welfare agency that the report relating to the progress of the child along with his or her recent photograph would be sent quarterly during the first 2 years and half-yearly for the next 3 years in the prescribed pro forma through the relevant Indian diplomatic post;

(15) power of attorney conferred by the intending parents in favour of the social or the child welfare agency in India which will be required to process the case. Such power of attorney should also authorise the lawyer in India to handle the case on behalf of the foreign adoptive parents, if they are not in a position to come to India;

(16) certificate from the recognised foreign social or child welfare agency sponsoring the application to the effect that the adoptive parents are permitted to adopt a child according to the laws of their country;

(17) undertaking from the recognised foreign social or child welfare agency to the effect that, in case of disruption of the adoptive family before the legal adoption has been effected, it will take care of the child and find a suitable alternative placement for the child with prior approval of CARA;

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(18) undertaking from the recognised foreign social or child welfare agency that it will reimburse all expenses to the concerned Indian social or child welfare agency as fixed by the competent court towards maintenance of the child and the processing charge fees.

It is important to reiterate that all the above certificates, declarations and documents in support of the application should be duly notarised by a notary public whose signature should be duly attested either by an officer of the Ministry of External Affairs, the Ministry of Justice or the Ministry of Social Welfare of the country of the foreign adoptive parents or by an officer of the Indian Embassy or the High Commission or Consulate in that country.

IX DOMESTIC LAW

Having elaborated the law and procedure relating to intercountry adoptions, brief reference is now made to the domestic law governing adoptions by Hindus. The principal law relating to adoption in India by Hindus only is contained in the Hindu Adoptions and Maintenance Act 1956 (HAMA 1956).

(a) Requisites of a valid adoption

Section 6 stipulates four conditions for a valid adoption, namely:

(1) the person adopting has the capacity, and also the right, to take in adoption;

(2) the person giving the child in adoption has the capacity to do so;

(3) the person adopted is capable of being taken in adoption; and

(4) the adoption is made in compliance with the other conditions mentioned in chapter 2 of HAMA 1956.

Section 6(iv) requires that the adoption should be made in compliance with other conditions mentioned in chapter 2 of HAMA 1956. In other words, in order that the adoption should be valid, the provisions of ss 7–11 must be satisfied. Section 7 deals with the capacity of a male Hindu to take in adoption; and s 8 with the capacity of a female Hindu to take in adoption. Section 9 qualifies persons capable of giving children in adoption; s 10 categorises those persons who may be adopted; and s 11 enumerates other conditions for a valid adoption. Thereafter, s 12 elaborates the effects of a valid adoption.

(b) Other conditions for a valid adoption

Section 11 of HAMA 1956 stipulates other vital conditions for a valid adoption, and is reproduced below.

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'11. Other conditions for a valid adoption

In every adoption, the following conditions must be complied with:-

(i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;
(ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;
(iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;
(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;
(v) the same child may not be adopted simultaneously by two or more persons;
(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth [or in the case of an abandoned child or child whose parentage is not known, from the place or family where it has been brought up] to the family of its adoption:
Provided that the performance of datta homam [a religious ceremony] shall not be essential to the validity of adoption.'

(c) Effects of a valid adoption

Section 12 specifically deals with the legal effects of an adoption made in accordance with the provisions of HAMA 1956. It can be pointed out that s 12 of HAMA 1956 satisfies the requirements of clause (ix) of para 310 of HC 395 of the current British Immigration Rules governing adoption. This clause in very harsh terms states that the adopted child 'has lost or broken his ties with his family of origin'.

As to the legal effects of a valid adoption, it is important to cite certain decisions of the Supreme Court of India. It was held by the Supreme Court of India in *Smt Sitabai v Ramchandra*:[16]

> 'The true effect and interpretation of ss 11 and 12 of Act No 78 of 1956 therefore is that when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created by the adoption in the adoptive family . . .'

Similarly, it was held by the Supreme Court in *Kartar Singh v Surjan Singh*:[17]

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[16] AIR 1970 SC 343, 348, para 6.
[17] AIR 1974 SC 2161, 2163, para 7.

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> 'The words in section 11(vi) "with intent to transfer the child from the family of its birth to the family of its adoption" are merely indicative of the result of the actual giving and taking by the parents or guardians concerned referred to in the earlier part of the clause. Where an adoption ceremony is gone through and the giving and taking takes place, there cannot be any other intention . . .'

Also, it was held by the Supreme Court of India in *Chandan Bilasini v Aftabuddin Khan*:[18]

> 'Section 12 of the Hindu Adoptions and Maintenance Act clearly provides that an adopted child shall be deemed to be the child of his adoptive father or mother for all purposes with effect from the date of the adoption and from such date all ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family . . .'

Finally, s 15 of HAMA 1956 underlines the irrevocability of the validly performed adoption by stating that it cannot be cancelled or renounced. Therefore, under Indian law, once a legitimate adoption is obtained, in accordance with the procedure established by law, the margin for interference is minimal, except in certain exceptional circumstances.

X REGISTERED ADOPTION CAN BE CHALLENGED

Section 16 of HAMA 1956 reads as follows:

> **'16. Presumption as to registered documents relating to adoption**
>
> Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.'

In an important ruling concerning adoption by Hindus, *Jai Singh v Shakuntala*,[19] the Supreme Court of India has recently held that, though a document registering an adoption should be treated as final proof of adoption, it could still be challenged in a court of law if evidence to the contrary was put forward.

The apex court, in interpreting the statutory intent of s 16 of HAMA 1956, said that the presumption about the registered document relating to adoption 'cannot be an irrebuttable presumption'. Justices Umesh C Banerjee and Brijesh Kumar held:[20]

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[18] (1996) 1 Hindu Law Reporter 79, 81, para 6.
[19] 2002 (3) SCC 634.
[20] Ibid 636 and 637, para 2.

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> '2. The section thus envisages a statutory presumption that in the event of there being a registered document pertaining to adoption there would be a presumption that adoption has been made in accordance with law. Mandate of the statute is rather definite since the legislature has used "shall" instead of any other word of lesser significance. Incidentally, however, the inclusion of the words "unless and until it is disproved" appearing at the end of the statutory provision has made the situation not that rigid but flexible enough to depend upon the evidence available on record in support of adoption. It is a matter of grave significance by reason of the factum of adoption and displacement of the person adopted from the natural succession – thus onus of proof is rather heavy. Statute has allowed some amount of flexibility, lest it turns out to be solely dependent on a registered adoption deed. The reason for inclusion of the words "unless and until it is disproved" shall have to be ascertained in its proper perspective and as such the presumption cannot but be said to be a rebuttable presumption. Statutory intent thus stands out to be rather expressive depicting therein that the presumption cannot be an irrebuttable presumption by reason of the inclusion of the words just noticed above . . .'

In the above-mentioned ruling, the Supreme Court also concurred with the similar tenor of law laid down by the Punjab and Haryana High Court in *Modan Singh v Sham Kaur*.[21]

Clearly, the ruling in *Jai Singh* will be of immense help to immigration officers of foreign missions/consulates/embassies in India in weeding out suspect adoption immigration applications lodged from within the applicant's own family designed to circumvent immigration controls.

XI PROBLEMS FACED IN INTERCOUNTRY ADOPTION

This is an issue of immense significance. At present non-Hindus and foreign nationals can only be guardians of children under the Guardian and Wards Act 1890. They cannot adopt children. The child loses out by being deprived of the benefits of a valid adoption. There have been disturbing press reports about 'greedy social activists'. Sharma Vinod, in his article 'Indian child losing out in adoption mart',[22] pointed out that at the root of the problem is certain placement agencies' desire for financial gain and their propensity to extort money from childless foreigners. In the same report, it was pointed out that in practice the paperwork is complex. The system is not working because of long delays at the different levels of scrutiny.

Additionally, according to in vitro fertilisation experts in New Delhi, the number of infertile couples from foreign countries opting for in vitro fertilisation is increasing. Low-cost and hi-tech treatment in India is helping NRI couples to realise their dreams of natural parenthood. Non-resident Indian couples are reluctant to opt for adoption for two major reasons. First, religious and social factors are a major issue. Secondly, it has been highlighted

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21 AIR 1973 P&H 122.
22 *The Hindustan Times* 9 September 1997.

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that cumbersome adoption and immigration laws make it very difficult to take the child to the United Kingdom or the United States, after the adoptive child is chosen from the homeland.[23]

In a hard-hitting editorial opinion, entitled 'Maternity for hire',[24] it has been noticed that a new trend is emanating. India, after becoming a hub for medical tourism, is entering another new platform. India is emerging as a sought after destination for surrogate mothers. Desperate childless NRI couples are rushing to India to rent a womb. Anand, in Gujarat, has seen as many as 14 commercial in vitro fertilisation surrogacy cases in the last 2 years. It is a disturbing trend. A woman's womb is not a piece of real estate to be rented out. Going through such a commercial pregnancy, a woman undergoes considerable physical and psychological trauma.

This article sadly and rightly so laments:

> 'It is particularly sad because there are over 12 million orphaned children in India who need parents. And another 44 million destitute children who are denied the warmth of a family. If only people could transcend the desire to have a baby that is genetically theirs, India would be the logical place where childless couples could seek parental happiness through adoption. Research shows that parental love has less to do with biological ties and more with shared experiences, and that adoptive parents love their children as much as biological parents. But our adoption figures don't go beyond a few thousand per year. Playing spoilsport is a 115-year-old Act – the Guardians and Wards Act – which does not allow Muslims, Christians, Jews and Parsis to become a child's adoptive parents. They can only be a "guardian". Even the more liberal Hindu Adoption and Maintenance Act, 1956, does not allow non-Hindus to adopt a Hindu child. The adoption process is tedious and hemmed in by all sorts of unnecessary restrictions. It is ironical that in a country with so many children without a home, there's a long waiting list of couples wanting to adopt. We urgently need to change the laws, make the process less cumbersome and allow India to become a popular adoption destination.'

XII NEW DIMENSION: THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) AMENDMENT ACT 2006

The Ministry of Women and Child Development has of late been mandated to look after the subject matters 'Adoption' and 'Juvenile Justice (Care and Protection of Children) Act 2000' pursuant to 16 February 2006 notification of Government of India regarding reallocation of the business. Also, the Government enacted the Juvenile Justice (Care and Protection of Children)

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[23] For details see Sharma Jyoti 'How egg-citing! NRIs eye desi donors' *The Times of India* 29 August 2003.

[24] *The Times of India* (New Delhi/Chandigarh Edition) 24 February 2006.

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Act 2000 ('the JJ Act') and further amended it in the year 2006 to ensure adequate protection and rehabilitation measures for children in need of care and protection.

The Juvenile Justice (Care and Protection of Children) Amendment Act 2006 ('the JJ Amendment Act') applies to all children as well as parents irrespective of their religion and gender. All adoptable children under the category of children in need of care and protection (as defined under the JJ Act) shall be processed under this specific legislation by district courts, city civil courts, family courts and other appropriate courts as may be defined under State Juvenile Justice Rules to be framed based on the above Act. The legislation, being child-focused legislation, guarantees all rights to an adopted child and it is also recognised under international obligations by all Hague member countries.

On implementation of the JJ Amendment Act 2006 and its State Rules, all cases of orphan, abandoned and surrendered children have to be processed under the Act so that unrelated children have adequate safeguards in their placement.

In an editorial article 'Adopting New Guidelines',[25] it has been analysed:

> 'In a bid to put adoptive parents of all faiths on the same platform, amendments to the Juvenile Justice (Care and Protection of Children) Act (JJ) have now been notified and guidelines framed. One of the most important amendments to the Act made clear that adoption under this legislation would allow an adopted child to become the "legitimate child of his adoptive parents, with the rights, privileges and responsibilities attached to the relationship". This is a significant move considering till now, adoption by non-Hindus has been guided by the Guardian and Wards Act (Gawa), 1890, which gives them the status of "guardians", a relationship that becomes void when the child entered adulthood. Conversely, it doesn't give the "ward" legal rights due to a biological child.'

In effect, non-Hindu parents can now claim full parenthood instead of just the interim 'guardian' status that they were allowed until recently. Prior to the enactment of the JJ Act 2006, only Hindu couples who adopted children could claim to be parents. Non-Hindus were just guardians to their adopted children. This, of course, also led to children being denied rights to inherited property and besides also creating day-to-day problems for parents at the time of school admissions and such like matters.

Another major upshot of the JJ Act 2006 is that intercountry adoptions are permissible under the same. The point to be noted is how the embassies and foreign missions in India would view adoption orders granted to Hindus and non-Hindus as well as foreigners. This is the moot point.

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[25] *The Hindustan Times* 19 November 2007.

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All opinions are not positive. The JJ Act has drawn some amount of criticism as well. In an article entitled 'Time to unscramble the adoption tangle',[26] Swati Deshpande has come out with some very valid criticisms as follows:

> 'Activists emphasise that there is no clarity on the provisions for adoption in the Juvenile Justice (Care and Protection) Act. "There is a lot of confusion on the issue of adoption under the Juvenile Justice (JJ) Act," said child-rights activist Sangeeta Punalekar. She noted that adoption was provided for under the JJ Act in 2000 itself to aid the rehabilitation and social integration of orphaned, abandoned or neglected children. "But even then it met with hardly any response," Punalekar said. To date, there are no known cases of adoption under the JJ Act in Maharashtra, though there have been a few cases in Delhi. Punalekar said the law stipulates that instead of getting the approval of higher courts – like district courts and high courts (in the case of inter-country adoption) – adoption should be done locally by child welfare committees and juvenile justice boards. However, she and other activists said there seem to be no rules or infrastructure in place nor is there clarity on related issues, like if the law will apply to Muslims. As it stands, the amendment to the JJ Act defines adoption as the "process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all the rights, privileges and responsibilities attached to the relationship". In other words, the Act would apply to all Indians . . . It is not clear how this law would override the provisions of other personal laws. The Muslim personal law, for instance, does not permit adoption, he noted. The government can't try and plug loopholes in one Act by amending another . . .'

Surrogacy has indeed arrived in India. In our day-to-day practice, we are confronted with queries from foreign lawyers as to the legal position relating to surrogacy arrangements. Here, it would be pertinent to briefly elaborate as to the legal position in this regard.

XIII THE LAW APPLICABLE IN INDIA AS TO THE LEGAL PARENTAGE OF CHILDREN BORN IN THAT JURISDICTION AS A RESULT OF A SURROGACY ARRANGEMENT

In India at the moment, we do not have any legislation on legal parentage as a result of surrogacy arrangements. At the moment, in India we have the Registration of the Births and Deaths Act 1969 which does not contain any provision regarding parentage as a result of a surrogacy arrangement. The said enactment laid down by the Parliament of India came into force on 31 May 1969. Surrogacy parentage was not an issue at the time the said legislation came into being. Neither have there been any amendments or additions with regard to any surrogacy issues in the said enactment pertaining to the registration of births and deaths in the Indian jurisdiction.

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[26] *The Times of India* 20 November 2007.

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As far as legislation on surrogacy is concerned draft surrogacy proposals were going through the Parliament at some stage. The current position in this regard is not very clear. Guidelines dealing with Artificial Reproductive Technologies (ART) have been prepared by an expert committee of the Indian Council of Medical Research in association with the National Academy of Medical Sciences (India), which could in the future become a part of the final draft of a proposed legislation. The preface to the Guidelines as circulated in March 2004 specifically points out that '[t]here are no guidelines for the practice of ART, accreditation of infertility clinics and supervision of their performance in India. This document aims to fill this lacuna and also provide a means of maintaining a national registry of ART clinics in India'.

For this purpose the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India have been framed. These Guidelines provide a foundation for the proposed legislation relating to this field of law. These Guidelines state that the surrogate mother is under no circumstances considered to be the legal mother.

Paragraph 3.5.4 of the said Guidelines provides that in cases where the surrogate mother is biologically unrelated to the child, the birth certificate shall have the name of the genetic parents. Therefore, if the genetic parents are the commissioning parents, who have contributed their genetic material for the unborn child, they shall be automatically recorded as the legal parents, if DNA tests prove the same. No adoption procedure needs to be followed by the genetic parents under such circumstances. Paragraph 3.5.4 of the said Guidelines reads as follows:

> 'A surrogate mother carrying a child biologically unrelated to her must register as a patient in her own name. While registering she must mention that she is a surrogate mother and provide all the necessary information about the genetic parents such as names, addresses, etc. She must not use/register in the name of the person for whom she is carrying the child, as this would pose legal issues, particularly in the untoward event of maternal death (in whose names will the hospital certify this death?). The birth certificate shall be in the name of the genetic parents. The clinic, however, must also provide a certificate to the genetic parents giving the name and address of the surrogate mother. All the expenses of the surrogate mother during the period of pregnancy and post-natal care relating to pregnancy should be borne by the couple seeking surrogacy. The surrogate mother would also be entitled to a monetary compensation from the couple for agreeing to act as a surrogate; the exact value of this compensation should be decided by discussion between the couple and the proposed surrogate mother. An oocyte donor can act as a surrogate mother.'

However, in terms of the Guidelines mentioned above, in cases where the surrogate mother also donates her egg, the commissioning parents/infertile couple will have to legally adopt the child, and it is only after this legal procedure has been complied with that the infertile couple becomes the legal parents of the child born through such an arrangement. This fact will also have to be recorded in the birth certificate issued to such a child.

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Furthermore, where the genetic material is supplied by third party donors, in such cases the birth certificate issued to the child will initially have the names of the genetic parents. Here, it would become mandatory for the infertile couple to legally adopt the child so born, before they can be referred to as the legal parents of such a child.

In order to avoid conflicts at a later stage, the said Guidelines categorically state that once the child has been legally adopted by the infertile couple, then the third party donor and the surrogate mother shall relinquish all parental rights connected with the child. Paragraph 3.5.5 of the Guidelines mandates as follows:

> 'A third-party donor and a surrogate mother must relinquish in writing all parental rights concerning the offspring and vice versa.'

However, it is submitted that the law relating to surrogacy in India is in its prenatal stage and unfortunately at the moment there is no legislation in existence prescribing a code of practice governing the moral, ethical and legal aspects of such surrogate arrangements. Hence, the Guidelines only have persuasive value at this moment in time.

XIV CONFLICT OF LAWS IN INTERCOUNTRY ADOPTIONS

During our time as counsel dealing with adoption applications at the British High Commission and other major embassies at New Delhi, we have quite frequently encountered a conflict of laws situation where NRIs, who have been residing abroad for several decades, adopt children from within their own family. The preference for adoption by immediate blood relatives is a common South Asian phenomenon.

The unsuspecting adoptive parents duly comply with the requirements of HAMA 1956 for taking the child in adoption. The adoption deed is proudly presented to the immigration authorities; and this is where the trouble begins. The United Kingdom immigration authorities completely disregard the Indian adoption deed, and they are legally justified in doing so under the Adoption (Designation of Overseas Adoptions) Order 1973.[27]

Under the 1973 Order, if a child has been legally adopted from a country whose adoption orders are recognised as valid under United kingdom law, i e from a 'designated' country, then the parents may apply for the child to join them in the United Kingdom as their adopted child.

If the child has not been legally adopted from a 'designated' country or the adoption is from a country whose adoption orders are not recognised as valid

[27] SI 1973/19.

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in United Kingdom law, i e the child is from a 'non-designated' country, entry clearance will have to be obtained for the child to travel to the United Kingdom for adoption through the English courts. India is specified as a 'non-designated' country under the 1973 Order.

The adoptive parents, then, are confronted with a refusal by the immigration authorities on the ground that the adoption deed is not valid under the 1973 Order, although there has been due compliance with the provisions of HAMA 1956. The only avenues available to the parents are to challenge the refusal by way of appeal or to lodge a fresh application.

The real dilemma in such a situation is to set back the clock to satisfy the requirements of British immigration law. How can NRI adoptive couple obtain a guardianship order from a local court once a formal irrevocable adoption process has taken place? Certainly, a guardianship order is on no better footing than a valid adoption under HAMA 1956. This is a proposition which, sooner or later, will have to be tested by the British courts.

Rather, it has been done so by the Court of Appeal in a judgment, upholding a judgment under the provisions of the HAMA, 1956. But, the central plank to uphold the validity of such an adoption is on the basis of right to family life. This judgment of immense significance has been analysed by our co-author Rambert De Mello in our book *Acting for Non-resident Indian Clients*.[28] His analysis is as follows:

> 'Recently, the Court held that the bias against Indian adoption custom was wrong and that it was a breach of the right to family life and discriminatory to refuse an adopted child entry clearance to the United Kingdom by giving less weight to an adoption effected by customary law in India and which was recognised as valid there, on the ground that it was not a recognised practice in English law: *Singh v ECO Delhi.*'

Singh[29] can be summarised as follows:

(1) The main principle arising for consideration in *Singh* was whether an adoption which does not meet the requirements of relevant international instruments should invariably be a reason for according little weight to it in determining whether family life exists or not. The adoption of the boy in the case of *Singh* was valid in India but not recognised in the United Kingdom.

(2) The court concluded that such a rigid and formulaic approach is not justified and that the failure to satisfy the requirement of relevant international instruments will vary from case to case, and that of considerable importance will be the nature of the departure from the provisions of a relevant instrument. If the departure is one of substance

[28] (Jordan Publishing Ltd, 2004) 221–222.
[29] [2005] QB 608; [2004] EWCA Civ 1075.

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rather than procedure and goes to the heart of the safeguards that the instrument is intended to promote, then it may well be appropriate to give the adoption order little weight.[30]

(3) In this case much might be said of the fact that the children had not been adopted and that their biological link with their natural parents was fluid, continuing and developing.

(4) The principles enunciated in *Singh* which are relevant in determining whether family life exists between an adopted child and adoptive parents are equally applicable in a situation which needs to be resolved whether there is family life existing between a child and his natural parents who are separated from each other.

(5) The best interests of the child will be relevant and may well be determinative at the stage at which the court has to decide the extent to which respect should be given to family life or whether interference with family life is justified under Art 8.2.[31]

(6) The potential for development of family life is relevant in determining whether family life already exists and this is not confined to cases involving children and their natural parents; unless some degree of family life is already established, the claim to family life will fail and will not be saved by the fact that at some time in the future it could flower into a full-blown family life or that the applicants have a genuine wish to bring this about.[32]

(7) The fact is that many adults and children, whether through choice or circumstance, live in families more or less removed from what until comparatively recently would have been recognised as the typical nuclear family – the Convention is a living instrument.[33] The law must adapt itself to these realities.[34] There is no bright line test that the law can set. The infinite variety of the human condition precludes arbitrary defining.

(8) The existence or non-existence of family life is a question of fact depending upon the real existence in practice of close personal ties – a close personal relationship which has sufficient constancy and substance to create de facto family ties – the parents' cohabitation with the child will often be highly significant but this is not decisive.[35]

(9) The fact that the parents do not see their children frequently is not fatal to establishing family life; one must be cautious before setting too high a

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30 Ibid para [33].
31 Ibid para [34] per Dyson LJ, and para [68] per Munby J.
32 Ibid para [38].
33 Ibid paras [63]–[64] per Munby J.
34 Ibid para [65].
35 Ibid para [79].

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> benchmark for the existence of family life certainly where there is the constancy and commitment which a parent has shown towards his child.[36]

It is strange, that this judgment has not got due recognition in the academic and the professional arena. This judgment should be publicised vigorously, so that prospective adoptive parents residing overseas can take due benefit of this path-breaking judgment. No doubt, this ruling is indeed laudable for building the edifice of the right to family life to recognise an adoption made in India under the provisions of HAMA 1956, which is otherwise in direct conflict with the provisions of British immigration law as contained in HC 395.

Likewise, the American Embassy and numerous European embassies at New Delhi also outright refuse to accept the adoption deeds, mentioned above, under the provisions of HAMA 1956. Hence, only guardianship orders are acceptable. These can be obtained only by lodging guardianship petitions under the provisions of the Hindu Minority and Guardianship Act 1956 in the court of the guardian judge, in whose jurisdiction the minor child is residing. It is like a full blown trial. It is very difficult to obtain guardianship orders. These petitions have to be supported by exhaustive documentation as to the background and standing of the proposed overseas adoptive parents. Sometimes, it can be a time-consuming exercise, and it is very difficult in such a situation for the foreign couple to spend long periods of time in India awaiting custody orders. With these custody orders, the adoption ultimately takes place in the foreign country of habitual residence of the adoptive parents. In India, we have no exclusive law of adoption for foreigners or NRIs.

Furthermore, adoptions within the family fold are not encouraged, while adoption applications by foreigners seeking to adopt children from orphanages and welfare homes are likely to receive positive treatment.

The noose of British immigration law has been further tightened by changes to HC 395, which were given effect by HC 538, and came into force on 1 April 2003. Reference in this regard is drawn to the observations of Richard McKee, a prominent Immigration Appeals Adjudicator:[37]

> 'Now HC 538 has not only lifted the restriction on third party support, but it has introduced a provision for de facto adoption. For all adopted children coming from countries whose adoption orders (if they have such things) are not recognised in the UK, the adoptive parents must have been living abroad, having assumed the role of the child's parents, for at least 18 months, of which the last 12 must have been spent living together with the child. This is to show a genuine transfer of parental responsibility. The expectation that the adoptive parents be married has now been dropped.'

The most worrying issue about these changes is that it is next to impossible for NRI couples to come and spend one complete calendar year with the adoptive

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[36] Ibid para [90].

[37] For details see Richard McKee 'New immigration rules' [2003] 17.2 IA & NL 127–129.

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child in India. Certainly, no United Kingdom employer or any other overseas employer would grant such long leave to any employee. However, more positively, senior level expatriates posted in India could possibly comply with the time requirement stipulated by the newly introduced provisions of HC 538.

Furthermore, very recently, there has been a European Court of Human Rights (ECHR) decision on the basis of a friendly settlement having very wide ramifications, which could change the entire gamut of intercountry adoptions from India. This case was the fallout of the immigration officer's denial to permit an Indian couple to bring their adopted child to the United Kingdom, which resulted in the Government of the United Kingdom paying costs and damages totalling more than £42,000 before the ECHR. This was a friendly settlement in the case of *Singh and Others v The United Kingdom*.[38] The said application was lodged before the ECHR on 24 May 2000 and admitted for hearing thereafter, upon preliminary submissions and arguments.

Earlier, on 11 March 1997, the immigration authorities had refused permission to the adoptive parents to bring the child into the United Kingdom. This was because adoptions from India are not recognised for the purposes of entry clearance. Thus, the child fell out of the rules for entry clearance as he was not adopted because of any inability on the part of his parents to care for him. But, there was a genuine transfer of parental responsibility. Incidentally, this adoption application was lodged by us at the British High Commission, New Delhi. This judgment has not received much publicity and academic analysis at this moment in time. This case was reported in the London *Times* on 21 June 2006. Whether this judgment will be followed as a precedent in the time to come or effect any changes in law or otherwise by the British Government remains to be seen.

XV CONCLUSION

There has been a growing demand for a general law of adoption enabling any person, irrespective of his religion, race or caste, to adopt a child. There is now a clear case for overhauling the existing adoption law in India.

As far as the mechanics of intercountry adoption are concerned, all the major embassies in India are more than stringent in dealing with adoption applications. The refusal rates are very high. There is no room at all for compassion. The hurdles are almost insurmountable, causing a lot of hardship to childless NRI couples.

The question that now remains to be answered is as to how successful the revised 2006 Guidelines discussed in this article have been. Sadly, the answer

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[38] Application number 60148/00, disposed of on 8 June 2006.

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can be found in a very recent Andhra Pradesh High Court judgment, *John Clements v All Concerned (AP)*.[39] The court lamented:[40]

> '59. Para 2.14 of the guidelines envisages that no application by foreigner for taking a child in adoption should be entertained directly by any social child welfare agency in India working in the areas of inter-country adoption or by any institution or centre or Home to which children are committed by the Juvenile Court. The very next paragraph says "the original application along with original documents as prescribed by the Supreme Court of India would be forwarded by the foreign enlisted agency to a recognised placement agency in India".
>
> 60. Taking advantage of the inconsistency in the Guidelines and ignoring the judgment of the Supreme Court the foreign enlisted agencies started directly approaching the placement agencies in India and are trying to take the Indian children in adoption with their connivance and active support of VCA and CARA officials, who are simply putting their seal of approval on these adoptions without bothering whether the procedure prescribed for intercountry adoption of a child is followed or not. With the result, trafficking in female children is going on unabated in violation of the guidelines given by the Supreme Court.
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> 61. After the present scam came to light, the Government of Andhra Pradesh issued the Andhra Pradesh Orphanages and other Charitable Homes (Supervision and Control) Rules in GO Ms No 16, dated 18 April 2001. In para 11 (VII) of the said GO it is stated that "relinquishment" of a child by "biological parents" on family grounds of poverty, number of children, or unwanted girl child will not be permitted. Such children should not be admitted into Homes or "Orphanages" and, it admitted, the licence and recognition of the Home or Orphanage shall be cancelled or withdrawn.'

Therefore, it can be concluded that, although there is no doubt that CARA is doing good work in its policing role, the negative media feedback has definitely not escaped judicial notice.

The finalisation of the 2007 Guidelines is eagerly awaited. Hopefully, the consolidated comprehensive Guidelines shall carve out clear-cut and precise uniformity in areas and legal issues addressed in this article and not provide piecemeal reforms and solutions.

While the Government has been grappling on an ad hoc basis with lacunae arising out of the Guidelines which have been revised from time to time, in the interim, new issues have cropped up. First, there are legal issues connected with surrogacy. There is no legislation in India pertaining to surrogacy as yet. Secondly, no practical tangible useful benefits are forthcoming at all to prospective NRI adoptive parents and persons of foreign origin arising out of India's signing of the Hague Convention on Intercountry Adoptions. Thirdly, the proposed revised Guidelines of 2007 should also categorically attempt to provide a clear-cut direction in no uncertain terms to all major embassies, high

[39] (2003) 2 Hindu Law Reporter 331.
[40] Ibid 331, paras 59–61.

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commissions and consulates in India that all adoptions under the provisions of the JJ Amendment Act 2006 by NRIs, persons of Indian origin and foreigners as well, should be duly acknowledged and their validity accepted as well to facilitate movement of the adopted children in the country of the habitual residence of the adopting parents. This of course has to be hedged with safeguards and compliance with due process of law, both in India and abroad. But, the core issue is the recognition of adoption orders handed down by the designated courts in India under the provisions of the above-mentioned amended provisions of the JJ Act of 2006. It is very important that these three new major issues also receive the due attention they warrant in the present day and age.

Lastly, the authors' experience reveals that guardian judges, especially in small towns and cities in India, who deal with such cases are not particularly conversant with the interpretation of the intercountry adoption Guidelines discussed in this chapter. Therefore, in sum and substance it can be stated that a uniform but strict procedure must be evolved which can be easily followed and adhered to in both letter and spirit. No doubt procedural hurdles and legal formalities are necessary to prevent abuse of the process but separate and intricate adoption and immigration procedures often leave foreign adopting parents in confusion over differing interpretations. Therefore, if the adoption process and procedures are overhauled so that they conform to a uniform pattern, it may make the process more convenient, less cumbersome and easier to follow. All of this would be in the best interests of the child, which is undoubtedly the paramount consideration, and at the same time would allow both the letter and spirit of law to be adhered to. Considered changes are thus urgently required in the field of intercountry adoptions from India. The time has also come to enact legislation dealing with legal parentage issues of children born out of surrogacy arrangements.

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ALTERNATIVE DISPUTE RESOLUTION IN INDIAN FAMILY LAW – REALITIES, PRACTICALITIES AND NECESSITIES

Anil Malhotra and Ranjit Malhotra[*]

Résumé

En Indes, l'accent est mis de plus en plus sur la nécessité d'instaurer des mesures contraignantes visant la tentative de réconciliation et l'on y assiste au développement d'une jurisprudence marquée en faveur du règlement amiable des conflits comme alternative aux débats conflictuels devant les tribunaux de la famille. Cependant, avec sa population de 1,1 milliard de personnes, le pays comprend plus de 30 millions d'Indiens non-résidents éparpillés dans 180 pays. La résolution des conflits matrimoniaux de ces citoyens d'origine indienne est souvent problématique, dans la mesure où le droit indien ne reconnaît pas l'échec irrémédiable du mariage comme motif de divorce. C'est la raison pour laquelle les jugements de divorce qui ont été prononcés à l'étranger sans avoir été précédés d'une tentative obligatoire de réconciliation, ne trouvent la faveur ni de la population ni des tribunaux en Inde. La loi devrait donc reconnaître que l'échec du mariage constitue en soi un motif valable de divorce, mais seulement lorsque les époux en font conjointement la demande. Ceci aura un double effet bénéfique. En premier lieu, les conjoints qui éprouvent des différences irréconciliables et qui désirent se séparer à l'amiable, auront une base légale pour le faire et ils éviteront ainsi les longs délais d'une procédure basée sur des motifs inventés de toute pièce. Deuxièmement, cette option pourrait entraîner une diminution des demandes de divorce à l'étranger. Le législateur indien devrait s'attaquer à cette question et proposer au niveau national une législation en matières familiales pour les Indiens non-résidents. C'est désormais devenu un besoin social urgent que d'adopter une loi sur les modes alternatifs de règlement des conflits et de mettre en place les services nécessaires pour permettre la dissolution, en Inde, des mariages célébrés à l'extérieur du pays. À défaut de pouvoir être dissous, ces mariages entraînent des problèmes d'enlèvement d'enfants ainsi que des conflits autour de l'obligation alimentaire et du partage des biens. Ces mariages boiteux doivent pouvoir bénéficier de services d'aide à la réconciliation afin d'éviter qu'ils ne soient dissous à l'étranger sur des bases qui entrent ensuite en conflit avec le droit personnel des parties en Inde. La priorité du législateur devrait être de créer, d'harmoniser et d'équilibrer la structure sociale des Indiens, résidents et non-résidents et des personnes avec lesquelles il ont créé des liens familiaux à l'extérieur du pays. Les

* Anil Malhotra LLM (London), Advocate;
Ranjit Malhotra LLM (London), Advocate.

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modes alternatifs de règlement des conflits devraient être développés de façon considérable pour répondre à la situation de ces mariages boiteux.

I INTRODUCTION: THE INDIAN BACKGROUND

The Constitution of India enacted on the 26 November 1949 resolved to constitute India as a Union of States and a sovereign, socialist, secular, democratic republic. Today, a population of about 1.1 billion Indians live in 28 states and 7 union territories within India besides about 25 million Indians who reside in foreign jurisdictions and are called non-resident Indians. Within the territory of India spread over an area of 3.28 million sq kms, the large Indian population comprises of multicultural societies professing and practising different religions and speaking different local languages coexisting in harmony in one of the largest democracies in the world.

The Indian Parliament, at the helm of affairs, legislates on central subjects in the union and concurrent lists and state legislatures enact laws pertaining to state subjects as per the state and concurrent lists with regard to the subjects enumerated in the Constitution of India. Likewise, pertaining to the judiciary, under art 214 of the Indian Constitution there shall be a High Court for each state and under art 124 there shall be a Supreme Court of India. Under art 141 of the Constitution, the law declared by the Supreme Court shall be binding on all courts within the territory of India. However, the Supreme Court may not be bound by its own earlier views and can render new decisions.

Part III of the Constitution of India secures 'Fundamental Rights' to its citizens which can be enforced directly in the respective High Courts of the states or directly in the Supreme Court of India by issue of prerogative writs under arts 226 and 32 respectively of the Constitution of India. Under the constitutional scheme, amongst others, 'Freedom of Religion' and the right to freely profess, practise and propagate it is sacrosanct and is thus enforceable by a prerogative writ issued by the superior courts.

Simultaneously, Part IV of the Indian Constitution lays down 'Directive Principles of State Policy' which are not enforceable by any court but are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles while making laws. Under art 44 of the Constitution in this Part, the state shall endeavour to secure a uniform civil code for citizens throughout the territory of India. However, realistically speaking, to date a uniform civil code remains an aspiration which India has yet to achieve and enact.

It is seen that the Indian legal system has grown and evolved with the lives and aspirations of its people and its varied cultures, religious practices and personal laws. The Indian legal system is founded and fortified by age-old concepts and precepts of justice, equity and good conscience, which are, indeed, the hallmarks of the common law.

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The Constitution of India is the fundamental authority of law in India. The Constitution gives due recognition to statutes, case-law and customary law consistent with its dispensations. A single unified judicial system is the unique feature of the Indian judiciary system. The Supreme Court at the apex of the entire judicial system is followed by High Courts in each state or group of states. Under the High Courts exists a hierarchy of Civil and Criminal Subordinate Courts. Panchayat Courts also function in some states under various names like Nyaya Panchayat, Panchayat Adalat, Gram Kachheri, etc to decide civil and criminal disputes of petty and local nature. These are grassroots level petty courts meant to decide small disputes at the lowest levels.

II EXISTING FAMILY LAW LEGISLATION PREVAILING IN INDIA

India is a land of diversities with several religions. The oldest part of the Indian legal system is the personal laws governing Hindus and Muslims. The Hindu personal law has undergone changes by a continuous process of codification. The process of change in society has brought changes in law reflecting the changed social conditions and attempts the solution of social problems by new methods in the light of experience of legislation in other countries of the world. The Muslim personal law has been comparatively left untouched by legislation.

The Indian legal system is basically a common law system. The Indian Parliament has enacted the following family laws which are applicable to the religious communities defined in the respective enactments themselves. A brief description of each of these separate enactments is given below.

(a) The main marriage law legislation in India applicable to the majority population constituted of Hindus is known as The Hindu Marriage Act, 1955, which is an Act to amend and codify the law relating to marriage among Hindus. Ceremonial marriage is essential under this Act and registration is optional. It applies to any person who is a Hindu, Buddhist, Jaina or Sikh by religion and to any other person who is not a Muslim, Christian, Parsi or Jew by religion. The Act also applies to Hindus resident outside the territory of India. Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment. Likewise, in other personal law matters, Hindus are governed by the Hindu Succession Act, 1956, which is an Act to amend and codify the law relating to intestate succession among Hindus. The Hindu Minority and Guardianship Act, 1956 is an Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus and the Hindu Adoptions and Maintenance Act, 1956 is an Act to amend and codify the law relating to adoptions and maintenance among Hindus.

It may be pertinent to point out that the Indian Succession Act, 1925, is an Act to consolidate the law applicable to intestate and testamentary succession in India unless parties opt and choose to be governed by their

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respective codified law otherwise applicable to them. In respect of issues relating to guardianship, the Guardian and Wards Act, 1890 would apply to non-Hindus. Interestingly, s 125 of the Code of Criminal Procedure 1973 provides that, irrespective of religion, any person belonging to any religion can approach a magistrate seeking maintenance. Therefore, apart from personal family law legislation, both Hindus and non-Hindus have an independent right of maintenance under the general law of the land, if he or she is otherwise entitled to maintenance under this Code.

(b) The Indian Parliament also enacted the Special Marriage Act, 1954, as an Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorces under this Act. This enactment of solemnising marriage by registration is resorted to by Hindus, non-Hindus and foreigners marrying in India who opt out of the ceremonial marriage under their respective personal laws. Registration is compulsory under this enactment. Divorce can also be obtained by non-Hindus under this Act. This legislation governs people of all religions and communities in India, irrespective of their personal faith. Likewise, under the Foreign Marriage Act, 1969, a person has only to be a citizen of India to have a marriage solemnised under this Act outside the territorial limits of India.

(c) The Parsi Marriage and Divorce Act, 1936 as amended in 1988, is an Act to amend the law relating to marriage and divorce among the Parsis in India.

(d) The Indian Christian Marriage Act, 1872, was enacted as an Act to consolidate and amend the law relating to the solemnisation of the marriages of Christians in India and the Divorce Act, 1869, as amended in 2001, is an Act to amend the law relating to divorce and matrimonial causes relating to Christians in India.

(e) The Muslim Personal Law (Shariat) Application Act, 1937, the Dissolution of Muslim Marriages Act, 1939, the Muslim Women (Protection of Rights on Divorce) Act, 1986 and the Muslim Women (Protection of Rights on Divorce) Rules, 1986, apply to Muslims living in India.

For enforcement and adjudication of all matrimonial and other related disputes of any person in any of the different religious or non-religious communities under the respective legislation mentioned above, the designated judicial forum or court where such petition is to be lodged is prescribed in the respective enactments themselves. There is an organised system of designated civil and criminal judicial courts within every state in India which works under the overall jurisdiction of the respective High Court in the state. It is in the hierarchy of these courts that all family and matrimonial causes are lodged and decided by the aggrieved party. In addition, the Indian Parliament has enacted the Family Courts Act, 1984 to provide for the establishment of Family Courts

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with a view to promote conciliation in and to secure speedy settlement of disputes relating to marriage and family affairs. Despite the existence of an organised, well regulated and established hierarchy of judicial courts in India, there are still unrecognised parallel community and religious courts in existence whose interference has been deprecated by the judicial courts since such unauthorised and unwarranted bodies work without the authority of law and are not part of the judicial system.

III BACKGROUND NOTE TO ALTERNATIVE DISPUTE RESOLUTION IN INDIA

It is believed that the development of the country can be also understood from the capability of its legal system in rendering effective justice. The practice of amicable resolution of disputes can be traced back to historic times, when the villages' disputes were resolved between members of a particular relationship or occupation or between members of a particular locality. In rural India, the 'panchayats' (assembly of elders and respected inhabitants of the village) decided almost all disputes between residents of the village, while disputes between members of a clan continued to be decided by the elders of the clan. These methods of amicable dispute resolution were recognised methods of administration of justice and not just an 'alternative' to the formal justice system formed by the sovereigns, feudal lords or the adalat systems initiated by the British and the formal court system. The two systems continued to function analogous to each other. The process followed by the traditional institutions was that of arbitration and conciliation, depending on the character of dispute.

In India there is a massive legal system comprising nearly 15,000 courts across the country. It is the constitutional obligation of the judiciary to exercise its jurisdiction to reaffirm the faith of the people in the judicial set up. Therefore, evolution of new juristic principles for dispute resolution is not only important but imperative. In India the need to evolve alternative mechanisms simultaneously with the revival and strengthening of traditional systems of dispute resolution has been reiterated in reports of expert bodies.[1] Each of these reports saw the process of improving access to justice through legal aid mechanisms and alternative dispute resolution (ADR) as a part of the systematic reform of the institution of the judiciary coupled with substantive reforms of laws and processes.

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1 Report of the Committee on Legal Aid (1971), Report of the Expert Committee on Legal Aid: Processual Justice to the People (Government of India, Ministry of Law, Justice and Company Affairs, 1973), Report on National Juridicare Equal Justice – Social Justice (Ministry of Law, Justice and Company Affairs, 1977).

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IV EXISTING STATUTORY PROVISIONS FOR ADR IN LAW IN INDIA

The sensitivity of the legislature towards providing speedy and efficacious justice in India is mainly reflected in several enactments which are enumerated as follows:

- arbitration under the Arbitration and Conciliation Act, 1996;
- settlement under Order XXXIIA of the Indian Code of Civil Procedure, 1908;
- the incorporation[2] of s 89 in the traditional Civil Procedure Code (CPC) read with Order X Rules IA, IB, and IC for settlement of disputes outside court;
- the establishment of Lok Adalat under the Legal Services Authority Act, 1987 looks to mediation, conciliation and informal settlement of disputes in litigation;
- reconciliation under s 23(2) and (3) of the Hindu Marriage Act, 1955 as also under s 34(3) of the Special Marriage Act, 1954;
- duty of the Family Court to make efforts for settlement under the Family Courts Act, 1984.

(a) The Constitutional Mandate

Article 21 of the Constitution of India declares in a mandatory tone that no person shall be deprived of his life or his personal liberty except according to procedure established by law. The words 'life and liberty' are not to be read narrowly in the sense monotonously dictated by dictionaries; they are organic terms which are to be construed meaningfully.

The right to speedy trial has been rightly held to be a part of the right to life or personal liberty by the Supreme Court of India.[3] The Supreme Court has allowed art 21 to stretch its arms as wide as it legitimately can.[4] The reason is very simple. This liberal interpretation of art 21 is to redress that mental agony, expense and strain which a person proceeded against in litigation has to undergo and which, coupled with delay, may result in impairing the capability or ability of the accused to defend himself effectively. Thus, the Supreme Court

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2 With effect from the 2002 amendment of the CPC.

3 *Hussainara Khatoon (1) v Home Secretary, State of Bihar* (1980) 1 SCC 81.

4 Article 21 is a Fundamental Right that can be directly enforced in the Supreme Court under art 32 of the Constitution of India. Fundamental Rights, as incorporated in Part III of the Constitution, are different from Constitutional Rights that cannot be directly enforced under art 32. All Fundamental Rights are Constitutional Rights but not vice-versa.

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has held the right to speedy trial a manifestation of fair, just and reasonable procedure enshrined in art 21. A speedy trial encompasses within its sweep all its stages including investigation, inquiry, trial, appeal, revision and re-trial. In other words, everything commencing with an accusation and expiring with the final verdict falls within its ambit. The same has got recognition from the 'legislature' as well in the form of the introduction of 'Alternative Dispute Resolution Mechanism' (ADRM) through various statutes.[5]

(b) The Indian Arbitration and Conciliation Act, 1996

The above is a generalised list of statutory enactments which govern the arena of Indian dispute resolution by finding expression in different words under separate laws. Arbitration generally is now a prevalent practice in the Indian civil jurisdiction. Due to mounting arrears of cases in courts in India, there was a dire need for effective means of alternative dispute resolution. India's first enactment on arbitration was the Arbitration Act, 1940. Other supporting legislation in existence was the Arbitration [Protocol and Convention] Act of 1937 and the Foreign Awards Act of 1961. Arbitration under these laws was never effective and led to further litigation as a result of rampant challenge of the awards rendered under these laws. The Indian legislature thus enacted the existing current Arbitration and Conciliation Act, 1996 to make arbitration, both domestic and international, more effective in India. The Act is based on the UNCITRAL Model Law (as recommended by the UN General Assembly) and facilitates international commercial arbitration as well as domestic arbitration and conciliation. Under the above 1996 Act, an arbitral award can be challenged only in the manner prescribed and on limited grounds. The 1996 Act also restricts court intervention in arbitration proceedings to minimal interference. India is party to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. As the name of the Act suggests, it also covers conciliation, which is a form of mediation. Accordingly, arbitration is a popular mode of dispute resolution in civil disputes and commercial agreements invariably contain an arbitration clause.

(c) Provisions for ADR under the Code of Civil Procedure, 1908

The Code of Civil Procedure, 1908 (CPC), as amended from time to time is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature in India. All litigation of a civil nature in India is essentially governed by the substantive provisions of law, contained in the various sections of the CPC and the corresponding implementing provisions are contained in various orders and rules of the CPC. There are three substantive and procedural provisions contained in the CPC which provide for settlement of disputes outside the court. These can be identified briefly as the following before quoting the details of the respective provisions:

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[5] See 'The Culture of ADR in India by Praveen Dalal' available at: www. odr. info/ THE%20CULTURE%20OF%20ADR%20IN%20INDIA.doc.

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- Section 89 of the Code of Civil Procedure: Settlement of disputes outside the Court;
- Order X of the Code of Civil Procedure, 1908: Examination of Parties by the Court; and
- Order XXXIIA[6] of the Code of Civil Procedure, 1908: Suits Relating to Matters Concerning the Family.

It may now be useful to quote the details of all the three provisions of the CPC mentioned above. They are extracted hereunder in the order given above.

(i) Section 89 of the Code of Civil Procedure: Settlement of disputes outside the Court[7]

With a view to implementing the 129th Report of the Law Commission of India, it was made obligatory for courts to refer disputes after the issues were framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat (a settlement court). It was felt that only after the parties failed to get their disputes settled through any one of the alternate dispute resolution methods should the litigation proceed further in the court in which it was filed. Accordingly, s 89 of the CPC reads as follows:

> **'89. Settlement of disputes outside the Court** – (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for–
>
> (a) arbitration;
> (b) conciliation;
> (c) judicial settlement including settlement through Lok Adalat; or
> (d) mediation.
>
> (2) Where a dispute had been referred–
>
> (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;
> (b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

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6 Order XXXIIA inserted by s 80 of Act No 104 of 1976 (with effect from 1 February 1977).

7 Inserted by CPC (Amendment) Act 1999 with effect from 1 July 2002. The earlier s 89 of the CPC was repealed by the Arbitration Act, 1940. There is now an independent Arbitration and Conciliation Act, 1996. The law has been consolidated in that Act and hence the present parallel amendment was necessitated in the CPC in 1999.

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(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.'

A perusal of s 89 of the CPC quoted above clearly spells out the statutory modes, mechanisms, machinery and procedure provided and stipulated for alternative modes of dispute redressal in all matters of civil litigation in India. These substantive provisions are procedurally supported by Order X, Rules 1A, 1B and 1C as below.

(ii) Order X of the Code of Civil Procedure, 1908: Examination of Parties by the Court

Rules 1A, 1B and 1C were inserted in Order X by the CPC (Amendment) Act, 1999. This was consequential to the insertion of s 89(1) of the CPC, making it obligatory upon the courts to refer the dispute for settlement by way of arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation. A settlement can thus be made by adopting any of the said modes specified in the amended s 89. Order X of the CPC along with Rules 1, 1A, 1B and 1C read in the following terms:

'Order X: Examination of Parties by the Court.

1. Ascertainment whether allegations in pleadings are admitted or denied – At the first hearing of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by the necessary implication admitted or denied by the party against whom they are made. The court shall record such admissions and denials.

1A. Direction of the court to opt for any one mode of alternative dispute[8] resolution.

After recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties.

1B. Appearance before the conciliatory forum or authority

Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

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8 Added by Act No 46 of 1999, s 20 (with effect from 1 July 2002).

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> 1C. Appearance before the court consequent to the failure of efforts of conciliation
>
> Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the court on the date fixed by it.'

As per the Rule 1A above, the parties to the suit are given an option for settlement of the dispute outside court. When the parties have exercised their option, it shall fix the date of appearance before such forum or authority as may be opted by the parties for settlement. As per Rule 1B, the parties are required to appear before such forum or authority opted by them. Rule 1C provides for the presiding officer of the forum or authority to refer the matter again to the court in case it feels that, in the interest of justice, the forum or authority should not proceed with the matter.

(iii) Order XXXIIA[9] of the Code of Civil Procedure, 1908

It may be pertinent to point out that all proceedings under the Hindu Marriage Act and the Special Marriage Act in India are regulated by the provisions contained in the CPC. Accordingly, insofar as suits relating to matters concerning the family are concerned, by an amendment made in 1976, the Indian Parliament in its wisdom added Order XXXIIA to the Code of Civil Procedure to provide for mandatory settlement procedures in all matrimonial proceedings specifically. Order XXXIIA of the CPC which is relevant to the present context is quoted below for reference:

> **'Order XXXIIA: Suits Relating to Matters Concerning the Family:**
>
> **1. Application of the Order**
>
> (1) The provisions of this Order shall apply to suits or proceedings relating to matters concerning the family.
>
> (2) In particular, and without prejudice to the generality of the provisions of sub-rule (1), the provisions of this Order shall apply to the following suits or proceedings concerning the family, namely:–
>
> (a) a suit or proceeding for matrimonial relief, including a suit or proceeding for declaration as to the validity of a marriage or as to the matrimonial status of any person;
> (b) a suit or proceeding for a declaration as to legitimacy of any person;
> (c) a suit or proceeding in relation to the guardianship of the person or the custody of any minor or other member of the family, under a disability;
> (d) a suit or proceeding for maintenance;
> (e) a suit or proceeding as to the validity or effect of an adoption;

[9] Order XXXIIA inserted by s 80 of Act No 104 of 1976 (with effect from 1 February 1977).

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(f) a suit or proceeding, instituted by a member of the family relating to wills, intestacy and succession;
(g) a suit or proceeding relating to any other matter concerning the family in respect of which the parties are subject to their personal law.

(3) So much of this Order as relates to a matter provided for by a special law in respect of any suit or proceeding shall not apply to that suit or proceeding.

2. Proceedings to be held in camera

In every suit or proceeding to which this Order applies, the proceeding may be held in camera if the Court so desires and shall be so held if either party so desires.

3. Duty of Court to make efforts for settlement

(1) In every suit or proceeding to which this Order applies, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, in any such suit or proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the Court to adjourn the proceedings.

4. Assistance of welfare expert

In every suit or proceeding to which this Order applies, it shall be open to the Court to secure the services of such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the Court may think fit, for the purpose of assisting the Court in discharging the functions imposed by rule 3 or this Order.

5. Duty to inquire into facts

In every suit or proceeding to which this Order applies, it shall be the duty of the Court to inquire, so far is [sic] reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant.

6. "Family" – meaning of

For the purposes of this Order, each of the following shall be treated as constituting a family, namely:–

(a) (i) a man and his wife living together,
(ii) any child or children being issue or theirs; or of such man or such wife,
(iii) any child or children being maintained by such man and wife;

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(b) a man not having a wife or not living together with his wife, any child or children, being issue of his, and any child or children being maintained by him;
(c) a woman not having a husband or not living together with her husband any child or children being issue of hers, and any child or children being maintained by her;
(d) a man or woman and his or her brother, sister, ancestor or lineal descendant living with him or her; and
(e) any combination of one or more of the groups specified in clause (a), clause (b), clause (c) or clause (d) of this rule.

Explanation – For the avoidance of doubts, it is hereby declared that the provisions of rule 6 shall be without any prejudice to the concept of "family" in any personal law or in any other law for the time being in force.'

A reading of the above clearly establishes the statutory mandate laid down by the CPC to make an endeavour in the first instance to assist the parties in arriving at a settlement in a matrimonial cause in any matrimonial proceeding before a court of competent jurisdiction. Hence, in any suit or proceeding for matrimonial, ancillary or other relief in matters concerning the family, there is a separate and independent statutory provision providing for mandatory settlement proceedings. This is over and above the other statutory provisions applicable.

(d) Lok Adalat system under the Legal Services Authority Act, 1987

The Legal Services Authorities Act, 1987, as per its preamble, was enacted as:

> 'An Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organise Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity.'

Under Chapter VI of the Act, authorities may organise Lok Adalats (Settlement Courts) at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit. Generally, the Lok Adalat consists of serving or retired judicial officers and other persons of eminence, specified by the respective government in consultation with the judiciary. Over the passage of time, such Lok Adalats have become a popular mode for informal settlement of civil disputes of all nature. Written compromises, settlements and negotiated conclusions drawn up in Lok Adalats are returned to the court of competent jurisdiction for passing an appropriate judicial award, decision, decree or compromise as the case may be. Even matrimonial matters are settled in Lok Adalats and thereafter such negotiated settlements are affirmed by the respective matrimonial courts by appropriate orders or consent decrees/judgments so drawn up.

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Lok Adalat generally means 'People's Court'. India has had a long history of resolving disputes through the mediation of village elders. The system of Lok Adalats is an improvement on that and is based on Gandhian principles. This is a non-adversarial system, where mock courts (called Lok Adalats) are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically for exercising such jurisdiction as they think fit. These are usually presided by retired judges, social activists, or members of the legal profession. Lok Adalats do not have jurisdiction on matters pertaining to non-compoundable offences.

There is no court fee and no rigid procedural requirement (ie no need to follow mandatory process laid down by the CPC or Evidence Act), which makes the process very fast. Parties can directly interact with the Lok Adalat judges in vernacular language, which feature is not possible in regular courts.

Cases that are pending in regular courts can be transferred to a Lok Adalat if both the parties agree and consent to it. A case can also be transferred to a Lok Adalat if one party applies to the court in writing where the matter is pending. If the court sees some chances of settlement after giving an opportunity of being heard to the other party, the matter can be transferred to the Lok Adalat for settlement.

The focus in Lok Adalats is on compromise and settlement. When no compromise is reached, the matter goes back to the regular court. However, if a compromise is reached, an award is made by consent and is binding on the parties. It is enforced as a decree of a civil court after it is affirmed as such by the regular court. An important aspect is that the award is final and cannot be appealed, not even under art 226 because it is a judgment by consent and consent orders are not appealable.

All proceedings of a Lok Adalat are deemed to be judicial proceedings and every Lok Adalat is deemed to be a civil court under the Legal Services Authorities Act, 1987.

The Law Commission of India in its 129th Report recommended that the alternate modes of dispute redressal be obligatory on the courts after framing of issues. It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the suit shall proceed further in the court where it was filed and where the matter was pending before settlement was attempted.

(e) Settlement under Indian Family Law Statutes

Reconciliation is mandatory under the Hindu Marriage Act, 1955 (HMA) and the Special Marriage Act, 1954 (SMA). However, other Indian matrimonial statutes do not provide for it and there is therefore no statutory mandate to attempt settlement in other cases.

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(i) Reconciliation under s 23(2) and (3) of the Hindu Marriage Act

Section 23(2) of the HMA states that, before proceeding to grant any relief under it, there shall be a duty on the Court in the first instance, in every case to make every endeavour to bring about reconciliation between the parties where relief is sought on most of the fault grounds for divorce specified in s 13 of the HMA. Section 23(3) of the HMA makes a provision empowering the court on the request of parties or if the court thinks it just and proper to adjourn the proceedings for a reasonable period not exceeding 15 days to bring about reconciliation. It must be borne in mind that a Hindu marriage is a sacrament and not a contract. Even if divorce is sought by mutual consent, it is the duty of the court to attempt reconciliation in the first instance. Accordingly, Hindu law advocates rapprochement and reconciliation before dissolving a Hindu marriage. Section 23(2) and (3) of the HMA, relevant for the present context, are reproduced below:

> **'23. Decree in Proceedings –**
>
> (1) …
>
> (2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties:
>
> [Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of section 13.
>
> (3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to report.]'[10]

(ii) Section 34 of the Special Marriage Act, 1954

The provisions of s 34(2) and (3) of the SMA are pari materia to the provisions contained in s 23(2) and (3) of the HMA. Even though the marriage contracted under the SMA does not have the same sacramental sanctity as marriage solemnised under the HMA, the Indian Parliament in its wisdom has retained the provisions for reconciliation of marriages in the same terms in the SMA as they exist in the HMA. The mandatory duty on the court is thus in similar terms. For reference, s 34(2) and (3) of the SMA are quoted below:

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[10] Inserted by Act 68 of 1976, s 16 (with effect from 27 May 1976).

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> **'34. Duty of Court in passing decrees –**
>
> (1) xx xx xx xx
>
> (2) Before proceeding to grant any relief under this Act it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties:
>
> [Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (c), clause (e), clause (f), clause (g) or clause (h) of sub-section (1) of section 27 of the Special Marriage Act, 1954.
>
> (3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.]'[11]

It may be noticed that the provisions under both the statutes are almost identical and accordingly every endeavour to bring about reconciliation is mandatory.

(iii) Other pre-emptive measures under the Hindu Marriage Act, 1955

Section 14 of the HMA is another pre-emptive measure provided by the said Act, which was presumably designed with the object of preventing hasty recourse to legal proceedings by the spouses without making a real effort to reconcile and save their marriage from being dissolved. In this context, it may be useful to quote s 14(1) of the HMA which states that:

> 'Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of marriage by a decree of divorce,[12] [unless at the date of presentation of the petition one year has elapsed] since the date of marriage.'

Thus, s 14 of the HMA provides a deterrent from initiating divorce proceedings in the first year of marriage. The logic again is to advocate settlement and reconciliation between parties and avoid hasty divorces.

However, under the proviso to s 14 of the HMA, the court is conferred a discretionary power to entertain a petition before the expiry of one year, if it finds on the allegation in the affidavit filed in support of the petition that prima

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[11] Inserted by Act 68 of 1976, s 34 (with effect from 27 May 1976).
[12] Substituted by Act 68 of 1976, s 9.

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facie there is exceptional hardship to the petitioner or depravity on the part of the respondent.[13] It presupposes an application for leave of court to present a petition for divorce before the expiry of one year from the date of marriage. Hence, the statute provides discretion to the court in entertaining a petition or divorce in the first year of marriage on the ground of exceptional hardship or exceptional depravity.

Section 14(2) of the HMA further states that:

> 'In disposing of any application under this section for leave to present a petition for divorce before the [expiration of one year][14] from the date of marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the [said one year].'[15]

Section 29 of the SMA contains similar provisions with similar bars.

(iv) Petition for divorce by mutual consent

Under s 13B of the HMA and s 28 of the SMA, divorce by mutual consent is available. However, it is not granted instantly and a joint motion made by both parties in the first instance has to wait for 6 months but not longer than 18 months to be confirmed for granting a divorce by mutual consent in the second motion. It is evident that reconciliation may be out of the question in a petition for divorce by mutual consent. But there is an inbuilt opportunity for reconciliation if parties wish to avail of it. When a joint petition is presented, it is adjourned for a minimum period of 6 months. This period is to enable them to think over the matter of divorce and, if the parties want to prolong their consideration of reconciliation, they can do so for another year (total period is 18 months, within which they can move the motion of a decree of divorce). Section 28 of the SMA contains similar provisions with similar bars. The logic in these enactments is again to provide for reconciliation in a thinking period between the first and the second motion.

Some precedents settled by Indian courts may be cited in support. In *Hitesh Narendra Doshi v Jesal Hitesh Doshi*,[16] the minimum 6-month waiting period from the date of the presentation of the petition for snapping the marital ties between the parties by mutual consent under s 13B(2) of the HMA was held to be mandatory and it was held that the court has no power to relax the said compulsory time wait of 6 months and cannot pass a decree of divorce forthwith.

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13 *Gulzar Singh v State of Punjab* 1998 (2) HLR 204 (P&H).
14 Substituted by Act 68 of 1976, s 9, for 'expiration of three years' (with effect from 27 May 1976).
15 Substituted by Act 68 of 1976, s 9, for 'said three years' (with effect from 27 May 1976).
16 2000 (2) Hindu LR (AP) (DB) 45: AIR 2000 (AP) 362.

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However, in *Mohinder Pal Kaur v Gurmeet Singh*[17] it was held that the 6-month waiting period can be brought down in cases where an existing divorce petition is already pending for more than 6 months and efforts for reconciliation have been made earlier but without any success. Thus, the waiting period cannot be curtailed in a freshly instituted petition for divorce by mutual consent if, in an earlier petition on fault or other grounds, the parties have already been litigating for more than 6 months and reconciliation between them has been of no avail.

(v) Matters to which reconciliation does not apply: petition on certain fault grounds

When a petition for divorce under the HMA is presented on the ground of change of religion (s 13(1)(ii)), unsoundness of mind (s 13(1)(iii)), leprosy (s 13(1)(iv)), venereal disease (s 13(1)(v)), renunciation of world (s 13(1)(vi)), or presumption of death (s 13(1)(vii)) reconciliation efforts need not be made, that is to say, the provisions of s 23(2) do not apply. The proviso to s 23(2) of the HMA exempts the mandatory requirement of attempting reconciliation between the parties when divorce is sought on any of the grounds in HMA above.

Similarly, when a petition for divorce is made under the SMA on the ground of 7 years sentence of imprisonment (s 27(1)(c)), unsoundness of mind (s 27(1)(e)), venereal disease (s 27(1)(f)), leprosy (s 27(1)(g)), or presumption of death (s 27(1)(h)), no efforts at reconciliation need be made. The proviso to s 34(2) of the SMA exempts the mandatory requirement of attempting reconciliation between the parties when divorce is sought on any of the grounds in SMA stipulated above.

However, it may be added out of abundant clarification that on all other grounds of divorce, both under the HMA and SMA, the court has an obligation to make efforts at reconciliation.[18] This mandatory and statutory duty of the court cannot be waived.

(vi) Reconciliation by the court

Section 23(2) of the HMA and s 34(2) of the SMA lay down that at first instance it is the duty of the court to make every effort to bring about reconciliation between the parties where it is possible to do so consistently with the nature and circumstances of the case. The words are 'before proceeding to grant relief'. At one time a view was propounded that the reconciliation endeavour should be made towards the end of the proceedings when the court comes to a conclusion that it is going to grant 'relief'. But then the provision also states 'at the first instance' and this has been interpreted to mean that before the court takes up the case for hearing, it should make an effort at

[17] 2002 (1) Hindu LR (Pb & Hry) 537.
[18] *Pramila v Ajit*, AIR 1989 Pat 163: (1989) 2 DMC 466.

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reconciliation. Presently, the latter is the prevalent view and hence reconciliation is to be attempted in the first instance.

(f) Family Courts Act, 1984

The Preamble to the Family Courts Act, 1984 enacted by the Indian Parliament states that it is:

> 'An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.'

In the Statement of Objects and Reasons of the Family Courts Act, five essential requirements were pinpointed in the context of providing reconciliatory efforts to litigating parties and these can be summarised as follows:

(a) make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply;

(b) provide for the association of social welfare agencies, counsellors, etc, during conciliation stage and also to secure the service of medical and welfare experts;

(c) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioners. However, the court may, in the interest of justice, seek assistance of a legal experts as *amicus curiae* in the case;

(d) simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute; and

(e) provide for only one right of appeal which shall lie to the High Court.

In seeking to achieve the above objects, the endeavour of the Family Courts Act was to adopt a friendly, conciliatory and informal dispute resolution atmosphere which would enable parties to amicably settle their differences without the shackles of the technical rules of the law of procedure and evidence. These objects find expression in the Constitution of the Family Courts Act, its jurisdiction and procedure. The necessary provisions for reconciliation in the Family Courts Act, 1984 are dealt with under s 9 of the Act which reads as follows:

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'9. Duty of Family Court to make efforts for settlement:

(1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.
(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it think fit to enable attempts to be made to effect such a settlement.
(3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of any other power of the Family Court to adjourn the proceedings.'

The Act also makes it open to the Family Courts under s 12:

> ' . . . to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act.'

Clearly, the thought, logic and motive in the Act in making available services of professional experts is to provide counselling, expert help and assistance of trained mediators. Therefore, this enactment is wholesome legislation on reconciliatory modes in family law disputes in the Indian matrimonial jurisdiction.

V ANALYSIS OF THE STATUS OF ADR IN FAMILY LAW IN INDIA

The duty of making or amending laws is on the legislature but to develop it and to interpret it to suit the needs and circumstances of society is the call of the judiciary. Hence, unless and until the beneficial provisions of the matrimonial legislation promoting and advocating reconciliation in matrimonial disputes in India are favourably interpreted and strictly implemented by the courts, the letter of law may be an illusory mirage which remains on the statute book only. It is therefore the solemn duty of the matrimonial courts in India to ensure that the mandatory settlement efforts are actually put into practice and parties are encouraged to actually utilise them for out-of-court settlements. Thus, there is a heavy burden on the courts to discharge this duty failing which it will be neither possible nor useful to enforce reconciliatory measure in matrimonial disputes in the Indian jurisdiction. Accordingly, it would be most useful to cite and quote some recent prominent verdicts of superior Indian courts which have stressed and highlighted the dire necessity of the beneficial provisions of Indian legislation which provide mandatory reconciliation procedures.

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Section 23 of the HMA and Order XXXIIA of the CPC and the duty enjoined upon the court came up for interpretation before the Supreme Court recently in the case *Jagraj Singh v Bir Pal Kaur.*[19]

The Supreme Court upheld the order of the High Court summoning the respondent husband by non-bailable warrants:

> '26 From the above case law in our judgment, it is clear that that a court is expected, nay, bound, to make all attempts and section (2) of section 23 is a salutary provision exhibiting the intention of the parliament requiring the court 'in the first instance' to make every endeavour to bring about a reconciliation between the parties. If in the light of the above mentioned intention and paramount consideration of the legislature in enacting such provision, an order is passed by a Matrimonial Court asking a party to the proceeding (husband or wife) to remain personally present, it cannot successfully be contended that the court has no such power and in case a party to a proceeding does not remain present, at most, the court can proceed to decide the case *ex parte* against him/her. Upholding of such argument would virtually make the benevolent provision nugatory, ineffective and unworkable, defeating the laudable object of reconciliation in matrimonial disputes. The contention of the learned counsel for the appellant therefore cannot be upheld.'

Hence, the order of the Apex Indian Court upholding the directions of the High Court summoning the respondent – husband in the above case – through non-bailable warrants clearly reflects the legislative intent of attempting mandatory reconciliation procedures. This judgment of the Supreme Court clearly confirms that settlement efforts in matrimonial matters are not an empty meaningless ritual to be performed by the matrimonial court. The verdict clearly reflects the benevolent legislative purpose.

A novel question came up for decision before the High Court of Kerala in *Bini v KV Sundaran*,[20] ie as to whether conciliation is mandatory after the introduction of the Family Courts Act, 1984, even on the excepted grounds of conversion to another religion, renunciation of the world, mental disorder, venereal disease and leprosy. Calling the Family Courts Act, 1984 a special statute, and its provisions to make attempt at reconciliation mandatory at the first instance, the High Court held:

> 'The parties can disagree on matters of faith and still lead a happy marital life if they could be convinced that matters of faith should not stand in the way of union of hearts. Thus though under the Hindu Marriage Act, 1955, no endeavour for reconciliation need be made in a petition for divorce on the ground of conversion to another religion, or other grounds excepted under Section 13(1) of the Hindu Marriage Act, 1955 or on similar or other grounds available under any other law also, after the introduction of the Family Courts Act, 1984, the Family Court is

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[19] JT 2007 (3) SC 389.
[20] AIR 2008 Kerala 84.

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> bound to make an endeavour for reconciliation and settlement. The requirement is mandatory. That is the conceptual change brought out by the Family Courts Act, 1984 which is a special statute.'

The court further says that 'the primary object is to promote and preserve the sacred union of parties to marriage. Only if the attempts for reconciliation are not fruitful, the further attempt on agreement or disagreement be made by way of settlement'.[21]

Hence, from a reading of the above judgment it is clear that the duty cast upon the matrimonial courts to attempt mandatory reconciliation cannot be avoided and cannot be circumvented even when divorce is sought on certain exceptional grounds which under the HMA and SMA do not provide compulsory settlement action.

Still further, stressing the need to treat the cases pertaining to family matters in a humanitarian way, the Supreme Court of India in the case *Balwinder Kaur v Hardeep Singh*[22] laid down that:[23]

> ' . . . stress should always be on preserving the institution of marriage. That is the requirement of law. One may refer to the Objects and Reasons which lead to setting up of Family Courts under the Family Courts Act, 1984. For the purpose of settlement of family disputes emphasis is 'laid on conciliation and achieving socially desirable results' and elimination of adherence to rigid rules of procedure and evidence.'

The Supreme Court further lays down that:[24]

> ' . . . it is now obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or settlement between the parties to a family dispute. Even where the Family Courts are not functioning, the objects and principles underlying the constitution of these courts can be kept in view by the Civil Courts trying matrimonial causes.'

The Supreme Court held that the objectives and principles of s 23 of the HMA govern all courts trying matrimonial matters.[25]

Deciding on the importance of making an attempt at reconciliation at the first instance, a Division Bench of the Calcutta High Court in *Shiv Kumar Gupta v Lakshmi Devi Gupta*[26] felt that the compliance with s 23(2) of the HMA is a statutory duty of the judge trying matrimonial cases. The court in this case

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21 Paragraphs 3 and 7 of the judgment.
22 AIR 1998 SC 764.
23 Paragraph 9 of the judgment.
24 Paragraphs 10 and 11 of the judgment.
25 Paragraph 15 of the judgment.
26 2005 (1) HLR 483.

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relied upon the decision of the Supreme Court in *Balwinder Kaur v Hardeep Singh* (which has been dealt with in preceding paragraphs) and held that:[27]

> ' . . . on a reading of Section 23(2) of the Act and on the perusal of the judgment in Balwinder Kaur on the interpretation of Section 23(2) this Court held that the decree, which was passed without complying with Section 23(2) of the said Act, cannot be sustained.'

In another perspective, in *Love Kumar v Sunita Puri*[28] it was held that the matrimonial court had acted in haste to pass a decree of divorce against the husband for his non-appearance at the time of reconciliation proceedings. The High Court accordingly set aside the divorce decree and remanded the matter back to the matrimonial court to be decided on its merits. The object of s 23(2) of the HMA was explained in paras 19 and 21 of this judgment as follows:

> '19. Under S. 23(2) of the Act it is incumbent on the matrimonial Court, to endeavour to bring about reconciliation between the parties, a great responsibility is cast on the Court. A Hindu marriage is not contractual but sacrosanct, it is not easy to create such ties but more difficult to break them; once annulled, it cannot be restored. A Judge should actively stimulate rapprochement process. It is fundamental that reconciliation of a ruptured marriage is the first duty of the Judge. The sanctity of marriage is the corner stone of civilization. The object and purpose of this provision is obvious. The State is interested in the security and preservation of the institution of marriage and for this the Court is required to make attempt to bring about a reconciliation between the parties. However, omission to make attempts at reconciliation will not take away the jurisdiction of the Court to pass any decree under the Act. This is not correct to say that in a divorce case reconciliation efforts have to be timed immediately preceding the grant of decree and not at any other stage of the proceedings of the trial. Such an attempt can be and should be made at any stage. The matrimonial Court is required to call parties and make a genuine effort for their reconciliation, there is not even a whisper in this provision that the matrimonial Court has the power to strike off the defence of that spouse, who after being given opportunities for reconciliation fails to appear.
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> …
>
> 21. But under S. 23(2) of the Act neither such a liability is cast on the one spouse nor such a right is given to the other spouse. Reconciliation is a mutual dialogue to bury their differences. A duty is cast on the Court to call the party at the initial stage for reconciliation. Even before delivering judgment and decree, the Court can make effort for reconciliation. Thus, the stage of trial for calling the parties for reconciliation is left to the discretion of the Court.'

From a reading of the above judgments, it can clearly be spelt out that, though reconciliation is a mandatory process, the timing and stage at which it is to be implemented may vary depending on the facts and circumstances of each case. At the same time causing prejudice to the rights of one party by striking off the

[27] Paragraph 8 of the judgment.
[28] AIR 1997 Punjab and Haryana 189: 1997(1) HLR 179.

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defence or dismissing the petition may actually work injustice to the rights of such party. Therefore, the matrimonial court in its wisdom may fashion and design the stage of attempting matrimonial reconciliation depending on the facts of each case without causing prejudice to the substantive rights of the parties. However, at the same time, the matrimonial court ought not to give the mandatory settlement procedure a go by.

In another case, High Court of Allahabad called it the bounded duty of the Family Court to make an attempt at conciliation before proceeding with the trial of the case.[29] In the recent case of *Aviral Bhatla v Bhavana Bhatla,*[30] the Supreme Court has upheld the settlement of the Delhi mediation centre, appreciating the effective manner in which the mediation centre of the Delhi High Court helped the parties to arrive at a settlement.

From a reading of the recent pronouncements of law discussed above, it is apt to conclude that there is a growing emphasis on the need for attempting mandatory reconciliatory measures and wherever matrimonial courts have been lacking in their duties to do so, superior Indian courts have stepped in, to set the records straight. Therefore, there is a growing jurisprudence to adapt to out-of-court settlement and reconciliation rather than litigating in matrimonial courts. However, the performance of this mandatory exercise ought not to be reduced to an empty ritual or a meaningless exercise. Otherwise, the utility of the beneficial provision will be lost.

VI CONCLUSIONS: NEED FOR REFORM AND SOME SUGGESTIONS

The philosophy of alternate dispute resolution systems is well illustrated by Abraham Lincoln's famous words: 'discourage litigation, persuade your neighbours to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expense, cost and time.' These words spell out grim reality and truth.

Litigation in respect of any matter concerning the family, whether divorce, maintenance and alimony or custody, trial of juvenile offenders or any other matrimonial cause, should not be viewed in terms of failure or success of legal action but as a social therapeutic problem. It should not be viewed as a prestigious dispute in which parties and their counsel are engaged in winning or defeating, but as a societal problem needing resolution. The amicable settlement of family conflict requires special procedures designed to help people in conflict and in trouble, to reconcile their differences, and where necessary to obtain professional assistance. Family disputes need to be seen with a humanitarian approach and hence attempts should be made to reconcile the differences so as to not disrupt the family structure. Adjudication of family

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[29] *Rajesh Kumar Saxena v Nidhi Saxena* 1995 (1) HLR 472.
[30] 2009 SCC (3) 448.

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disputes is an entirely different matter from conventional civil or criminal proceedings, it is a different culture and has a different jurisprudence altogether.[31] The whole of society feels the reverberations of a family dispute.

Whereas there already exist some provisions for the conduct of arbitration, conciliation and Lok Adalat in different statutes, the need for a framework to regulate the ADR process as a whole and mediation in particular has been sought to be fulfilled by the Supreme Court of India. It has done so by providing the final version of the Model Rules of ADR and the Model Rules of Mediation, both framed by the Law Commission of India, in its orders passed in the case of *Salem Bar Association v Union of India*[32] with a direction that all High Courts should adopt these with such modifications as they may consider necessary.

The Supreme Court has also made an observation regarding the disturbing phenomena of the large number of cases flooding the courts pertaining to divorce or judicial separation. Recently, in 2009, in *Gaurav Nagpal v Sumedha Nagpal*[33] the Supreme Court observed:

> 'It is a very disturbing phenomenon that large numbers of cases are flooding the courts relating to divorce or judicial separation. An apprehension is gaining ground that the provisions relating to divorce in the Hindu Marriage Act, 1955 (in short the 'Marriage Act') has led to such a situation. In other words, the feeling is that the statute is facilitating breaking of homes rather than saving them, this may be too wide a view because actions are suspect. But that does not make the section invalid. Actions may be bad, but not the Section. The provisions relating to divorce categorise situations in which a decree for divorce can be sought for. Merely because such a course is available to be adopted, should not normally provide incentive to persons to seek divorce, unless the marriage has irretrievably broken. Efforts should be to bring about conciliation to bridge the communication gap which lead to such undesirable proceedings. People rushing to courts for breaking up of marriages should come as a last resort, and unless it has an inevitable result, courts should try to bring about conciliation. The emphasis should be on saving of marriage and not breaking it. As noted above it is more important in cases where the children bear the brunt of dissolution of marriage.'

However, we cannot remain oblivious to the fact that India with its population of 1.1 billion Indians has over 30 million non-resident Indians who live in 180 countries abroad. Some of these former Indian citizens are foreign nationals with overseas spouses. But, the fact remains that their personal family law still governs them due to extra territorial application. Resolution of marital disputes of such citizens of Indian origin creates conflicts since India does not have on its statute book irretrievable breakdown of marriage as a ground for divorce in India. Therefore, foreign divorce decrees on the breakdown ground with no prior mandatory reconciliation procedures do not find favour either in

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[31] See Paras Diwan *Law of Marriage and Divorce* (Preface to the 1st edn) (Universal Law Publishing, Delhi, 5th edn, 2008).

[32] 2003 (1) SCC 49.

[33] AIR 2009 SC 557, para 50.

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Indian courts or in the domestic societal set up. How does one resolve such emerging dimensions of family law disputes where marriages solemnised in India are sought to be dissolved abroad in countries of foreign residence? The authors have advocated a solution[34] penned as follows:

> 'The answer therefore is that the existing three-tier divorce structure in India under the HMA 1955 and the SMA 1954, i.e. fault grounds, mutual consent principle and break down theory, seems to provide sufficient options in the existing societal structure. Therefore, no major changes are called for. However, a civilized parting of spouses where a marriage has irretrievably broken down needs to be incorporated in the statute book as an additional ground for divorce, but only in cases where both the parties to the marriage jointly petition the court for such relief. This, in the opinion of the authors, will have an immediate two-fold benefit. First, where parties have irreconcilable differences and want to part amicably, an option will be available to them to part legally and logically without resorting to a protracted time-consuming legal battle on "trumped-up" grounds. Secondly, recourse to divorce in foreign jurisdictions may decline once a proper legal option of irretrievable break down is available on Indian soil. Irretrievable breakdown can thus serve as an additional ground for divorce in the HMA 1955 and the SMA 1954, and to prevent hasty divorces or misuse, sufficient statutory safeguards can be incorporated to arm the judiciary to prevent any abuse of the process of law. Keeping the Hindu ceremonial and sacramental concept of marriage intact is essential. Erosion of values in matrimonial life must be checked, and traditional marriage protected. The institutions of family, home and children of the marriage, as they exist today under Hindu law, need protection. Hindu law therefore does not need any major overhaul. It is self-sufficient, but does need some immediate amendment.'

The above views of the authors clearly depict the inbuilt conciliatory settlement theory embedded in Indian family law to save the marriage by in-house settlement. But, marriages solemnised in India according to personal laws of non-resident Indians who have permanently migrated abroad need to find resolution in the existing statutory family laws either by suitable amendments or a brand new legislation which will incorporate corresponding mandatory conciliatory procedures. For this problem, the authors have advocated their suggestions in this regard in the following words:[35]

> 'A reading in totality of the matters in the overseas family law jurisdiction gives an indication that in such affairs, it is the judicial precedents which provide the much available guidance and judicial legislation on the subject. With the large number of non-resident Indians now permanently living in overseas jurisdictions, it has now become important that some composite legislation is enacted to deal with the problems of non-resident Indians to avoid them from importing judgments from foreign Courts to India for implementation of their rights. The answer therefore, lies in giving them law applicable to them as Indians rather than letting them invade the Indian system with judgments of foreign jurisdictions which do not find applicability in the Indian system. Hence, it is the Indian legislature which now

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[34] See Anil Malhotra and Ranjit Malhotra *Acting for Non-Resident Indian Clients* (Jordan Publishing Limited, 2004) ch 3, pp 76–77.

[35] See Anil Malhotra *India, NRIs and the Law* (Universal, New Delhi, 2009) at pp 271–272.

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> seriously needs to review this issue and come out with a composite legislation for non-resident Indians in family law matters. Till this is done, foreign Court judgments in domestic matters will keep cropping up and Courts in India will continue with their salutary efforts in interpreting them in harmony with the Indian laws and doing substantial justice to parties in the most fair and equitable way. However, in this process, the Indian judiciary has made one thing very clear i.e. the Indian Courts would not simply mechanically enforce judgments and decrees of foreign Courts in family matters. The Indian Courts have now started looking into the merits of the matters and deciding them on the considerations of Indian law and the best interest of the parties rather than simply implementing the orders without examining them. Fortunately, we can hail the Indian judiciary for these laudable efforts and till such time when the Indian Legislature comes to rescue with appropriate legislation, we seek solace with our unimpeachable and unstinted faith in the Indian Judiciary, which is rendering a yeoman service.'

Therefore, the dire pressing need of the day in the current social milieu, where 30 million Indians now live outside India, is to create a law and infrastructural machinery for ADR mechanisms in resolving marriages solemnised in India but which have been fractured or broken abroad. For the lack of resolution, they lead to interparental child removal custody conflicts, disputes of maintenance and differences over settlement of matrimonial property. It is these limping marriages which need reconciliatory formulas in India to prevent them from being split abroad on grounds and reasons which do not find favour with the personal family laws of the parties in India. These cross border marital conflicts should not stem into or branch out into other ancillary issues multiplying the problem. This, in the opinion of the authors, ought to be the focus of the legislative intent today in creating, harmonising and balancing the societal structure of Indians, non-resident Indians and all those who form relationships with them to build families abroad. ADR needs to be developed in a big way for resolving limping unions.

Some suggestions can be mooted by the authors to improve the situation and to make ADR a reality in the structure of the current Indian family law.

(1) Participation of citizens

Alternative dispute resolution cannot see the light of the day unless citizens also 'participate' in that movement. The citizens can help in the achievements of these benign objectives by restraining themselves while invoking jurisdictions of the 'traditional courts' where the matter in dispute can be conveniently and economically taken care of by ADR mechanisms. The right to speedy trial is not a fact or fiction but a 'constitutional reality' and it has to be given its due respect. The courts and the legislature have already accepted it as one of the media of reducing the increasing workloads on the courts. The same is also gaining popularity among the masses due to its advantages. We need 'private initiatives' for not only the establishment of ADR facilities in India but equally a 'liberal use' of the same by its citizens. This initiative needs awakening by self consciousness and not by implementation of laws. Spouses, parents and couples need to realise the advantages of reconciliation, mediation

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and alternative dispute resolution methods in the family structure. Matrimonial relief carved out by settlement will serve better than results obtained by adversary litigation involving time, effort, finances and above all by breaking up a family.

(2) More authority should be given to the Family Courts

Family matters should not be litigated in any court unless it is of an extraordinarily grave nature; it should be amicably resolved. Family disputes such as divorce, matrimonial property division, custody of children and maintenance should not come into the higher courts and they should be resolved mutually and conclusively in the Family Court itself. It would save the time of the superior courts where other matters could be resolved in the time which would have been consumed for settling matrimonial disputes. Family disputes are disputes that can be resolved even in the home itself by a unanimous consensus. Mandatory reconciliatory procedures should assume finality so that matters can be put to rest conclusively without any further challenge.

(3) Creation of more Family Courts

The necessity and urgency of creating more Family Courts under the Family Courts Act, 1984 in India is a very important factor which will contribute to the resolution of family law disputes by ADR. The current handling of matrimonial litigation by conventional courts in jurisdictions where there are no Family Courts is a poignant reminder of the situation created by lack of Family Courts in such jurisdictions. The availability of trained counsellors, mediators, professionally trained persons and above all specialist family law judges would all form part of a well organised team in a Family Court which in turn would itself create a mechanism and structure for alternative disputes resolution of family law disputes. This would therefore give a new dimension to the existing matrimonial scenario in the Indian jurisdiction.

India has the laws to promote ADR modes in the existing litigation setup but the infrastructure, professional assistance and the medium through which these beneficial reconciliatory mediation procedures are to be implemented are lacking within India. Therefore, creating the via media by which the beneficial ADR laws can be implemented in family law disputes is what is required today. Additionally, legislative changes are required for providing reconciliatory methods of marriages of non-resident Indians. The package is wholesome. The need is dire. The numbers are huge. The sooner we begin, the sooner reform will start.

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CUSTOM AS AN IMPORTANT SOURCE OF HINDU LAW: ITS USAGE IN INTERNATIONAL FAMILY MIGRATION

Anil Malhotra and Ranjit Malhotra[*]

Résumé

La coutume est une source juridique importante en droit hindou et elle est reconnue en tant que telle par la Loi sur le mariage hindou de 1955. La jurisprudence est abondante sur le sujet. La Cour suprême de l'Inde, de même que plusieurs Hautes Cours de justice à travers le pays, ont constamment rappelé leur position qui est bien ancrée à cet égard, tant dans le domaine du mariage que de celui du divorce. L'objectif du présent texte est d'assurer que les personnes impliquées dans de tels mariages ou divorces, puissent bénéficier d'une approche qui soit respectueuse de la coutume, particulièrement dans le contexte de la migration internationale. Il arrive que certaines autorités diplomatiques indiennes, ne reconnaissent pas les mariages et les divorces coutumiers. La connaissance approfondie du droit familial interne est donc cruciale ici.

I INTRODUCTION

As practitioners in the area of private international law, when dealing with major embassies and high commissions in New Delhi on behalf of intending settlement applicants in the context of family migration, it is essential for foreign immigration and family law lawyers to understand the legal position in India as to family law issues. These issues include the statutory recognition of customary marriages and divorces and the registration of marriages under the provisions of the Hindu Marriage Act, 1955 (HMA 1955) as applicable to non-resident Indians staying abroad. This is the main thrust of this chapter. Due to local variations and the recognition of customs under Indian law, immigration law at the Indian end has a very different complexion. These differences are critical to foreign immigration lawyers preparing immigration applications, at the initial stages of lodging the family reunion applications and of course in the event of any litigation before immigration adjudicators and tribunals.

* Anil Malhotra LLM (London), Advocate, Chandigarh; Ranjit Malhotra, LLM (London) Advocate, Chandigarh.

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Apart from statutory recognition by HMA 1955, this chapter also traces the case-law on the subject of customary marriages and divorces. The case-law analysis is in chronological order from 1969 with reference to some very old decisions of the Privy Council to 2010 taking into account the important relevant judgments. The judgments quoted are of the Supreme Court of India and various High Courts in the country, especially the Punjab and Haryana High Court, within whose jurisdiction the bulk of the population of Punjabi origin resides, as well as the neighbouring states. Customary Karewa marriages are popular among certain agricultural sects in rural parts of Punjab. Also, it is manifest from the case-law analysis that customary marriages including the custom of Karewa marriages, which are defined below, have not been overruled, modified or diluted in any form at all.

It is pertinent to mention that Karewa marriage is just one of the many forms of customary marriages, but as a matter of fact customary marriages in India vary within different communities and regionally as well. Karewa marriage was defined way back by Sir WH Rattigan, before the partition of India took place, as follows:[1]

> 'A "Karewa" marriage with the brother or some other male relative of the deceased husband requires no religious ceremonies, and confers all the rights of a valid marriage.'

The relevant case-law analysis on customary marriages and customary divorces in this chapter is to drive home the point that custom traditionally is an important source of Hindu law, and that continues to be the position.

II FAMILY IMMIGRATION ISSUES

(a) Indian marriages: registration of marriages – law and custom

Both formally registered and customary marriages are recognised under the laws of India. Visa officers have full information about the state of origin of the applicants. They are quite up to date on issues like land value, monies earned from cultivation per acre, Indian customs, etc. In Hindu marriage cases they view the *Saptapadi* photographs with a jeweller's focus. *Saptapadi* is the

[1] WH Rattigan *A Digest of Customary Law* (Allahabad: University Book Agency, 15th edn, revised by Prakash Aggarawala, with a foreword by Dr Bakshi Tek Chand, 1989) para 75 of ch 5. For further details see pp 525–555. The first edition of this book was published in the year 1880, and further six editions of this book were brought about by the author himself, the last of his original work having been published in 1901. This has been followed by revised editions. The introduction at p 1 of this book reads as follows: 'A Digest of Civil Law for The Punjab Chiefly Based On The Customary Law. Preliminary: Custom in this Province is the first rule of decision in all questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, any religious usage or institution, alluvion and diluvion.'

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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.

At the major embassies and high commissions in New Delhi including the office of the Canadian consulate at Chandigarh, the capital of the state of Punjab, most visa officers will be aware that in certain areas in the state of Punjab especially in Jalandhar and Hoshiarpur Districts, which are famous for outbound family migration, fake marriages are performed with all the pomp and show without the religious ceremonies actually taking place at all. This is to facilitate migration through the family route.

A typical case is where the British Asian boy or girl is from the Midlands in the UK or a spouse from Maryland in the USA or from areas having dense Indian population in Canada, who is being married to a spouse from the state of Punjab. And the parents, being wary of the outcome of the spouse application, insist on a contingent arrangement. In such a situation, a fake marriage certificate is submitted to the immigration authorities. In an attempt to safeguard the interests of their children, the parents fall prey to bad advice. It is sad to mention that dubious travel agents and unqualified local consultants thrive on this non-resident clientele.

Under s 8 of the HMA 1955, the principal law governing Hindu marriages, registration of marriages is not compulsory. This is primarily because Hindu marriages and most marriages in India have always been performed in public with wide publicity. Section 8(2) provides that any state government may make rules for the compulsory registration of Hindu marriages. Furthermore, s 8(5) specifically expresses that failure to register a Hindu marriage does not affect its validity. Even where compulsory registration of marriage is laid down under the rules, non-registration does not affect the validity of the marriage, but merely entails a nominal fine. Moreover, mere registration of a marriage under s 8 will not ipso facto make the marriage valid.

In light of the prevailing law in India, registration of marriages in this region by non-resident Indians is only undertaken to satisfy the immigration authorities. It is not very difficult to obtain fake marriage certificates in the abovementioned areas of Punjab. Such false practices have a direct bearing on genuine applicants. Even their documentation and circumstances leading to the marriage are viewed cautiously.

Customary marriages are also performed in limited situations where one of the spouses is resident abroad. Generally, it is the husband who is resident abroad.

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III CUSTOM AS AN IMPORTANT SOURCE OF HINDU LAW

The HMA 1955 is an Act of the Parliament of India to amend and codify the law relating to marriage among Hindus. At the outset, it is important to mention that s 5 of the HMA 1955, which deals with the conditions for a valid Hindu marriage, also by virtue of s 5(iv), allows marriage within the prohibited relationship degrees as and when permitted by the custom or usage governing the parties to the marriage, as is generally the situation in customary marriages. It is also important to mention that s 29 recognises customary marriages before the enactment of the HMA 1955 while simultaneously recognising customary divorces even after the enactment of the HMA 1955. To make matters explicitly clear customary divorces, subject to conditions of compliance, are clearly recognised under the provisions of s 29 of the HMA 1955. Customary marriages within the prohibited degrees of relationship are specifically recognised by virtue of s 5(iv) of the HMA 1955 after the legislation came into force, on 18 May 1955, and this continues to be the position to date.

It is important to consider the other relevant provisions of the HMA 1955. The relevant sections relating to the territorial jurisdiction and the extraterritorial application are defined in s 1 of the HMA 1955. The application of the said central legislation is defined in s 2, while the definition clause is contained in s 3. The conditions for a valid marriage are stipulated in s 5 and registration of marriages under the legislation is provided in s 8. The savings clause has explicit recognition in s 29.

The relevant sections of the HMA 1955 with regard to the scope of the present chapter are reproduced below.

> **'1. Short title and extent.**
>
> (1) This Act may be called the Hindu Marriage Act, 1955.
>
> (2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.
>
> **2. Application of Act.**
>
> (1) This Act applies –
>
> (a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,
> (b) to any person who is a Buddhist, Jaina or Sikh by religion, and
> (c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by

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any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.–The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:–

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;
(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and
(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. Definitions.

In this Act, unless the context otherwise requires,–

(a) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:
Provided that the rule is certain and not unreasonable or opposed to public policy; and
Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;
(b) "district court" means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act;
(c) "full blood" and "half blood"–two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife and by half blood when they are descended from a common ancestor but by different wives;
(d) "uterine blood"– two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

Explanation.–In clauses (c) and (d), "ancestor" includes the father and "ancestress" the mother;

(e) "prescribed" means prescribed by rules made under this Act;

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(f)
(i) "sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the 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 "sapindas" 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 who is within the limits of sapinda relationship with reference to each of them;

(g) "degrees of prohibited relationship"–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 grandfather's or grandmother's brother of the other; or
(iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters;

Explanation.–For the purposes of clauses (f) and (g), relationship includes–

(i) relationship by half or uterine blood as well as by full blood;
(ii) illegitimate blood relationship as well as legitimate;
(iii) relationship by adoption as well as by blood; and all terms of relationship in those clauses shall be construed accordingly.'

It is important to mention that a definition similar to s 3(a) of the HMA 1955 is also found in s 3(a) of the Hindu Adoptions and Maintenance Act 1956 (HAMA 1956).

Section 5 of the HMA 1955 prescribes the valid conditions for a Hindu marriage, which are stated below. It will be noticed that s 5(iv) explicitly recognises customary marriages.

'5. Conditions for a Hindu marriage.

A marriage may be solemnised between any two Hindus, if the following conditions are fulfilled, namely:–

(i) neither party has a spouse living at the time of the marriage;
(ii) at the time of the marriage, neither party–
(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
(c) has been subject to recurrent attacks of insanity;
(iii) the bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of the marriage;

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(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.'

Clearly, it will be noticed that s 5(iv) statutorily permits marriage between the degrees of prohibited relationship on the basis of custom or usage.

Section 8 of the HMA 1955 provides for registration of marriages, and even validly performed customary marriages can be registered under s 8 of the HMA 1955 which reads as follows:

'8. Registration of Hindu marriages.

(1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.

(2) Notwithstanding anything contained in sub-section (1), the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in sub-section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.

(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.

(4) The Hindu Marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall, on application, be given by the Registrar on payment to him of the prescribed fee.

(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.'

Section 29 of the HMA 1955 gives statutory recognition to customary divorce and the same is stated below for ease of reference.

'29. Savings.

(1) A marriage solemnised between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same gotra or pravara or belonged to different religions, castes or sub-divisions of the same caste.

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> (2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnised before or after the commencement of this Act.
>
> (3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.
>
> (4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954 (43 of 1954) with respect to marriages between Hindus solemnised under that Act, whether before or after the commencement of this Act.'

IV ESSENTIALS OF A VALID CUSTOM

It is important to refer to the essential ingredients of a valid custom, which essentially require that the custom should be ancient, certain, reasonable and not opposed to public policy. In 1969, in *Rabindra Nath Dutta v The State*[2] the Calcutta High Court laid down that the provisions of the HMA 1955 do not provide for any particular kind or form of ceremonies to be observed in a Hindu marriage. The judgment reads as follows:[3]

> '20. The Hindu Marriage Act does not lay down any special or particular kind or form of ceremonies to be compulsorily observed in all Hindu marriages. In fact, the form of marriage, prescribed by the Sastras, is subject to modifications by custom or usage. But the expression "Customary Ceremonies" cannot be taken to mean that "Sastric Ceremonies" have been totally ignored. The expression "Customary Rites and Ceremonies" naturally means such sastric ceremonies, which the caste or community to which the party belong is customarily following. Customary rites and ceremonies to be accepted must be shown that such custom as an essence of marriage ceremony had been followed definitely from ancient times and that the members of the Caste, Community or Sub-Caste had recognised such ceremonies as obligatory. Once it is proved by evidence what ceremonies had been followed as customary rites, it is no longer left to the will of the Caste, Community or Sub-Caste to alter them as the essence of custom is that on account of its definiteness it had been recognised and adopted by the caste or community with certainty and without any variation.'

The Supreme Court of India in the case of *Harihar Prasad Singh and Others v Balmiki Prasad Singh and Others*[4] held that the specific family custom pleaded in a particular case should be proved. The initial onus lies on the plaintiffs to prove the special custom. It must be proved that the custom has been acted

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2 All India Reporter (AIR) 1969 Calcutta 55.
3 Ibid, para 20, p 58.
4 AIR 1975 SC 733.

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upon in practice for such a long period and with such invariability as to show that it has by common consent been submitted to as the established governing rule of the particular family.

V TRADITIONAL REASONS AND OBJECTIVES BEHIND CUSTOMARY MARRIAGES

The *Chadar* ceremony (the second marriage which is one of the forms of Karewa marriage), is a brief marriage ceremony which is basically handing over the bride to the bridegroom. This custom of low-key marriages is uniformly followed within the Jatts and certain sections of the Sikh community and is an established ongoing practice of Karewa marriages within the Sikh community. There is no dispute as to the validity of such a custom.

This customary wedding ceremony is generally a small low-key ceremony. Given the circumstances of such a wedding, no celebrations are held at all. No guests are invited nor are any pictures taken at all. These Karewa marriages, generally as per custom, are usually performed in such a low-key manner. Following the tenets of the Sikh religion, no actual wedding ceremony is performed in a Sikh temple, unlike a wedding ceremony in normal circumstances. The main reason for following such a practice is that it is a remarriage of a widow, quite often within the immediate family itself.

Traditionally, one of the prime objectives of such a customary marriage is the rehabilitation of the widow within the family fold, and to retain the land holding within the family fold. Since, Karewa marriages emanate from the state of Punjab, which is known for its flourishing agriculture, the size of the land holdings have added significance for the family name. Land holdings in the state of Punjab are considered to be the pride of the family and more valuable than the family silver.

VI ADDITIONAL MODES OF PROVING VALID CUSTOMARY MARRIAGES: CREDIBLE EVIDENCE BY WAY OF AFFIDAVITS AND EXPERT LEGAL REPORTS

Evidence as to the usage and continuance of customary marriages and practices can be put forward in the shape of affidavits, to demonstrate the genuineness of the same to the satisfaction of the immigration authorities when they doubt the existence and usage of such customary practices. The claim may additionally be supported by expert reports from lawyers of repute, in the event of any post-refusal appeal proceedings or in any litigation in any foreign court or tribunal.

Such affidavits should be tendered by the aggrieved beneficiary applicant wife, and made by the *Sarpanch* (the elected village headman including several

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respectable elderly people from the village from different walks of life). There should be at least eight to ten such affidavits couched in very specific terms as to the applicability, specific practice, usage and continuity of the custom within the community.

The Supreme Court in *Harihar Prasad*[5] has traced the history of the usage of the family customs, also placing reliance on some of the very early decisions of the Privy Council:

> '6. Now on whom does the burden rest and what is the scope of the evidence that is admissible? The earliest decision on the question regarding proof of custom in variance of the general law is found in *Ramalakshmi Ammal v Shivanatha Perumal* (1872) 14 Moo. Ind. App. 570 at p 585 (PC) to the effect:
>
> > "It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."'

This passage was quoted by this court with the approval in its decision in *Pushpavathi Vijayaram v P Visweswar*[6] and this court went on further to observe:

> 'In dealing with the family custom, the same principle will have to be applied, though, of course, in the case of a family custom, instances in support of the custom may not be as many or as frequent as in the case of customs pertaining to a territory or to the community or to the character of any estate. In dealing with family customs, the consensus of opinion amongst the members of the family, the traditional belief entertained by them and acted upon by them, their statements, and their conduct would all be relevant and it is only where the relevant evidence of such a character appears to the Court to be sufficient that a specific family custom pleaded in a particular case would be held to be proved, *Abdul Hussein Khan v Bibi Sona*, (45 Ind. App.10= AIR 1917 PC 181).'

The observations of the Supreme Court of India back in 1964 in *Pushpavathi Vijayaram v P Visweswar*, were subsequently reiterated in *Harihar Prasad* in 1975. Obviously, affidavits of local village people should state that the customary marriage of the applicant was on the basis of family custom, consensus of the applicant wife and also the family and the community and they acted accordingly upon the traditional belief entertained by them.

It should not be the case at all that the usage of the custom of Karewa marriage, other forms of customary marriages or divorces by either of the spouses with their consent and the support of the family has sprung up overnight, possibly to circumvent immigration rules. The pleaded custom

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5 Ibid, para 6, p 737.
6 AIR 1964 SC 118.

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should be supported by affidavits of respectable community members and there should exist no such infirmity in the pleadings made by them.

VII CUSTOMARY DISSOLUTION OF MARRIAGES, UNDER HMA 1955, S 29(2)

Customary dissolution of marriages is permitted under s 29(2) of the HMA 1955. There is a direct judgment of the Jammu and Kashmir High Court in *Smt Rano Devi v Rishi Kumar*.[7] The interpretation of s 29(2) of the HMA 1955 in crystal clear terms reads as follows:

> 'It clearly states that marriage may be dissolved in accordance with a custom governing the parties, or under any other law providing for the same. This sub section is couched in a stronger language and says that notwithstanding anything contained in the Act, including Sections 4 and 13, a Hindu marriage may be dissolved even under the customary law of the parties, by adopting a mode different from the one provided under the Act. This is what has happened here also. Instead of approaching the District Court in a petition under Section 13, the parties, by mutual agreement, dissolved their marriage by executing a deed of divorce, a mode permissible under the customs followed by them. The trial Court was, therefore, right in dismissing the appellant's petition on the ground that since the marriage between the parties already stood dissolved through a customary divorce, no decree for the restitution of conjugal rights could be passed in her favour.'

There is a custom among the Sikh Jats of Amritsar, by which a husband can dissolve a marriage out of court, preferably by written instrument, which of course is saved by s 29(2) of the HMA 1955. Thus, a second marriage after such a customary divorce was held not to be void. This was held in the case of *Balwinder Singh v Gurpal Kaur*[8] which has elucidated the position of customary divorces in very eloquent terms as follows:

> '20. The upshot of the whole discussion, therefore is that there is ample oral as well as other evidence on record to warrant the conclusion that there does exist a custom amongst Sikh Jats of District Amritsar under which a marriage can be dissolved out of court preferably through a written instrument. The very fact that dissolution of marriage amongst Sikh Jats of that district has been taking place even after the enactment of the Act is in itself a strong proof of its recognition by the community concerned. It would show that despite the relief of dissolution of marriage by divorce being available under the Act people still prefer to resort to customary law rather than seek redress in a court of law under the Act. So, the mere fact that the appellant has not furnished any old instance would not undermine the evidentiary value of the instances cited by various witnesses in Court; rather they tend to establish beyond doubt that such a custom is firmly rooted and is still prevalent despite the remedy of divorce being available under statutory law. Hence, I hold accordingly.'

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7 AIR 1981 Jammu and Kashmir 2, para 6, p 4.
8 AIR 1985 Delhi 14, para 20.

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Quite often, there are refusal letters by the embassy authorities in instances of Karewa marriages or other forms of valid customary marriages. That such an assertion in the case of a valid customary marriage that the beneficiary has married her former brother-in-law, which of course is not legally sustainable also in light of the law laid down in *Parkash Chander v Smt Parmeshwari*.[9] The most relevant paragraph relating to the interpretation of Karewa marriages reads as follows:

> '12. The next question of definite importance which arises in this case is whether during the lifetime of Ishwar Singh who was very much present in the village, any Karewa marriage could be legally entered into between the respondent and the appellant, or had it in fact been so taken place. There is no doubt whatsoever in my mind that in the presence of Ishwar Singh, who was very much alive in the village, no valid marriage could take place between the parties. Such a marriage would be void in the face of the provisions of Section 5 (1) of the Act wherein it is laid down that a marriage may be solemnised between any two Hindus if neither party has a spouse living at the time of the marriage. It has been held by the Supreme Court in *Mohd. Ikram Hussain v. Stat of Uttar Pradesh,* All India Reporter 1964 Supreme Court 1625, that in view of provisions of Sections 5 and 11 of the Act, such a marriage would be null and void. In para 74 of the Digest of Customary Law by Sir W.H. Rattigan (13th edition), it has been laid down that until the former marriage is validly set aside, a woman cannot marry a second husband in the lifetime of her first husband.'

VIII THE WIFE SHOULD NOT HAVE A LIVING SPOUSE FOR A VALID KAREWA MARRIAGE

It is very important that for a Karewa marriage to be valid the wife should have no living spouse at the time she solemnised her subsequent Karewa marriage.

In the abovementioned case of *Parkash Chander* (1987), the Karewa marriage was held to be invalid because the original husband of the wife was subsequently found not to be dead. He was found to be alive after a certain period of time. Meanwhile, the wife had entered into a Karewa marriage with her brother-in-law. In this particular case, the wife pleaded the custom raising the presumption that, since her first husband had not been heard of for 7–8 years he was presumed to be dead. This contention was rejected outright on the ground that the alleged custom was contrary to s 108 of the Indian Evidence Act, 1872. The Punjab and Haryana High Court tersely held as follows:[10]

> '20. . . . In the instant case what the respondent had pleaded was that since Ishwar Singh, her husband, had not been heard of and his whereabouts were not known for a period of 7–8 years, she entered into a Karewa marriage with the appellant. Therefore, it is not necessary to probe into the facets of the issue whether there is a custom prevalent in the community of the parties which permits dissolution of marriage on the ground that either party had been mentally insane, had become

9 AIR 1987 Punjab and Haryana 37, para 12, p 42.
10 Ibid, para 20, p 46.

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> impotent or was incapable of performing the duties of husband/wife. The only aspect that needs examination and determination is whether a divorce is permissible in the community of the parties under custom where one of the spouses is unheard of or his whereabouts are not known. Before examination of this aspect of the issue, it has to be kept in mind that a custom to be valid must not contravene any express provision of the law. It should not be against public policy nor it should be contrary to justice, equity and good conscience and it should be ancient, certain and invariable. These ingredients of a valid custom are laid down in para 1 of Rattigan's digest of Customary Law ibid . . .'

In the event of refusal of a settlement visa for a wife to join her husband overseas in the case of a valid customary marriage, support can very much be drawn by the beneficiary wife from these observations of the Punjab and Haryana High Court. This is to the effect that the custom of Karewa marriage pleaded by the beneficiary wife is very much valid, does not contravene any express provision of law and nor is it against public policy.

Under the provisions of the HMA 1955 both parties to the marriage are at full liberty to solemnise their marriage by way of customary rites and ceremonies generally prevalent in their community. However, such ceremonies and rites should essentially fulfil the essential ingredients of a custom, as already stated above. But, if *Saptapadi* (taking of seven steps around the holy fire) and invocation before the sacred fire are made, the marriage is validly solemnised under the Shastric law.

IX CUSTOMARY MARRIAGES WILL NOT BE RECOGNISED IN THE ABSENCE OF COGENT RELIABLE PROOF

In a customary marriage case where there is no proof of custom nor is a customary marriage pleaded, such a customary marriage will not be recognised. In this particular regard, it is important to note the observations of the Kerala High Court in *Chakki v Ayyappan*:[11]

> '10. The appellant cannot succeed only by a showing that in other marriages of the community there were exchange of rings and pooja and thali etc. Those can be accepted as requirements of customary marriage only if they are proved to be sufficiently ancient and definite and that members of the community recognise them as obligatory. It should also be shown that those formalities were unalterable. As we indicated earlier, there are no pleadings, much less any proof of an ancient, definite and unalterable custom in this regard.'

By way of clarification, in this case, the marriage was held to be valid on the basis of the performance of the statutory essential requirement of a Hindu marriage, ie invocation before the sacred fire, and *Saptapadi* (taking seven steps by the groom and bride jointly before the sacred fire).

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[11] AIR 1989 Kerala 89, para 10, p 92.

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X KAREWA MARRIAGES GENERALLY PREDOMINANT IN AGRICULTURAL TRIBES OF PUNJABI ORIGIN

In *Garja Singh and another v Surjit Kaur and another*,[12] it was held that a marriage will be valid only if the ceremony through which it is solemnised is sanctioned by the religion of either party as a customary ceremony. Therefore, merely going through some ceremonies like distribution of *Gur* and *Shakkar* (sugar) with the intention that the parties be taken to have been married will not make them the customary ceremonies prescribed by law or sanctioned by custom. Even in the general customary law in Punjab as applicable to the predominantly agricultural tribes, the Karewa marriage with the brother or some male relative of the deceased husband requires no religious ceremonies and confers all the rights of a valid marriage. However, the bride in this case had no connection whatsoever with the deceased, alleged to be her husband prior to the execution of the 'Karewa Nama'. The marriage with a stranger has to be performed in accordance with the customary rights or ceremonies as prescribed by law. There was no allegation, much less proof, as to what were the customary ceremonies performed for solemnising the marriage between the deceased and the defendant claiming a share in the estate of the deceased, as his widow. This is also one of the judgments which categorically notices that such Karewa marriages are generally predominant in agricultural tribes of Punjabi origin.

XI CUSTOM SHOULD BE PROVED IN THE FOLLOWING TERMS

Furthermore, the Punjab and Haryana High Court in *Asha Rani v Gulshan Kumar*[13] has elaborated on the way in which custom should be proved:

> '10. A custom must be proved to be ancient, certain and reasonable if it is to be recognised and acted upon by Courts of Law. The specific family custom pleaded in a particular case should be proved by the party pleading it. It must be proved that the custom has been acted upon in practice for such a long period and with such invariability, as to show that it has, by common consent, been submitted to as the established governing rule of the particular family. Custom no doubt can be proved by oral evidence of witnesses acquainted with custom, instances and general pronouncements. Section 29 (2) of the Act does not disturb the position which a customary divorce occupied before the enactment of the Act.'

As stated above customary marriage and divorce, qua the aggrieved beneficiary applicant, can additionally be proved by key credible witnesses from the community and possibly community leaders as well, in the shape of affidavits.

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[12] AIR 1991 Punjab and Haryana 177.
[13] AIR 1995 Punjab and Haryana 287, para 10, p 289.

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XII NOT NECESSARY FOR PARTIES TO OBTAIN DIVORCE FROM COURT, ON GROUND ALREADY RECOGNISED BY CUSTOM

In *Rita Rani v Ramesh Kumar*[14] it was held that, if there is a local custom by which marriage can be dissolved either by brotherhood or by executing an agreement, such a customary dissolution of marriage is saved by s 29(2) of the HMA 1955. And more importantly the parties are not required to obtain a decree of divorce through a court, after such a customary divorce has been effected. The Punjab and Haryana High Court held as follows:[15]

> '7. Relying on *Balwinder Singh v Smt. Gurpal Kaur*, AIR 1985 Delhi 14: [1985(1) All India Hindu Law Reporter 442 (Delhi)], *Smt. Sudarshan Kaur v Major Manmohan Singh Bhatt*, AIR 1978 Punjab and Haryana 115; A Digest of Customary Law by Sir W.H. Rattigan (Fourteenth Edition) page 470; and Hindu Law by Mula 16th edition page 745, he contended that from the pleadings and sole testimony of Ramesh Kumar, it is evident that in the cast of the parties, there is customary mode of marriage and customary mode of dissolution of marriage also. Therefore, Ramesh Kumar himself dissolved his earlier marriage with Rita Rani under this customary mode ie dissolution of marriage by "biradari". He stressed that under Section 29(2) of the Act, it is not necessary for parties in any such case to go to Court to obtain divorce on ground recognised by custom. It is not the case of Ramesh Kumar that this customary mode of dissolution of marriage is either against the public policy or is not upheld by Courts.'

The ruling in this case is of immense significance. It has been categorically held by the Punjab and Haryana High Court at Chandigarh in this case that it is not necessary for the parties to go to court on the ground that such a divorce is recognised by custom. Likewise, it is argued by analogy that it is not mandatory for the parties to the marriage as in the present case to go to court for validation of their customary marriage. Generally, there is an assertion in the refusal letters in settlement cases by the embassy authorities to the effect 'also please provide a court order stating that this relationship is allowed'. Clearly, in light of the settled position of law as stated above, the assertion of a court declaration by the embassy authorities to the effect that the relationship is permitted by law is not a sustainable action.

XIII COURTS CAN TAKE JUDICIAL NOTICE OF GENERAL CUSTOMS

The Punjab and Haryana High Court in *Ranbir Kaur alias Harjit Kaur v Gurnam Singh*,[16] held that the courts can take judicial notice of general customs. The court elaborated that the term 'general custom' is used in the sense that it has, by repeated recognition by courts over a period of time,

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14 1995 (2) *Hindu Law Reporter* 338 (Punjab and Haryana).
15 Ibid, para 7, p 339.
16 1996 (2) *Hindu Law Reporter* 71.

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become entitled to judicial notice. This judgment crystallises the law on judicial notice of general customs by consolidating the earlier case-law as follows:[17]

> '8. Whoever sets up a custom must prove the same. Sometimes the custom is recognised by Courts and it passes into the law of land. This question was considered by the Supreme Court in the case of *Ujagar Singh v Mst. Jeo*, AIR 1959 SC 1041. In paragraph 14 it was held:
>
>> 14. It therefore appears to us that the ordinary rule is that all customs, general or otherwise, have to be proved. Under S.57 of the Evidence Act however nothing need to be proved of which courts can take judicial notice. Therefore, it is said that if there is a custom of which the courts can take judicial notice, it need not be proved. How the circumstances in which the courts can take judicial notice, it need not be proved. How the circumstances in which the courts can take judicial notice of a custom were stated by Lord Dunedin in *Raja Ram Rao v Raja of Pittapur*, 45 Ind App 148 at pp 154, 155: (AIR 1918 PC 81 at P.83), in the following words, "When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without necessity of proof in each individual case." When a custom has been so recognised by the courts, it passes into the law of the land and the proof of it then becomes unnecessary under S.57 (1) of the Evidence Act. It appears to us that in the courts in the Punjab the expression "general custom" has really been used in this sense, namely, that a custom has by repeated recognition by courts, become entitled to judicial notice as was said in *Bawa Singh v Mt. Taro*, AIR 1951 Punjab 239; and *Sukhwant Kaur v Balwant Singh*, AIR 1951 Punjab 242.'

The judgment specifically highlights the importance of general custom. This term is used in the sense that the same by repeated recognition by the courts has become entitled to judicial notice.

Thus, it can be stated that the onus of proving and establishing a custom would lie on the party who claims its benefit. As already stated before, from the catalogue of evidence in the shape of affidavits furnished by the beneficiary applicant, other members of the family, as also by respectable people from the community, the practice of customary marriages and divorces can be proved successfully. Whether the same is acceptable for judicial notice or it is to be proven separately would depend on the facts and circumstances of each case. It is clear that, in the northern Indian state of Punjab, customary divorce and customary widow remarriage is an acceptable customary practice in some local communities.[18]

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[17] Ibid, para 8, p 74.

[18] For further details see Sir WH Rattigan *A Digest of Customary Law (in Punjab)*, 1880, and reprinted subsequently by other authors, which discusses in great detail customary law practices prevalent in Punjab in all walks of life (above n 1). In the most recent edition (1995), chapter V specifically reports and discusses known prevalent customary practices of marriage and divorce in different classes and communities in Punjab.

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The scheme and object of the HMA 1955 are not to override any such custom which recognises divorce, and explicit recognition is given to the same by the saving clause contained in s 29(2). It is not necessary for parties in any such case to go to court to obtain divorce on the grounds that it is already recognised by custom. The custom, as elaborated above must be a valid custom. Section 29(2) saves customary divorce but the party relying on a custom needs to prove the existence of such custom and also that it is ancient, certain, reasonable and not opposed to public policy. In *Mariammal v Padmanabhan*,[19] the Madras High Court overruled the finding of the trial court that there cannot be customary divorce after the coming into force of the HMA 1955. It held that divorce was recognised by custom even before the Act, and after the Act courts also uphold the custom if not opposed to public policy.

From the discussion and the case-law analysis on s 29 of the HMA 1955 it is manifest that the section specifically saves customs regarding marriage and divorce from the operation of the provisions of the HMA 1955 and they are legally recognised. In *Jasbir Singh v Inderjit Kaur*,[20] the husband sought annulment of his marriage on the ground that, at the time of marriage, his wife was already married. The wife's contention was that she had obtained a customary divorce from her previous husband and the petitioner was aware of this as he had seen the written deed of customary divorce; he was, therefore, estopped from taking the plea that the wife was already married and not divorced. The wife was a Jat Sikh from District Sangrur in Punjab. After going through the evidence, the court held that it was established that there is a custom among the Jat Sikhs of District Sangrur which permits divorce and the wife had obtained the divorce according to that custom. The validity of the custom being saved, it was not necessary for the parties to go to court to obtain divorce; it is open for the parties to dissolve the marriage out of court, in accordance with the custom. The court relied on, inter alia, *Gurdit Singh v Mst Angrez Kaur*[21] where the apex court held that there can be valid divorce where custom allows dissolution, and on dissolution of a marriage by custom, the party can enter into second marriage in the lifetime of the first divorced spouse. The husband's petition for annulment was consequently dismissed in *Jasbir Kaur* as, the wife having obtained customary divorce from her previous husband, the marriage with the petitioner was legal and valid. The Punjab and Haryana High Court held as follows:[22]

> '9. In AIR 1978 P&H 98 (supra) relied upon by the learned counsel for the appellant-husband, it has been held that a party relying upon a particular custom is called upon to allege and to prove that custom. It was further held that entries in a Riwaj-e-am, which pertain to a special custom applicable to a locality or a class of persons, should also be presumed to be correct unless rebutted . . .'

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[19] AIR 2001 Mad 350.
[20] AIR 2003 Punjab & Haryana 317.
[21] AIR 1968 SC 142.
[22] *Jasbir Singh v Inderjit Kaur* AIR 2003 Punjab & Haryana 317, para 9 at p 319.

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The court further held as follows:[23]

> '20. . . . In *Gurdit Singh v Mst. Angrez Kaur*, AIR 1968 SC 142, it was held by the Hon'ble Supreme Court that a custom exists among the Hindu Jats of the Jalandhar District which permits a valid divorce by a husband of his wife which dissolves the marriage. It was further held that on the dissolution of such a marriage the divorced wife can enter into a valid marriage with a second husband in the lifetime of the first husband. The law laid down by this Court in (1962) Punj LR 1179, was affirmed by the Hon'ble Supreme Court, in the said authority. In *Balwinder Singh v Smt. Gurpal Kaur*, 1985 Marriage Law Journal 414: (AIR 1985 Delhi 14) it was held by the Delhi High Court that on a plain reading of Section 29(2) of the Hindu Marriage Act, it is manifest that a marriage may still be dissolved in accordance with a custom governing the parties or under any other law providing for the same. It was further held that the validity of any custom recognising the right to dissolve a marriage is expressly saved by this sub-section. It was further held that as a necessary corollary, it follows that it would not be necessary for the parties in any such case to go to Court to obtain divorce on grounds recognised by custom and it would be open to dissolve the marriage out of Court in accordance with such custom. It was further held that the net result will be that a Hindu marriage may now be dissolved under Section 13 of the Hindu Marriage Act or under any other special enactment or in accordance with any custom applicable to the parties. Reliance was also placed on the law laid down by Hon'ble Court, in *Gurdit Singh's* case (supra), in respect of the existence of such a custom in District Jalandhar. It was also held that the existence of such a custom permitting dissolution of marriage by divorce amongst Hindu Jats was also prevalent in District surrounding Jalandhar District, including Amritsar, Hoshiarpur and Ludhiana.
>
> 21. In view of the above, in my opinion, it can safely be held that there is a custom among Jat Sikhs of District Sangrur, permitting dissolution of marriage by divorce through writing executed by the parties in this regard and such a divorce would be recognised, in view of Section 29(2) of the Hindu Marriage Act and the law laid down by the Hon'ble Supreme Court and Delhi High Court, in the cases referred to above. I am further of the opinion, that the learned Additional District Judge had rightly found that the marriage between the petitioner and respondent could not be annulled under Section 11 of the Hindu Marriage Act, inasmuch as respondent had validly obtained a divorce from her previous husband Lachhman Singh, at the time when her marriage had taken place with the petitioner. Accordingly, I affirm the findings of the learned Additional District Judge in this regard.'

This ruling in *Jasbir Singh* laying in similar tenor to *Rita Rani*[24] is again of immense significance. This is because it has been yet again categorically reiterated by the Punjab and Haryana High Court at Chandigarh that it is not necessary for the parties to go to court on the ground that such a divorce is recognised by custom. Hence, if the denial letter by the embassy authorities in the case of a valid Karewa marriage states to the effect 'also please provide a court order stating that this relationship is allowed', clearly this would not be legally sustainable according to the settled law, as elaborated above.

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23 Ibid, paras 20 and 21, pp 323 and 324.
24 Above n 14.

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XIV CUSTOMARY DISSOLUTION OF MARRIAGE DOES NOT REQUIRE VALIDATION FROM COURT – RECENT SUPREME COURT OF INDIA JUDGMENT

Much more recently, the Supreme Court of India in *Mahendra Nath Yadav v Sheela Devi*,[25] upheld the judgment of the Allahabad High Court stating that the High Court rightly held that dissolution of marriage through the panchayat (local elected village council at the grassroot level) according to custom cannot be a ground for granting divorce under s 13 of the HMA 1955. The facts of this case are as follows:[26]

> '4. According to appellant, it was customary in the locality and in the community to which both parties belong to have a divorce through the Panchayat. Thus, the Panchayat was convened on 7–6-1997. The said Panchayat decided that the appellant should pay a sum of Rs. 30,000/- to the respondent's family. It was paid and a document was prepared which was duly signed by the parties. Thus, the marriage came to an end. In order to give legal effect to the said customary divorce, the appellant tried to persuade the respondent to get divorce from the Family Court under Section 13B of the 1955 Act, by consent. However, she did not agree. Thus the appellant approached the Family Court by filing Petition No. 370 of 1998 under Section 13 of the 1955 Act, seeking divorce on the ground of desertion and cruelty.
>
> 5. The respondent filed the counter-case ie Petition No. 57 of 1999 under Section 9 of the 1955 Act, for restitution of conjugal rights. The Family Court decreed the suit mainly on the ground that the marriage stood dissolved through Panchayat and dismissed the petition filed by the wife for restitution of conjugal rights vide order dated 15–09–2000. Being aggrieved, the respondent preferred appeals against both the orders before the High Court and the High Court has reversed the said order in both the cases. Hence this appeal.'

The reasoning clearly elucidated by the apex court in not interfering with the judgment of the High Court is as follows:[27]

> '7.The High Court has rightly held that dissolution of marriage through Panchayat as per custom prevailing in that area and in that community permitted cannot be a ground for granting divorce under Section 13 of the 1955 Act. We fully agree with the said decision for the reason that in case the appellant wanted a decree on the basis of customary dissolution of marriage through Panchayat held on 7–6-1997, he would not have filed a petition under Section 13 of the 1955 Act. Filing this petition itself means that none of the parties was of the view that the divorce granted by the Panchayat was legal. In view of the above, we do not see any reason to interfere with the well-reasoned judgment of the High Court.'

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[25] (2010) 9 SCC 484.
[26] Ibid, paras 4 and 5, pp 485–486.
[27] Ibid, para 7, p 486.

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XV DIFFERENT TYPES OF CUSTOMS

The Supreme Court of India in an elaborate judgment handed down in 2007 has very clearly elucidated the three types of different customs in the case of *Smt Ass Kaur (Deceased) by LRs v Kartar Singh (Dead) by LRs and Ors.*[28] One of the key issues in this case was succession rights on the basis of Karewa marriage:

> '10. Hindu law recognises three types of customs: local custom, class custom and family custom. The courts below have held that the parties were governed by Zimindara custom. Whether the said custom is a general custom, or a special custom or for that matter a family custom has not been stated. The customary law prevailing in the State of Punjab has received a statutory sanction by reason of the Punjab Laws Act, 1872, Sections 5 and 7 whereof read as under:
>
> > 5. Decisions in certain cases to be according to Native law.– In questions regarding succession, special property of females, betrothal, marriage divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution the rule of decision shall be –
> >
> > (a) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority.
> >
> > (b) the Muhammadan law, in cases where the parties are Muhammadans and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such customs as is above referred to.
> >
> > 7. Local customs and mercantile usages when valid.–All local customs and mercantile usages shall be regarded as valid, unless they are contrary to justice, equity or good conscience, or have, before the passing of this Act, been declared to be void by any competent authority.
>
> 11. Amongst the Sikh Jats of Punjab province, there exists a custom, where the widow marries her first husband's brother in the Karewa form, remarriage would not cause forfeiture of her own share.[29]
>
> 12. In respect of Jats belonging to Ferozepur district, it has been held that a widow who remarried her first husband's brother succeeds to a co-widow in preference to collaterals. But the widow's right only accrues on husband's death, and if it does not accrue then, it cannot accrue later by the death of subsequent heir. The fact, if the widow is a Karewa widow it would not affect her right in a suit the parties to which were the two widows of a Manhas Rajput resident in the Shakargarh Tehsil of Gurudaspur District, had that [sic] the plaintiff (upon whom under the

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28 *Judgments Today* 2007 (9) SC 118, paras 10–12, pp 121 and 122.

29 See *Chunnilal v Mst Attar Kaur* AIR 1933 Lah 69.

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> circumstances the onus lay) had failed to prove a custom in her favour, excluding the defendant, who was a co-widow by a Karewa marriage, from succeeding to a share in the deceased husband's estate.[30] Even a woman who had contracted such marriage may not forfeit her life estate, if any, in her deceased husband's property despite the provisions of the Hindu widows Remarriage Act, 1856. However, the said principle would not apply where a remarriage is not with the brother of her deceased but with some other relative.'

Furthermore, the apex court in paras 17 to 19 of its judgment has reiterated the settled position of law that courts can take judicial notice of custom and as and when the custom has been recognised by the courts, the same need not be proved. Paragraphs 17 to 19 at pages 123 and 124 read as follows:

> '17. We may, however, notice that customary law has been recorded in Rattigan's Digest of Customary Laws. The courts below have categorically held the law to be applicable in the instant case is the customary law having regard to the fact that the parties belonged to the community of Sidhu Jats.
>
> 18. In *R.B.S.S. Munnalal and Ors. v S.S. Rajkumar and Ors.* AIR 1962 SC 1493, this Court was considering the question as to whether a Jain widow could adopt a son to her husband without his express authority, being governed by the custom which had by long acceptance become part of the law applicable to them. Therein, it was observed:
>
> > . . . It is well-settled that where a custom is repeatedly brought to the notice of the Courts of a country, the courts may hold that custom introduced into the law without the necessity of proof in each individual case . . .
>
> 19. The court can also take judicial notice of such customs in terms of Section 57 of the Evidence Act, 1872. As and when custom has repeatedly been recognised by the courts, the same need not be proved. Reference in regard to the Punjab 'general custom' may be made to *Ujagar Singh* (supra), and *Bawa v Taro* AIR 1951 Punjab 239.'

The law reiterated and the law laid down by the Supreme Court of India in *Smt Ass Kaur (Deceased)*, would clearly support the case of a beneficiary wife who is affected by the refusal of her settlement visa application. The apex court has yet again given clear-cut recognition to Karewa marriages, even in rights of succession. Furthermore, the observations in para 25 at pages 124 and 125 of the above judgment are also very important in a situation where a wife has performed a valid customary marriage:

> '25. As statutory law did not exclude the applicability of the customary law, the principle that customary law would prevail over the statutory law would apply. It was so found by the courts below.'

The point to be conveyed is that, in the case of a valid customary marriage, the customary law would prevail over statutory law.

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[30] *Mst Dakho v Mst Gano* 22 PR 889.

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Lastly, in relation to the present judgment, support is drawn from the observations in para 29 at page 125 of the *Smt Ass Kaur (deceased)* judgment which reads as follows:

> '29. In *Daya Singh (dead) through L.Rs.* (supra), paragraph 23 of Rattigan's Digest of Customary Law of Punjab has been noticed. It was held:
>
> It is on the basis of this Customary Law that the reversioners succeeded in the suit filed by them questioning the gift made by the respondents['] mother to her. There is no doubt that Rattigan's work is an authoritative one on the subject of Customary Law in Punjab. This Court in *Mahant Salig Ram vs. Musammat Maya Devi* said:
>
>> The customary rights of succession of daughters as against the collaterals of the father with reference to ancestral and non-ancestral lands are stated in para 23 of Rattigan's Digest of Customary Law. It is categorically stated in sub-para (2) of that paragraph that the daughter succeeds to the self-acquired property of the father in preference to the collaterals even though they are within the fourth degree. Rattigan's work has been accepted by the Privy Council as a book of unquestioned authority in the Punjab. Indeed, the correctness of this para was not disputed before this Court in *Gopal Singh v Ujagar Singh.*'

The Andhra Pradesh High Court in 2008 has in relation to the constant usage of customary law has reiterated the relevant operative parts of earlier judgments of the Supreme Court of India and the Privy Council. This is in the case of *Atluri Brahmanandam v Anne Sai Bapuji*:[31]

> '17. In *Gokal Chand v Parvin Kumari* AIR 1952 SC 231, Supreme Court laid down general principles, to be kept in view, in dealing with the question of customary law. Inter alia it is laid down that, "a custom in order to be binding must derive its force from the fact that by long usage it has obtained a force of law, but English rule that, 'a custom in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary' should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality".
>
> 18. In *Raja of Pittapur* AIR 1918 PC 81, the Privy Council held as under:
>
>> This proposition, it must be noted, does not negative the doctrine that there are members of the family entitled to maintenance in the case of an impartible zamindari. Just as the impartibility is the creature of custom, so custom may and does affirm a right to maintenance in certain members of the family. No attempt has been, as already stated, made by the plaintiff to prove any special custom in this zamindari. That by itself in the case of some claims would not be fatal. When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of

[31] 2008 (2) *All India Hindu Law Reporter* 432, paras 17–20, p 437.

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> the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading.

19. In *Bai Sakar* AIR1937 Bombay 65, Supreme Court laid down as under:

> The fact that a particular custom has been judicially recognized establishes that the custom is reasonable and not opposed to public policy so that it will be upheld whenever it is proved. This is the legal aspect of custom: *Moult v Halliday* (1898) 1 QB 125. But, subject to what I shall presently state, judicial recognition of a custom in another suit leaves untouched the proof of the fact that the custom is applicable to the particular parties who are before the court.

20. In *Ujagar Singh* AIR 1959 SC 1041, while observing that every general custom relied on [by] a person must be clearly proved to exist, the Supreme Court ruled that if the Court takes judicial notice of such custom under Section 57 of Indian Evidence Act, 1872, no further proof is required. Keeping this in mind, the submission of learned Counsel for the appellant that the plaintiff did not plead and prove the existence of such custom is without any merit . . .'

Much more recently, the Punjab and Haryana High Court in *Rajinder Kaur v Kuldeep Singh*[32] refused to recognise a customary divorce in the absence of any evidence on record to prove that divorce through a *Panchyatnama* (written agreement executed before the local elected village council at the grassroots level), was actually permissible under any custom or usage prevalent in the society. In this particular case, the second marriage of the wife, without legally nullifying the earlier marriage, was held to be a nullity. The decree earlier passed by the trial court declaring the second marriage null and void on the petition of the husband was upheld by the High Court in no uncertain categorical terms.

Paragraph 11 at pages 207 and 208 of that judgment in this regard is most relevant and is reproduced hereunder:

> '11. As already observed above learned matrimonial court also found as a fact, that no evidence was led to establish that there was any custom or usage prevalent in the community of the appellant under which divorce through writing of panchayatnama was permissible. Hon'ble Supreme Court in the case of *M.M. Malhotra v Union of India and others* AIR 2006 SC 80, has laid down as under:–
>
> > "11. For appreciating the status of a Hindu woman marrying a Hindu male with a living spouse some of the provisions of the Hindu Marriage Act, 1955 (herein referred to as the 'Marriage Act') have to be examined. Section 11 of the Marriage Act declares such a marriage as null and void in the following terms:
> >
> > 11. 'Void marriage—Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either

[32] 2011 (1) *Haryana Law Reporter* 205.

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party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.'"

Clause (i) of Section 5 lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. By reason of the overriding effect of the Marriage Act as mentioned in Section 4, no aid can be taken of the earlier Hindu law or any custom or usage as a part of that law inconsistent with any provision of the Act. So far as Section 12 is concerned, it is confined to other categories of marriages and is not applicable to one solemnised in violation of Sections (i) of the Act. Sub-section (2) of Section 12 puts further restrictions on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective The marriages covered by Section 11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose. The provisions of Section 16, which is quoted below, also throw light on this aspect.

16. Legitimacy of children of void and voidable marriages:–

(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

Sub-section (1), by using the words underlined above clearly implies that a: void marriage can be held to be so without a prior formal declaration by a court in a proceeding. While dealing with cases covered by Section 12, sub-section (2) refers to a decree of nullity as an essential condition and sub section (3) prominently brings out the basic difference in the character of void and voidable marriages as

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> covered respectively by Sections 11 and 12. It is also to be seen that while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. The marriage of the appellant must, therefore, be treated as null and void from its very inception.
>
> In view of the authoritative pronouncement of Hon'ble Supreme Court marriage between the parties was nullity, therefore, learned matrimonial court rightly allowed the petition and dissolved the marriage by way of a decree of nullity.'

The judgment above is significant for two reasons. First, the court tersely refused to recognise an invalid customary marriage. Secondly, the judgment explicitly lays down that no formal declaration from the court of competent jurisdiction is necessary in the case of void ipso jure marriages.

XVI CONCLUSION

Clearly, it emerges that custom is an important source of Hindu law, having due statutory recognition by virtue of the saving clauses under the provisions of the Hindu Marriage Act 1955. A huge amount of case-law is available on the subject.

There is a clear consistency of approach by the Supreme Court of India and various High Courts in different parts of the country in reiterating the earlier settled position of customary law with regard to marriage and divorce. The underlying aim of this chapter is to attempt to ensure that the principled approach in customary marriages and divorces, as applicable under the relevant provisions of the Hindu Marriage Act 1955, is duly availed of by the parties to such genuine customary marriages and divorces in limited situations, especially in the area of international family migration.

Sometimes, from practical experience it is noticed that parties who genuinely perform customary marriages and enter into customary divorces depending on the facts and circumstances of each case, intending to join their spouses resident abroad on the basis of family reunion, in the context of the present chapter, are not properly and professionally guided. This of course results in outright refusals, at the hands of the embassy authorities. The problem is compounded by the fact of lack of specialist knowledge on the part of visa and consular officers, obviously for which they cannot be blamed. Clearly, this is an avoidable situation. The fact of the matter is that such a gap needs to be plugged appropriately by proper paperwork substantially highlighting the statutory provisions and the settled position of law.

Lastly, as it will be noticed that knowledge of Indian family law also becomes essential for foreign immigration lawyers acting on the behalf of sponsors in appeal proceedings in the event of unsuccessful applications. Specialist domestic family law expertise is pivotal in customary marriages and divorces. The relevant provisions of Indian law in this regard will hopefully prevent

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foreign practitioners from unwarily walking into traps created by conflicts between local Indian laws and laws of their own jurisdiction.

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India

MISSING CHILDREN IN INDIA: SUGGESTIONS, REMEDIES AND SOLUTIONS

*Anil Malhotra and Ranjit Malhotra**

Résumé

L'augmentation du nombre d'enfants disparus est devenue une question préoccupante en Inde. Une enquête appropriée est nécessaire pour appréhender la disparition d'enfants car, en raison de leur âge et de leur sexe, ils sont particulièrement vulnérables et exposés aux crimes. Plusieurs pétitions ont d'ailleurs été déposées devant différentes juridictions supérieures du pays, afin de militer pour la formation de cellules d'enquête distinctes, spécialisées dans la recherche d'enfants disparus et regroupant pour cela des agents ayant une connaissance aiguë de la matière. Ce chapitre contient quelques statistiques récentes. Il énonce ensuite un certain nombre de mesures, prévues dans le cadre de la loi, pour aider à la recherche d'enfants disparus. Il est notamment question du renforcement du rôle de la police et des médias, et de la mise en place de systèmes d'information efficaces. Il suggère également la mise en œuvre des dispositions de la *Commission for Protection of Child Rights Act, 2005*.

I INTRODUCTION

The Constitution of India enacted on the 26 November 1949 resolved to constitute India as a Union of States and a sovereign, socialist, secular, democratic republic. Today, a population of over 1.1 billion Indians live in 28 states and 7 union territories within India besides about 30 million Indians who reside in foreign jurisdictions and are called non-resident Indians. Within the territory of India spread over an area of 3.28 million sq kms, the large Indian population comprised of multicultural societies professing and practising different religions and speaking different local languages coexist in harmony in one of the largest democracies in the world.

The Indian Parliament at the helm of affairs legislates on central subjects in the Union and concurrent lists, and state legislatures enact laws pertaining to state subjects as per the state and concurrent lists with regard to the subjects

* Anil Malhotra LLM (London), Advocate, Chandigarh.
Ranjit Malhotra LLM (London), Advocate, Chandigarh.

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enumerated in the Constitution of India. Likewise, pertaining to the judiciary, under art 214 of the Indian Constitution there is a High Court for each state and under art 124 there is a Supreme Court of India. Under art 41 of the Constitution, the law declared by the Supreme Court is binding on all courts within the territory of India. However, the Supreme Court may not be bound by its own earlier views and can render new decisions.

Part III of the Constitution of India secures for its citizens 'Fundamental Rights' which can be enforced directly in the respective High Courts of the states or directly in the Supreme Court of India by issue of prerogative writs under arts 226 and 32 respectively of the Constitution of India. Under the constitutional scheme, amongst others, freedom of religion and the right to freely profess, practise and propagate religion is sacrosanct and is thus enforceable in the extraordinary writ jurisdiction.

Simultaneously Part IV of the Indian Constitution lays down 'Directive Principles of State Policy' which are not enforceable by any court but are nevertheless fundamental in the governance of the country and it is the duty of the state to apply these principles while making laws. Under art 44 of the Constitution in this Part, the state shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. However, realistically speaking, to date a Uniform Civil Code remains an aspiration which India has yet to achieve and enact.

The Indian Penal Code, 1860 is a general penal code for India and extends to the whole of India. Chapter XVI of the Indian Penal Code (IPC) relates to 'Offences Affecting the Human Body' which include not merely culpable homicide (including one amounting to murder) but also 'hurt' (simple or grievous) and involves within its sweep cases of wrongful restraint, wrongful confinement, use of criminal force, assault simpliciter, kidnapping or abduction or trafficking in human beings and sexual offences including rape and unnatural offence. It is plain that the expression 'hurt', as defined in s 319 of the IPC includes causing of 'bodily pain, disease or infirmity' to any person. The offence of dowry death (s 304B) was added in 1986, along with the offence of cruelty by husband or relatives of husband (s 498A) in the wake of outrage felt by the civil society due to increased incidents of cases where women had been subjected to domestic violence and harassment soon after marriage.

The increase in the number of missing children in India and the need for a proper investigation in such cases of missing children, who due to their age and gender are more vulnerable to crimes, has become an alarming and a startling issue at the present time in India. A number of petitions have been filed before different High Courts in the country seeking formation of separate investigation cells for the search of missing children, involving officers having special knowledge and expertise in the matter. A news item appeared on 25 December 2011 in the *Indian Express* (*Chandigarh Newsline*) titled, '943 missing since 2000, no sign of 54 abducted'. The news item was based on the data furnished by the police department of the union territory of Chandigarh. The

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statistics reveal that 943 persons from Chandigarh have been missing since 2000 and 54 persons who have been kidnapped since 2000 are yet to be traced. It has become a prime concern for the entire country that certain guidelines and measures are laid down in order to trace the missing children and to prevent an increase in the number of children missing or abducted in future. Before doing so, it may be useful to quote relevant extracts from synopsis of the book entitled *Missing Children of India*,[1] a pioneering study by the Bachpan Bachao Andolan (BBA) which is a leading child rights organisation in New Delhi. This book was released in December 2011 by BBA. Furthermore, the National Human Rights Commission report on missing children[2] released in 2007 is also an authentic, detailed and wholesome study on the subject of missing children all over India. Both these studies are the basis of the present chapter to suggest remedies and solutions which can possibly be utilised and implemented as a measure for resolving this malady.

II CRIMINAL OFFENCES AND PROCESS IN CRIMINAL MATTERS IN INDIA

The substantive law of crimes in India is contained in the Indian Penal Code (Act XLV of 1860) (IPC) which is governed by the procedure enacted in the Code of Criminal Procedure, 1973 (CrPC). Both are federal laws and apply uniformly throughout the territory of India.

Section 2(c) of the CrPC defines a 'cognizable offence' as an offence for which, and defines a 'cognizable case' as a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

Section 2(l) of the CrPC defines a 'non-cognizable offence' as an offence for which, and defines a 'non-cognizable case' as a case in which, a police officer has no authority to arrest without warrant.

An aggrieved person can approach a police station which falls in the jurisdiction of the area where the offence has been allegedly committed and can get his or her grievance recorded. The police are under a duty to record the complaint in the form of a Daily Diary Report (DDR).

(i) If upon inquiry, the police are of the opinion that a cognisable offence is made out in terms of the Indian Penal Code or any other law in force in India, then the DDR can be converted to a First Information Report (hereinafter referred to as FIR) under s 154 of the CrPC. An FIR is recorded by the police officer on duty upon information given either by

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1 Bachpan Bachao Andolan *Missing Children of India* (Delhi: Vitasta Publishing Pvt Ltd, 2011).
2 *Report of the NHRC Committee on Missing Children* (New Delhi: National Human Rights Commission, 2007).

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the aggrieved person or any other person about the commission of an alleged offence and is followed by an investigation into the offence.

(ii) If, upon inquiry, the police are of the opinion that a non-cognisable offence is made out in terms of the IPC or any other law in force in India, then according to s 155 of the CrPC, the police officer shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as may be prescribed by the state government from time to time (DDR). He shall then refer the informant to the magistrate.

(iii) According to s 155(2) of the CrPC, a police officer does not have the power to investigate a non-cognisable case without an order of a magistrate having power to try such a case or commit the case for trial.

Therefore, any person who is aggrieved on account of a criminal wrong having been committed against her or him on account of any offence having been made out in terms of the IPC or any other law in force in India has an option of making a grievance in three possible ways which are briefly explained here:

First, the aggrieved person can give the information relating to the commission of a cognisable/non-cognisable offence to an officer in charge of a police station as mentioned under ss 154 and 155 of the CrPC.

Section 154 of the CrPC is reproduced here for ready reference:

> **'154. Information in cognizable cases.**
>
> (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.
>
> (2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.
>
> (3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.'

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Secondly, if a person has a grievance that the police station is not registering the FIR under s 154 of CrPC, then that person can approach the superintendent of police under s 154(3) of the CrPC by an application in writing as stated above.

Thirdly, if the FIR is not registered in any way as mentioned above, then it is open to the aggrieved person to file an application under s 156(3) of the CrPC before the magistrate concerned. If such an application under s 156(3) is filed, the magistrate can direct the FIR to be registered.

The Supreme Court of India in *Sakiri Vasu v State of UP* has ruled at p 908 as follows:[3]

> '… if a person has a grievance that the police station is not registering his FIR under Section 154, CrPC, then he can approach the Superintendent of Police under Section 154(3), CrPC, by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156(3), CrPC before the learned Magistrate concerned. If such an application under Section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.'

Once the FIR has been registered, the investigation in the case commences. Investigation includes all the proceedings of the collection of evidence conducted by a police officer or by any person who is authorised by the magistrate on his behalf.

Section 156 of the CrPC in this regard which gives the powers to the police to investigate the cognizable offences is reproduced here:

> **'156. Police officer's power to investigate cognizable cases**
>
> (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.
>
> (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.
>
> (3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.'

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3 *Sakiri Vasu v State of UP* All India Reporter 2008, 907 at 908, para 11.

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According to the judgment of the Indian Supreme Court (above), even if after registering the FIR no proper investigation is conducted, it is open to the aggrieved person to file an application under s 156(3) of the CrPC before the magistrate concerned. If such an application under s 156(3) is filed before the magistrate, the magistrate can direct a proper investigation to be made. It may be added here that the magistrate can also under the same provision monitor the investigation to ensure a proper investigation.

The police while conducting the investigation of the case records the statements of the witnesses under s 161 of the CrPC. Section 157 of the CrPC casts a duty upon the investigating police officer to forthwith send the report of the cognisable offence, prepared under s 173 of the CrPC, to the concerned magistrate. The police officer is also under a duty to follow the procedure laid down in s 157 of the CrPC as follows:

> **'157. Procedure for investigation.**
>
> (1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender:
>
> Provided that–
>
> (a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;
> (b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.
>
> (2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements to that sub-section, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.'

Thereupon, after all the evidence has been collected by the police, a report (called 'Challan') is filed in the court before a competent magistrate and thereafter, as prescribed in the CrPC, charges are framed by the court against

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the accused under s 211 of the CrPC. The court under s 211 of the CrPC has the power to alter the charges at any time during the trial but before the judgment.

Besides the procedural provisions quoted above, s 482 of the CrPC is also reproduced for ready reference:

> **'482. Saving of inherent power of High Court**
>
> Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.'

It may be commented that, if there is any lacuna in the criminal process or there is failure to comply with the provisions of law or there is any apprehension to any party in any criminal litigation of any threat to life or personal liberty, the person can invoke the jurisdiction of the High Court directly in a petition under s 482 of the CrPC for seeking appropriate orders to secure the ends of justice.

III EXTRACT FROM BACHPAN BACHAO ANDOLAN'S SYNOPSIS OF THE BOOK TITLED *MISSING CHILDREN OF INDIA* (2011)

The book *Missing Children of India*[4] is a compilation of information collected on missing children by Bachpan Bachao Andolan during the period from January 2008 to January 2010. This book gives the following findings and figures which are extracted for ready reference.

> 'The recent official figures (of Census 2011) related to children are yet to be published, but, figures regarding missing children (as per RTI[5] applications) show that 117,480 children were reported missing, 74,209 were traced and 41,546 remained untraced in two years between 2008 and 2010.'

A tabulated extract of the numbers of missing children state/union territory wise in the country for the period January 2008 to January 2010 follows:

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4 Above n 1.
5 RTI stands for Right to Information under the Right to Information Act 2005.

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Status of missing children (national)

S No	State/UTs	Re-ported	Traced	Un-traced	NCRB[6] (200820010)
	Jan 2008–Jan 2010				
1	A&N	115	112	3	22
2	Andhra Pradesh	3,555	2,939	616	1,146
3	Arunachal Pradesh	243	152	91	30
4	Assam	2,686	551	410	12
5	Bihar	3,345	1,752	1,593	1,321
6	Chandigarh	156	116	40	63
7	Chhatisgarh	5,594	4,252	1342	226
8	Dadra & Nagar Haveli	48	39	9	19
9	Delhi	13,570	11,870	1,700	3,459
10	Goa	238	206	32	45
11	Haryana	185	146	39	253
12	HP	113	72	41	158
13	Jharkhand	320	178	142	45
14	Karnataka	9,956	6,522	3,434	175
15	Kerala	2116	1900	216	197
16	MP	12,777	9,537	3,240	713
17	Maharashtra	26,211	18,706	7,505	1,244
18	Meghalaya	178	112	66	33
19	Mizoram	0	0	0	3
20	Nagaland	457	226	231	3
21	Sikkim	342	279	63	9
22	UP	9,482	7,586	1,896	3,759
23	Uttarakhand	380	303	77	36
24	W Bengal	25,413	6,653	18,760	583
	TOTAL	117,480	74,209	41,546	13,554

[6] National Crimes Record Bureau.

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In the synopsis of the book, the following findings have been attributed to the large number of missing children:

> **'Findings:**
>
> Some of the most significant findings of this study are:
>
> - No clear-cut definition of missing children as per legal system, which leads to confusion as to how the cases should be treated.
> - No provision on addressing the issue of missing children in the Indian legal system.
> - No comprehensive SOPs/Protocol for addressing the issue of missing children at the national level, involving all states/UTs and other stakeholders.
> - No proper mechanism to document and update the database and information on the number of registered, traced and untraced cases of missing children.
> - Lack of coordination between the agencies dealing with the missing children for example police, NCRB/SCRB/DCRB and NGOs/CSOs.
> - Urban centres have high number of children reported missing.
> - Areas with better connectivity and facility of transport and communications have high number of missing children.
> - States and districts with international borders also have large number of children registered missing.
> - Regions with migratory population, including slums, are registering more missing children.
> - Children and families from socially and economically poorer background formed the majority of victims.'[7]

In the light of the findings given in the book, Bachpan Bachao Andolan has made its recommendations and suggests a plan of action that needs to be followed in order to deal with the disturbing issue of the rise in the cases of the missing children all over the country.

IV EXTRACT FROM THE NHRC REPORT (2007)

It is further pertinent to analyse the approximate number of missing children complaints that are increasing over the years. For this purpose, the National Human Rights Commission (NHRC) Report[8] may be the most relevant document. The NHRC was constituted in India under the protection of Human Rights Act, 1993, for better protection of human rights and for matters connected therewith or incidental thereto. The NHRC Report is based on an

7 Abbreviations used: SOP – Standing Operating Procedure, NCRB – National Crime Records Bureau, SCRB – State Crime Records Bureau, DCRB – District Crime Records Bureau, NGOs – Non-Government Organisations, CSOs – Civil Society Organisations.

8 Above n 2.

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exhaustive study on the subject of missing children in India. For purposes of ready reference, an extract from Executive Summary of the NHRC Report follows:[9]

> 'India is home to more than 400 million children below the age of 18 years, and is considered one of the countries in which youth and children comprise more than 55% of the population. These children represent diverse cultures, religions, castes, communities & social and economic groups. The Government is undoubtedly committed to doing its best for children. However, despite its best efforts, there are innumerable children who are subjected to exploitation and atrocities of various kinds. Moreover, countless children go "missing" every year. These cases of missing children represent a conglomeration of a number of problems, including abductions/kidnappings by family members, abductions/kidnappings carried out by non-family members or strangers, children who run away on their own or are forced to run away due to compelling circumstances in their families and extended surroundings, children who face unfriendly and hostile environment and are asked to leave home or who are abandoned, children who are trafficked or smuggled or exploited for various purposes, and children who are lost or injured. Undoubtedly, each of these groups of children exemplifies different social problems. Since, as a group, missing children – are so heterogeneous, there is no adequate data or consistently applied set of definitions to describe them. In addition, many cases of missing children are not reported to the police at all for various reasons, and police involvement in the resolution of different kinds of cases varies widely across the country. All this poses a serious problem. The NHRC Action Research on Trafficking, published by Orient Longman in 2005, has shown that in any given year, an average of 44000 children are reported missing; of them, as many as 11000 remain untraced.
>
> The revelations at Nithari exemplify that missing children may end up in a variety of places and situations – killed and buried in a neighbour's backyard, working as cheap forced labour in illegal factories/establishments/homes, exploited as sex slaves or forced into the child porn industry, as camel jockeys in the Gulf countries, as child beggars in begging rackets, as victims of illegal adoptions or forced marriages, or perhaps worse than any of these as victims of organ trade and even grotesque cannibalism as reported at Nithari.
>
> The Committee observed that there are some studies conducted by both governmental and non-governmental organizations which bear testimony to the fact that a large number of girls and boys who run away from their homes or are said to have run away from their homes are mainly school dropouts or children get fed up with domestic conditions. The glamour and lure of big cities often make them blind to the stark realities of urban life. Being vulnerable, they often fall prey to promises of jobs or careers in films or modeling and eventually end up as sex workers or as domestic help/labourers in homes, small hotels/restaurants, tea shops/stalls and unorganized establishments, many of them hazardous. Many of the run away boys and girls become victims of the organized begging rackets or pickpocketing/drug peddling racket etc. Most of these children are also trafficked and further abused, physically or sexually, and their cases are not even brought to

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9 Above n 2, 9–12 (from chapter 2 entitled 'Situational Analysis of Missing Children in India').

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the knowledge of the police. Many of these children come from indigent families who either do not have access to authorities or whose complaints are not treated with due diligence.

The Action Research Study on Trafficking by NHRC has brought out several case studies to establish this linkage between "trafficking" and "persons reported missing".

The Committee observed that the juvenile justice system too has failed to provide due care and protection to children. Despite the specific provisions made in the Juvenile Justice (Care and Protection of Children) Act, 2000, many State Governments/Union Territories are yet to frame Rules under the principal Act. In a majority of places, Special Juvenile Police Units had not been set up. All this has eroded the confidence of the people in the system.

When a child goes missing, nobody, except the perpetrator, knows the real intent behind it. It could be quite possible that the child for various reasons has run away on his or her own from home, a relative's home, or an institution which the child's parents/caretakers construe as "missing". On the other hand, it is also possible that the child may have gone missing from the scene for a different reason altogether, which could be sexual gratification, sexual exploitation, labour exploitation, profit-making, or personal vengeance etc. In these cases the person(s) directly or indirectly involved in the incident may resort to crimes of various kinds ranging from kidnapping, abduction, grievous hurt, assault, rape, unnatural offences, and even murder of the child. In fact, even a child who has run away on purpose is also susceptible to being kidnapped, abducted, abused or assaulted. This raises the question as to why reports of missing children are not treated as cognizable offence.'

Later the Report states:[10]

'The NCRB, under the TALASH Information System, maintains a national level database of missing persons under the following broad categories – "missing", "kidnapped", "arrested", "deserted", "escaped", "proclaimed offender", "wanted", "unidentified dead body", "unidentified person" and "traced/found". Earlier, data on missing children under the broad category of "missing" was not available. However, this is now available for both the sexes under the age group 0–12 and 13–18. The NCRB, by and large, functions as a "Documentation Centre" or at best a "Transfer Desk"' because as of today the NCRB neither investigates, nor does it monitor or facilitates the recovery of missing children as a pro-active organization. The Police Stations, too, generally do not give any feed back to the NCRB when the missing child is rescued, traced or returned. Hence the data lacks accuracy. Thus, despite being the national repository of "crime data", the NCRB is unaware both of children who are traced or of those who remain untraced.

Interestingly enough, though the category of missing children has come to be reflected in the TALASH Information System, there is no mention or analysis of it to date in the Crime in India Report being published by the NCRB. This is in spite of the fact that Chapter Six therein titled "Crime Against Children" categorically

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[10] Ibid 13–15.

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> affirms that "Generally, the offences committed against children or the crimes in which children are the victims are considered as Crime Against Children". It then goes on to highlight crimes committed against children that are punishable under the Indian Penal Code 1860 and crimes committed against children that are punishable under the Special and Local Laws.
>
> As per the latest Crime in India Report – 2005, a total of 14,975 cases of crimes against children were reported in the country during 2005 as compared to 14,423 cases during 2004, signifying an increase of 3.8 per cent. The highest crime rate was reported from Delhi (6.5) followed by Chandigarh (5.7) and Madhya Pradesh (5.6) as compared to the national average of 1.4. A total of 4026 cases of child rape were reported in the country during 2005 as compared to 3542 in 2004 accounting for a significant increase of 13.7 % during the year. The State of Madhya Pradesh reported the highest number of cases (870) followed by Maharashtra (634). These two States together accounted for 37.3% of the total child rape cases reported in the country. Highlighting cases related to kidnapping and abduction, the Report mentions that a total of 3518 cases were reported during the year as compared to 3196 cases reported in the previous year accounting for an increase of 10.1%. Delhi reported the highest percentage of such cases among children up to 15 years. The analysis of data clearly reveals the increase of number of crimes against children in the country.
>
> The aforesaid data reveals the predicament of missing children in many ways. Apart from the NCRB, there are some regional police websites like the Zonal Integrated Police Network (ZIPNET) and a few State police websites, which provide data on missing persons, including data on missing children. But the information provided therein remains largely incomplete. Since awareness about these databases – particularly, among police personnel – is low, it has not drawn adequate attention in the investigation and tracing of missing children.'

From a reading of these extracts, it transpires that thousands of cases are registered in various police stations regarding children and adults who go missing every year in India. The list of reasons for which such children are kidnapped is unending. Children and women specifically are the worst sufferers of such situations where they are either forced into begging or prostitution. It is in the context of seeking the proper investigation of such cases of missing children reported all over India that the following suggestions are mooted.

V SUGGESTIONS IN THE EXISTING FRAMEWORK OF INDIAN LAWS

(a) Suggestions for tracing missing children and preventing future incidents in India

The suggestions given here are based on the 2011 report of the BBA, the 2007 report of the NHRC and the guidelines given by the Supreme Court in *Horilal*

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v Commissioner of Police, Delhi and others,[11] as well as a study of subsequent judgments of different High Courts in India on the subject of tracing missing children. Accordingly, the following suggestions can take the shape of guidelines in order to trace the missing children effectively in a lesser period of time. These suggestions are a compilation of the collective study of all the above reports on the subject with our various independent inputs. The guidelines are laid down in the following steps:

(i) Compulsory registration and investigation of all cases of missing children

The first and the foremost step with a view to starting the investigation and to moving a step closer to finding the missing child is the prompt and compulsory registration of the case with the police. The earlier the case gets reported/registered and the police start their investigation, the better the chances that the missing child is located in a short period of time. Police have to promptly and compulsorily register the case of missing children and initiate actions on all fronts to trace the missing child. A centralised system is to be established by which any one aggrieved by non-registration at the police station can, through this centralised system, forward their petition to senior police officers for appropriate intervention. An acknowledgement has to be provided to the aggrieved person. Once the case gets registered and the investigation starts soon after the crime is committed, it is possible that the missing child is found before being removed from the territorial limits of India or any state within the territory of India.

(ii) Immediate action to be taken to secure any evidence that might be of help

Immediate action is to be taken to secure evidence necessary to compare and conclusively establish the identity of the missing child through DNA/DMA analysis, in case only the mortal remains of the missing person were to be located. This would aid and assist in establishing the identity of the missing child as well as giving suitable clues to detect the identity of persons responsible for abduction if the missing child has been kidnapped or removed by force.

Subjecting the suspects to further narco-analysis may be of further help in eliciting finer details pertaining to the revelations already made and the activities that took place at the alleged time of disappearance so that the field verification of the revelations made is possible. Subjecting some key witnesses also to narco-analysis will help in checking and verifying their statements made earlier to the police.

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[11] *Horilal v Commissioner of Police, Delhi and others* Writ Petition (Criminal) No 610 of 1996, decided on 14 November 2002.

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(iii) Speeding up the investigation

A senior police officer in every state in India has to be entrusted with the investigation. Regular reviews at periodic intervals with respect to the progress should be taken by the police officers in the state. The officer should also get the details with regard to pending cases of children missing and in identifying dead bodies. Special squads if needed should be appointed to pursue further investigation. The state should issue strict instructions directing all police officers to treat matters of missing children as high priority cases.

Further, police investigation cells can be made in the police stations in a state to look immediately into the matters of missing children. The cells, however, should have an adequate number of police officials to work on a case immediately and the police officials included in the police investigation cell should be qualified to do the job successfully. Introduction of these special cells will speed up the investigation process considering the fact that the team of such officers will look only into the matter of missing children and with time and experience will get better in the field.

(iv) Setting up a police information network or a national database for quick information on missing children in India

It is very important that the present methods of collecting information about missing children be modified by way of a centralised network in India. It is necessary that the network is web-enabled, maintained and most importantly updated. A national tracking system that would encompass the grass roots in locating and tracing missing children should be introduced. There should be prompt reporting of not only missing children cases, but also return, rescue or recovery. All instances where children are rescued from places of exploitation including places of sexual exploitation and also exploitative labour should be updated in the national database. The database should be updated on a regular and systematic basis. This would help the investigating authorities to know the complete details of the children missing and those found, and keep themselves updated on the pending cases as well. The details of previous missing children and the places and the way they were found would help the authorities to track the culprit very soon in the future.

The government of India should establish a centre for such missing children at the national level. The centre if established should be the repository of all the data on the missing children including the collection, analysis, interpretation and documentation of data. However, it is very important that the centre for missing children is adopted and implemented by the government of India without any delay.

Another step that might be taken is to have a separate website for all the state police authorities like the Delhi Police web-based Zipnet programme to upload

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all the details of the cases regarding missing children and to update it with the latest details on the case to help the family of the missing children to know more about the case.

(v) Improvement in the mechanism of publishing details of missing children and the role of media

Publication of look-out notices in local dailies, TV and cable networks including private TV channels/Doordarshan government programme, vernacular newspapers and other electronic media agencies needs to be devised. Improved arrangements are required to instantly communicate the disseminated details of missing children to important hospitals, mortuaries, all police stations, outposts, entry and exit points in every state to help them to correlate and give feedback of any information of relevance in tracing the missing child. Such details should also be made available to officials in charge of temples, churches, mosques, marriage registration offices as well as hospitals etc automatically, with photographs of missing children for any useful feedback and intervention as required.

In view of the current alarming situation, the media can play an important role in increasing public awareness of missing children and the plight of the thousands of hapless families whose family members/children are listed as untraced. This could be achieved by taking the following steps:

(a) At the newsroom level, crime reporters and metro editors need to include the category of missing children as a regular beat and as part of their daily news grind. Regular follow-up news reports and look-out notices in the media would help a lot.

(b) These stories need to be followed up and tracked regularly just like other stories of murder, human trafficking, abduction and kidnapping.

(c) Newspapers can make a separate section in their classified sections on missing children. The notices and advertisements on missing children need to have a better display and be given more prominence and space in newspapers and TV bulletins. TV channels should have a repetitive telecast on missing children details.

The above suggested measures will help to a great extent to create awareness among the citizens of India and also to be careful and cautious and help prevention of any further increase in the number of missing children.

(vi) Speedy communication of information by the police personnel

One of the important aspects of a police investigation in such cases is communication of the crime to other states or places where the missing children are likely to be taken and further to communicate important messages

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during the continuation of the investigation. However, the communication between police personnel in India is not very prompt resulting in losing the chances of finding the missing children. Therefore, it is very important that the communication techniques between police personnel for transfer of important information are modified. Police personnel should be able to communicate and pass on information promptly. It is suggested that e-communications and Skype contact must be promoted for use by state police and police personnel must be educated/updated with using latest technology communication methods for tracing missing children. This would greatly facilitate faster communication by the police forces in India.

(vii) Collection of forensic evidence for establishing identity of unidentified dead bodies

No unidentified dead body should be permitted to be disposed of without ensuring collection of all possible evidence that will enable conclusive identity to be established by comparison of necessary forensic samples. A mandate must be issued to all police stations not to cremate the body of any missing/unclaimed child/person till a conclusive effort has been made to consolidate all evidence necessary which may lead to establishing the identity of the missing unclaimed child's remains.

Finger and palm prints, DNA comparison and skull superimposition techniques are being used now to conclusively establish the identity of a person. Since these techniques require some control samples for the purpose of comparison, immediately after a person goes missing, it is necessary to arrange for collection and preservation of control samples of the finger/palm print, DNA specimen, good photographs of the face, etc of the missing person. Some of these can be collected from the already available personal effects or through samples taken from parents, siblings etc.

The photograph of an unidentified dead body should be taken in such a manner that it assists in identification of facial features, personal items, any personal identification marks, shoes, watches, jewellery, tattoo marks, finger prints/palm print, DNA finger print, etc. Dental records must be preserved to establish the identity.

(viii) Introduction of a child tracking system

Children who go missing are likely to be unwary victims of exploitation and trafficking. A child tracking system should be part of the national database to prevent trafficking and exploitation of the person missing. It is extremely important that both at state and central level a missing children database should be established which facilitates countrywide exchange of information for locating/tracing missing children. Compilation of data of missing children and the mode/methods utilised for their location and search will help to resolve

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future cases of missing children and aid in the compilation of statistics for future reference. Exchange of data state-wide will greatly help police authorities to resolve cases of missing children.

(ix) Public co-operation

Police help centres should be established in the jurisdiction of all the police stations in a state or union territory (UT) as well as in public places such as malls, public amusement places, bus stations, railway stations, etc so that the information on the missing children and unnatural and unidentified bodies may be disseminated to the public for possible clues or information exchange. These centres should be integrated with closed circuit television systems to be put at all public places covering the ports of entry/exit, malls, prominent public amusement places, eateries, etc to facilitate public-spirited persons to assist the police in tracing missing persons.

(b) Further suggestions to help in prevention of abduction, kidnapping and forcible removal of children in future

(i) Necessity of defining the term 'missing children'

Defining a 'missing child' is very important to help investigating agencies to deal with the problem. It is important to have a clear mandate on definitions of 'human trafficking' and 'missing children'. The reason for the need of a clear and specific definition lies in the fact that, because the term 'missing children' is not specifically defined in Indian penal laws, many cases are not registered by the police authorities in the state claiming that the matter is not of a 'missing child'. The special operating procedure developed by the Delhi Police has defined a missing child in the following words:

> 'A child (a person who is below 18 years of the age) whose whereabouts are not known to the parents, legal guardians or any other person who may be legally entrusted with knowing whereabouts/well being of the child whatever may be the circumstances/causes of disappearance. The child in need of care and protection will be considered missing until located and/or his/her safety/well-being is established.'

Once, the term 'missing persons' is defined exhaustively, it will be much easier for the family members of such a child to get the case registered and the investigation can be started at the earliest without any ambiguity or uncertainty.

(ii) Missing children squad or children's desk in police stations

Creation of a skilled investigation and rapid response squad on missing children is a necessity. One of the recommendations is that every police station across the respective states should have a special squad/missing persons desk to trace missing children. This squad/desk should have a registering officer who should be made responsible for registering complaints of missing children. The

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officer should maintain complete records of efforts made by them to trace missing children as well as by the special squad. The registering officer should also work as an enquiry officer, responsible for following up the entire procedure of tracing/tracking the missing child. The squad should also be regularly updated with the small details they have about the missing persons so that the families of the missing persons are well aware of the steps being taken by the authorities in finding their lost family members. The records should also be updated with the information of the missing persons who have been traced and returned back to their respective families at least in the past 6 months.

(iii) Involving Panchayati Raj Institutions (PRIs) (village bodies) etc

In order to make the investigative procedures concerning missing children more transparent and user-friendly, it would be preferable for the police investigating team to involve the community at large, such as representatives of Panchayati Raj Institutions (village level bodies), municipal committees, neighbourhood committees, resident welfare associations, in addition to existing helplines. This will enable the community to get fully involved along with the police in tracing missing children and also if these institutions at a lower level are involved, it is easy to pass on the information of the missing children to more and more people making the search of such children or adults easier and faster. The Director-General of Police (DGP) in every state and UT in India should seriously consider taking full advantage of these agencies in the task of not only investigating crimes relating to children but also tracking down missing children. The role of Panchayats and such bodies should be extended to:

- prompt reporting of missing children;
- prompt dissemination of intelligence, if any, to the law enforcement agencies;
- rendering assistance to law enforcement agencies for tracing children;
- provide timely feedback to the law enforcement agencies about the return of the child.

This would not only help in finding missing children whose complaints have been registered but, because of the involvement of the agencies at a lower level, also help people in villages and the surrounding areas to report more cases of missing children, making them more aware in their daily lives and thus preventing the increase of crime at such a fast rate.

(iv) Involving non-government organisations (NGOs)/state legal services authorities and setting up of advisory boards

In places where vulnerable groups of children are found in large numbers, there is need for enforcement agencies to evolve some kind of a mechanism in

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partnership with non-governmental organisations and social workers, whereby apart from rendering counselling to them, awareness raising activities are also carried out. The involvement of the state legal services authority and its district level units can be extremely useful in this regard. This would not only instill confidence in the general public but also empower people and give them special protection so that they are in no way lured by external agencies/factors. This initiative could be taken by the missing children squad/cell in the districts. The DGPs need to ensure action on this initiative of public–private partnership.

Each state government in India should set up an advisory body including all government departments concerned as well as appropriate NGOs working in the field of missing children, trafficked children, child labour, etc. The body should be given statutory powers to ensure monitoring of the enforcement of child welfare legislative provisions.

(v) Establishing helplines

There is a need to establish a child helpline through NGOs and other agencies with adequate support from the government in all districts in India. The Department of Women and Child Development, Government of India, may take the initiative to set up such a national network. Such a helpline helps in immediate registration or providing the police with the information of missing children immediately, thereby improving the chances of finding the missing children or persons sooner.

(vi) Importance of registration of the cases of 'missing children' as a cognisable offence

It should be made mandatory for the police to promptly register without any delay all complaints of missing children as a First Information Report (FIR). At the moment the issue of missing children is not a cognisable offence and the very fact that a child is missing does not convey occurrence of a crime. However, some states like Andhra Pradesh, Tamil Nadu and New Delhi allow police to register FIRs and take up investigation. In order to facilitate proper enquiry/investigation, it is advisable that a FIR is registered by the police with respect to the issue of missing children at the very inception without awaiting initial police preliminary inquiries. However, experience shows that in many cases a child may not have gone missing and the panic reaction of the parents or wards leads to such reporting. Therefore, all such issues may not warrant registration of an FIR immediately. Nevertheless, it is advisable to register a FIR if a missing child does not come back or is not traced within a reasonable time. State governments are advised to consider the issue of appropriate directions to law enforcement agencies to set a time-limit of 15 days from the date of reporting, that if a missing child is not traced back within that time, a presumption may be made of some mala fides and a FIR must be registered with respect to all such issues of missing children. Filing of a FIR greatly assists in finding missing children in a country like India, where the population is large and the criminal rate is very high. Registering a FIR makes it

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incumbent on the police authorities to look into the matter and they become responsible to the family of the missing child or person, thereby leading to good chances of finding the missing children or persons.

(vii) Mandatory intimation of missing children FIRs to state legal services authorities

It should be mandatory for police authorities in all states and UTs in India to forward both by e-mail and by post a copy of each FIR registered with regard to missing children to the respective state legal services authority or its district level chapters. In turn the legal services authority should provide all possible legal aid to parents and families of missing children and act as an interface between the parents of the missing children and the police authorities. This will help in keeping a vigil on any large scale kidnapping by organised gangs and provide a monitoring avenue whereby the police authorities can be asked to give regular feedback on the FIR so lodged.

(viii) Attention to transit points of trafficking

There is a need to keep special vigils at railway stations, bus stands, airports, seaports and such other places, which act as transit points for missing children, including children who run away or are made to run away. In this context, the government railway police, the Railway Protection Force, airport and seaport authorities need to be oriented about the issue of missing children. It is important that, as soon as the information about a missing child or person is received, authorities and police posts at all the nearest airports, railway stations, bus stands and seaports are informed about them and photographs/ details are displayed at such places.

(ix) Nodal officers

Nodal officers on missing children in every district should be appointed. The officer should be notified by the respective state governments and should be made accountable to take all steps to trace/give care and protection to the missing child. Adequate legal administrative and financial support should be provided by the state government. The family members of the missing child would have another option to get the complaint registered if it is refused by the police officers.

(x) Cross-border missing children

This is a grey area, which largely remains unaddressed. It has been reported that several foreign children who have been trafficked into India have been punished as illegal immigrants and are made to suffer. In this regard the National Human Rights Commission (NHRC) has already recommended that state governments undertake a review of all such cases and provide relief to such children, as all trafficked children, irrespective of their nationality, are children in need of care and attention. Moreover, there is a need of developing

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a protocol on this issue. It is learnt that United Nations Office on Drugs and Crime (UNODC) in its anti-human trafficking project can provide the required technical assistance. In this regard the Ministry of Women and Child Development can utilise the technical assistance of UNODC and, in close coordination with the Ministry of External Affairs (MEA), develop a protocol on this topic.

(xi) Interparental child abduction issues

Interparental child removal both within India and across international borders (both inbound and outbound) is a common phenomenon today. Parental child removal is neither defined in any law as an offence nor is it taken cognisance of by the police unless there is court intervention. India is not a signatory to the Hague Convention on Civil Aspects of International Child Abduction, 1980 and children forcibly brought to India or taken out of India by estranged parents do not fall within the ambit of any penal law. This grey area seriously needs legislation. Until that is done, the state/district legal services authorities and/or the mediation cells at the High Court/District Court levels must be associated or involved by police authorities and the courts to whom these matters get reported. Alternative dispute resolution and mediation in such cases can play a major role in the return of children to the place/country of their habitual and permanent residence. Return of children, their forcible removal and/or abduction by parents must be stopped forthwith.

(xii) Procedure after return of the child

The duty of the police authorities should not end with the child returning back home. Rather, whenever a missing child is traced or comes back on his or her own, the police or investigating officer should make sure that all relevant angles such as involvement of organised gangs, application of provisions of Bonded Labour Act and such other relevant Acts applicable in India are looked into as probable causes of the child going missing.

If the involvement of an organised gang is found, it is the responsibility of the police or investigating officer to refer the matter to the Crime Branch of the respective state police or the special cell constituted by the Central Bureau of Investigation (CBI) in this regard to prevent future recurrence.

(xiii) Comprehensive plan for the rehabilitation of the missing child

Another very important step that should be kept in mind once the missing child comes back to the family or is found by the police is their rehabilitation. So, to achieve this purpose it is important that the government of India or of the respective state takes steps for creation of a comprehensive plan for rehabilitation of the rescued children who need rehabilitation or any other assistance to come back to the mainstream of life.

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Hence, the above-mentioned steps for protection and prevention of cases of missing children in future, and for tracing the already missing minor children all over the country, if followed diligently, can help solve the problem of kidnapping and abduction of innocent minor children. It is further stated that, if the guidelines are strictly looked into and followed by the concerned state departments, it can be an important step in saving lives of many children in the future.

VI SUGGESTIONS IN THE ALTERNATIVE FRAMEWORK – THE COMMISSION FOR PROTECTION OF CHILD RIGHTS ACT, 2005

(a) Introduction

Besides the above steps that can be taken in the framework of existing statutory laws, another suggestion can be mooted within the framework of the Commission for Protection of Child Rights Act, 2005 (CPCRA). In this context, it is relevant to quote the Preamble of the CPCRA:

> 'An Act to provide for the constitution of a National Commission and State Commissions for Protection of Child Rights and Children's Courts for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto.
>
> WHEREAS India participated in the United Nations (UN) General Assembly Summit in 1990, which adopted a Declaration on Survival, Protection and Development of Children;
>
> AND WHEREAS India has also acceded to the Convention on the Rights of the Child (CRC) on the 11th December, 1992;
>
> AND WHEREAS CRC is an international treaty that makes it incumbent upon the signatory States to take all necessary steps to protect children's rights enumerated in the Convention;
>
> AND WHEREAS in order to ensure protection of rights of children one of the recent initiatives that the Government have taken for Children is the adoption of National Charter for Children, 2003;
>
> AND WHEREAS the UN General Assembly Special Session on Children held in May, 2002 adopted an Outcome Document titled "A World Fit for Children" containing the goals, objectives, strategies and activities to be undertaken by the member countries for the current decade;
>
> AND WHEREAS it is expedient to enact a law relating to children to give effect to the policies adopted by the Government in this regard, standards prescribed in the CRC, and all other relevant international instruments.'

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(b) Sections 13, 17, 24, 25 and 26 of the CPCRA.

It may now be useful to quote ss 13, 17, 24, 25 and 26 of the CPCRA which are extracted for ready reference.

'13. Functions of Commission.

(1) The Commission shall perform all or any of the following functions, namely:–

(a) examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation;
(b) present to the Central Government, annually and at such other intervals, as the Commission may deem fit, reports upon the working of those safeguards;
(c) inquire into violation of child rights and recommend initiation of proceedings in such cases;
(d) examine all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster, domestic violence, HIV/AIDS, trafficking, maltreatment, torture and exploitation, pornography and prostitution and recommend appropriate remedial measures;
(e) look into the matters relating to children in need of special care and protection including children in distress, marginalized and disadvantaged children, children in conflict with law, juveniles, children without family and children of prisoners and recommend appropriate remedial measures;
(f) study treaties and other international instruments and undertake periodical review of existing policies, programmes and other activities on child rights and make recommendations for their effective implementation in the best interest of children;
(g) undertake and promote research in the field of child rights;
(h) spread child rights literacy among various sections of the society and promote awareness of the safeguards available for protection of these rights through publications, the media, seminars and other available means;
(i) inspect or cause to be inspected any juvenile custodial home, or any other place of residence or institution meant for children, under the control of the Central Government or any State Government or any other authority, including any institution run by a social organisation; where children are detained or lodged for the purpose of treatment, reformation or protection and take up with these authorities for remedial action, if found necessary;
(j) inquire into complaints and take suo motu notice of matters relating to,–
    (i) deprivation and violation of child rights;
    (ii) non-implementation of laws providing for protection and development of children;
    (iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children, or take up the issues arising out of such matters with appropriate authorities; and
(k) such other functions as it may consider necessary for the promotion of child rights and any other matter incidental to the above functions.

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(2) The Commission shall not inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force.'

'17. Constitution of State Commission for Protection of Child Rights.

(1) A State Government may constitute a body to be known as the (name of the State) Commission for Protection of Child Rights to exercise the powers conferred upon, and to perform the functions assigned to, a State Commission under this Chapter.

(2) The State Commission shall consist of the following Members, namely: –

(a) a Chairperson who is a person of eminence and has done outstanding work for promoting the welfare of children; and
(b) six Members, out of which at least two shall be women, from the following fields, to be appointed by the State Government from amongst persons of eminence, ability, integrity, standing and experience in,–
    (i) education;
    (ii) child health, care, welfare or child development;
    (iii) juvenile justice or care of neglected or marginalized children or children with disabilities;
    (iv) elimination of child labour or children in distress;
    (v) child psychology or sociology; and
    (vi) laws relating to children.

(3) The headquarter of the State Commission shall be at such place as the State Government may, by notification, specify.'

'24. Application of certain provisions relating to National Commission for Protection of Child Rights to State Commissions.

The provisions of sections 7, 8, 9, 10, sub-section (1) of section 13 and sections 14 and 15 shall apply to a State Commission and shall have effect, subject to the following modifications, namely:–

(a) references to "Commission" shall be construed as references to "State Commission";
(b) references to "Central Government" shall be construed as references to "State Government"; and
(c) references to "Member-Secretary" shall be construed as references to "Secretary".

25. Children's Courts.

For the purpose of providing speedy trial of offences against children or of violation of child rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify at least a court in the State or specify, for each district, a Court of Session to be a Children's Court to try the said offences:

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Provided that nothing in this section shall apply if –

(a) a Court of Session is already specified as a special court; or
(b) a special court is already constituted,

for such offences under any other law for the time being in force.

26. Special Public Prosecutor.

For every Children's Court, the State Government shall, by notification, specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a Special Public Prosecutor for the purpose of conducting cases in that Court.'

(c) Suggested measures under CPCRA

In the light of the above provisions of the CPCRA, it is incumbent on governments of all states and UTs of the country to take all necessary steps to protect children's rights enumerated in the Convention on the Rights of the Child (CRC). Sections 13 and 24 of the CPCRA provide ample powers both to the national commission and the state commissions for inter alia taking necessary steps and recommending appropriate remedial measures with regard to issues pertaining to missing children and all children in distress. These can be enforced in all states and UTs by setting up and/or constituting state commissions for protection of child rights under s 17 of the CPCRA in the respective territories of the individual governments. Hence, as a starting point, states and UTs should forthwith set up such state commissions so that the entire machinery can be galvanised under their regime.

It is suggested that any averment by state or UT governments against setting up state commissions for protection of child rights in their territories should not be entertained due to the sensitivity and magnitude of the problems relating to missing children. This is supported by the following contentions. A news report in the *English Tribune* dated 29 December 2011, quoting the Bureau of Police Research and Development (BPRD) of the Union Home Ministry which organised a workshop to study the problem of disappearance of children in the northern states showed the concern in this matter. The news report quotes that over 200 of the 800 missing persons in Haryana in the last 6 months are minors. 72 of these 200 missing children are girls, which indicates the direct bearing on the safety of children. Likewise, a news report in *The Pioneer* dated 3 October 2010 indicates that:

> 'Child protection continues to be the last priority of the city administration. Even after the recent study of the UT Health Department, which stated that child abuse is rampant in the city of Chandigarh, the Chandigarh Administration continues to overlook the need to implement the Integrated Child Protection Scheme (ICPS) here.'

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Hence, all states and UTs in India need to set up state commissions as a priority.

To complete the setting up of a fully operational system under the CPCRA, children's courts can be constituted in the said respective territories under s 25 of the CPCRA and special public prosecutors can be appointed in these territories under s 26 of the CPCRA. Thus, independent of other statutory enactments dealing with criminal laws or other penal provisions in general, CPCRA can be very effectively utilised for individually setting up a statutory system for enforcement of child rights specifically and particularly in the larger interest of children. This will create a special, exclusive and individual forum to redress breachers of children's rights and will provide effective, speedy and timely relief in the case of any individual incident of missing or distressed children.

The issues pertaining to missing children and children in distress can be exclusively looked into by the respective state commissions in their individual territories in view of the powers vested in them under ss 13 and 24 of the CPCRA. Clearly, if the state commission concerned suo motu or upon inquiry into complaints regarding missing children or children in distress comes to a conclusion that there is a violation of child rights, there is non-implementation of laws relating to children or there is non-compliance of decisions, guidelines or instructions pertaining to the welfare of children, such commission under s 15 of the CPCRA can approach the Supreme Court or High Court for issuance of directions, orders or writs as may be deemed necessary by the court, besides recommending that concerned governments grant interim relief as deemed necessary. Thus, any individual case of missing children or children in distress can be immediately remedied by the state commission by enforcing the above provisions of the CPCRA.

The composition of the state commission with its six members, out of which at least two should be women specialising in child health, care, welfare or child development, juvenile justice, child psychology, laws related to children and/or having knowledge of children in distress will give adequate opportunity to the state commission to receive complaints or act suo moto whenever there is any issue of kidnapping or removal of children and deprivation or violation of child rights. The commission is vastly empowered to examine all factors affecting children and relating to trafficking, torture, exploitation, pornography and prostitution and to recommend appropriate remedial measures. The commission has mandatory powers to forward cases to any magistrate and hear them as complaints. Independently, the commission upon inquiry can recommend initiation of proceedings for prosecution or such other action as deemed fit. Hence, all cases of trafficking of children particularly for exploitation, begging, prostitution and pornography can be monitored and future recurrence can be checked. All organised child mafias can therefore be attempted to be eliminated.

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(d) Conclusion of suggested measures under CPCRA

A reading of the provisions, remedies and suggestions made above under the CPCRA indicates that a separate and independent machinery can be set into motion under the auspices of the CPCRA to specifically look into all issues related to child rights while the process of the criminal law moves in the mainstream.

The menace of missing children in large numbers can be curbed with a heavy hand only if the issues relating to children are segregated and dealt with under separate parameters under the watchful eye of child specialists, ie qualified members of the state commissions for protection of child rights. Only if qualified, trained and experienced persons sensitive to child rights are empowered to handle the problems of missing children can the process and machinery of the criminal law work in tandem.

Once offenders are apprehended, speedy trials of offences against children or of violation of child rights can be ensured in children's courts which can be set up under the CPCRA. This can prevent recurrence of organised children-related offences.

A vigilant state commission for protection of child rights both as a watch dog and as an investigator can serve a very significant role in the removal of problems of missing children. Hence, only if the issue of missing children is taken out of the general stream of treatment and handed over to child specialists to monitor it from the outside can the necessary attention, time and energy be devoted to this highly sensitive issue of missing children.

VII CONCLUSION

In the backdrop of the above study, all missing children whose whereabouts are not known even after years of investigations and all the new cases registered every day in the police stations across the country can benefit and be traced if the above suggestions and recommendations are taken into account by the police or the investigating authorities while searching for the missing children. It may be suggested that not only should the police or the investigating authorities be responsible for finding the missing children whose cases have been reported in the police stations but the public bodies, NGOs/state legal services authorities should also be made a part of the support services. That would help and speed up the investigation process making it possible for missing children to come back home. If all authorities at all levels, ie village, district, state and centre, as well as public bodies, work together to find missing children, it will not be very difficult to find the missing children. Therefore, keeping in mind the above guidelines and suggestions it is possible to efficiently investigate and find the missing children besides preventing future instances of kidnapping of children. Considering that India is a large nation geographically with vast territories housing a multicultural society and a huge population of

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over 1.1 billion people, resolving critical issues like missing children is not an easy task. However, keeping in view that this vulnerable section of society is at a very high risk rate, every effort, step and endeavour should be made to adapt means and methods to protect the future of the nation's children. Therefore, it should be the endeavour of every official body of the system to contribute and do whatever is possible for the plight of missing children who must be helped. Resolving their problems should be the top priority in all walks of life.

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India

LAW AND SURROGACY ARRANGEMENTS IN INDIA

Anil Malhotra and Ranjit Malhotra[*]

Résumé

La gestation pour autrui (GPA) est courante en Inde où elle attire les étrangers qui veulent un enfant. Le pays reconnaît pour le moment, en application du droit commun des contrats, la légalité de la GPA, incluant la GPA rémunérée. Les étrangers, à moins d'être Hindous, ne peuvent adopter un enfant né d'une gestation pour autrui. Cependant, un tribunal peut rendre une ordonnance de garde autorisant l'enfant à quitter le pays. Ce principe a été confirmé par la Cour suprême de l'Inde dans une affaire impliquant un couple de Japonais qui se sont séparés avant la naissance de l'enfant. La mère de l'époux avait initié les procédures et elle a pu, à l'issu de la décision de la Cour suprême, amener l'enfant au Japon. Cet arrêt aura un impact sur d'autres cas, notamment lorsque le père génétique est célibataire ou vit en couple avec un autre homme. Un projet loi, préparé par un comité d'expert, propose un encadrement de la gestation pour autrui et rend les ententes de GPA exécutoires. En attendant, le gouvernement indien vient cependant de modifier ses exigences en matière de visas, de manière telle que le commerce international de la GPA risque bien de plonger du nez. Les personnes qui veulent se rendre en Inde en vue d'une GPA devront désormais obtenir un 'visa médical' plutôt qu'un simple visa de touriste. Or un tel visa ne sera délivré qu'à la vue d'une lettre des autorités du pays du demandeur établissant que la GPA y est reconnue et garantissant que l'enfant pourra y entrer. En réalité, cette nouvelle réglementation vient suppléer le défaut du Parlement de contrôler le commerce de la gestation pour autrui.

I POSITION OF INDIAN LAW FOR SURROGACY ARRANGEMENTS

Surrogacy in India is as of now considered legitimate because no Indian law prohibits surrogacy, but then, as a retort, no law to date permits surrogacy either. Hence, surrogacy agreements in India are governed by ordinary contract law, ie the Indian Contract Act 1872, to determine the legality of any such contract or agreements executed in India for different forms of surrogacy

* Anil Malhotra LLM (London), Advocate, Chandigarh.
Ranjit Malhotra LLM (London), Advocate, Chandigarh.

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arrangements. The enforceability of any such agreement is within the domain of Indian civil procedural laws and the main component of this is in the Indian Code of Civil Procedure.

In the absence of any law to govern surrogacy, the Indian Council of Medical Research (ICMR) had issued guidelines in 2005 to check the malpractices in India but these guidelines being non statutory are not mandatory, do not have any compulsive force and are not enforceable or justiciable in a court of law in India.

The recent case[1] of a Japanese baby born of an Indian surrogate mother has triggered a debate as to the natural/genetic father's rights, since, after divorce, he could not claim custody according to Indian laws on the facts of that case. The Supreme Court of India had in the case dealt with the matter upon the grandmother's claim to custody and had made observations regarding commercial and other forms of surrogacy since the Union of India had pleaded before it as follows:[2]

> 'that there is no law governing surrogation in India and in the name of surrogation, a lot of irregularities are being committed. According to it, in the name of surrogacy, a money making racket is being perpetuated. It is also the stand of the said respondent that the Union of India should enforce stringent laws relating to surrogacy.'

However, it may be added that the Supreme Court of India stated that:[3]

> 'Surrogates may be relatives, friends or previous strangers. Many surrogate arrangements are made through agencies that help match up intended parents with women who want to be surrogates for a fee. The agencies often help manage the complex medical and legal aspects involved. Surrogacy arrangements can also be made independently. In compensated surrogacies, the amount a surrogate receives varies widely from almost nothing above expenses to over $30,000. Careful screening is needed to assure their health as the gestational carrier incurs potential obstetrical risks.'

It may further be added that the Supreme Court of India, fully realising the existing surrogacy practices prevalent in India, observed:[4]

> '5. Surrogacy is a well known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may … as a gestational carrier carry the pregnancy to delivery after having been implanted with an embryo. In some cases, surrogacy is the only available option for parents who wish to have a child that is biologically related to them.

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1 *Baby Manji Yamada v Union of India and Another* Judgments Today 2008 (11) Supreme Court 150.

2 Ibid, para 3, p 151.

3 Ibid, para 12, p 153.

4 Ibid, paras 5–11, pp 152–153.

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The word "surrogate", from Latin "subrogare", means "appointed to act in the place of". The intended parent(s) is the individual or couple who intends to rear the child after its birth.

6. In "traditional surrogacy" (also known as the Straight method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (inter-cervical insemination) which is performed at a fertility clinic.

7. In "gestational surrogacy" (also known as the Host method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child (e g because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.

8. "Altruistic surrogacy" is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of her child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing and other related expenses).

9. "Commercial surrogacy" is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms "wombs for rent", "outsourced pregnancies" or "baby farms".

10.Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a health condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy.

11. Alternatively, the intended parent may be a single male or a male homosexual couple.'

From a reading of the above, it is apparent that 'commercial surrogacy' is a medical procedure which is considered to be legal in India due to the factors mentioned in para 9 of the judgment above. However, the fact remains that there is no statutory codified law governing commercial surrogacy and other arrangements.

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It may be noticed here that a Draft Bill called the 'Assisted Reproductive Technology (Regulation) Bill & Rules – 2010' which has been prepared by a 12-member committee including experts from Indian Council for Medical Research and from the Ministry of Health and Family Welfare, as well as medical specialists and other experts, has been circulated for comment and posted online recently for feedback. The new Assisted Reproductive Technology (Regulation) Bill & Rules 2010, propose to legalise commercial surrogacy and its salient points are:

- The surrogacy agreement will be legally enforceable.
- The surrogate mother may receive monetary compensation for carrying the child in addition to health care and treatment expenses during pregnancy.
- The surrogate mother will relinquish all parental rights over the child once the amount is transferred and birth certificates will be in the name of genetic parents.
- The prescribed age limit for a surrogate mother is between 21 and 45 years. The proposed Bill also states that no surrogate mother can undergo an embryo transfer more than three times.
- Single parents can also have children using a surrogate mother.
- All foreigners seeking infertility treatment in India will first have to register with their embassy. Their notarised statement will then have to be handed over to the treating doctor. The foreign couple will also state whom the child should be entrusted to in case of an eventuality such as a genetic parent's death.

The Bill is still being debated and has not yet become law in India. Hence, anything quoted above is only a proposed law. Therefore, in the absence of any codified law as the situation exists today, in respect of surrogacy arrangements, the ordinary civil law of the land is applicable in respect of surrogacy also since there is no specific law on the subject to govern such arrangements. The Code of Civil Procedure 1908, is an Act made by the Indian Parliament for the entire territorial jurisdiction of India as a federal law to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature. Section 9 of this Code permits courts to try all civil suits unless barred:

> '9. Courts to try all civil suits unless barred— The Courts shall subject to the provisions herein contained have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.'

As a result, in the law as it exists in India today, both the validity and enforceability of any surrogacy arrangement or agreement can be achieved in a civil court by a civil suit under s 9 of the Code, seeking appropriate relief as is

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admissible to parties under Indian law. However, the touchstone of the validity of a civil suit would have to be tested under contract law.

Against this backdrop, it may thus be necessary to also see the position of surrogacy arrangements or agreements under the Indian law of contract. It is first be pertinent to quote s 10 of the Indian Contract Act 1872:

> '10. What agreements are contracts – All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.'

For the present context, any surrogacy arrangement or agreement, which is arrived at by the free consent of the parties who are competent to contract and who have entered into the arrangement or agreement for a lawful consideration as also with a lawful object which is not expressly declared to be void, would be a contract. It may be added that since under the prevalent law in India, commercial surrogacy procedures are legal in India, subject to the fulfilment of other conditions of s 10 of the Contract Act a surrogacy arrangement or agreement would be a contract. In the face of this conclusion, a surrogacy agreement or arrangement would be a contract enforceable by civil suit under s 9 of the Code of Civil Procedure.

For the present purposes, it may be helpful to note certain observations of the Supreme Court of India interpreting s 9 of the Code of Civil Procedure. The Supreme Court of India in the case of *E Achuthan Nair v P Narayanan Nair and Another*,[5] held as follows:

> 'In India, the question whether a suit is cognizable by a civil court is to be decided with reference to Section 9 of the Civil Procedure Code. If the suit is of a civil nature, the court will have jurisdiction to try the suit unless it is either expressly or impliedly barred.'

Further, the Supreme Court of India in another case, *PMA Metropolitian v MM Marthoma*,[6] held:

> 'The expansive nature of the Section 9 is demonstrated by use of phraseology with positive and negative. The earlier part opens the door widely and later debars entry to only those, which are expressly or impliedly barred. The two explanations, one existing from inception and latter added in 1976 bring out clearly the legislative intention of extending operation of the section to such religious matters where right to property or office is involved irrespective of whether any fee is attached to the office or not. The language used is simple but explicit and clear. It is structured on the basic principle of a civilized jurisprudence that absence of machinery for enforcement of right renders it nugatory. The heading which is normally key to the section brings out unequivocally that all civil suits are cognizable unless barred. What is meant by it is explained further by widening the

[5] All India Reporter 1987 Supreme Court 2137.
[6] All India Reporter 1995 Supreme Court 2001 at 2022-23.

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> ambit of the section by use of the word "shall" and the expression, "all suits of a civil nature" unless "expressly or impliedly barred". Each word and expression casts an obligation on the Court to exercise jurisdiction for enforcement or right. The word "shall" makes it mandatory. No Court can refuse to entertain a suit if it is of description mentioned in the section. That is amplified by use of expression, "all suits of civil nature". The word "civil nature" is wider than the word "civil proceeding". The section would, therefore, be available in every case where the dispute has the characteristic of affecting one's rights which are not only civil but of civil nature.'

In the face of the above interpretations of s 9 of the Code of Civil Procedure by the Supreme Court of India, it is safe to conclude that surrogacy agreements or arrangements which satisfy the ingredients of s 10 of the Indian Contract Act would be contracts which are enforceable in a civil court since the cognisance of such a civil suit would neither be expressly or impliedly barred.

There also exists in India another piece of federal legislation applicable throughout the territory of India called 'The Guardian and Wards Act 1890', which is an Act to consolidate and amend the law relating to guardians and wards prevalent in India. Section 4 of the Act specifies the persons entitled to apply for a guardianship order and s 9 prescribes the court as having jurisdiction to entertain the guardianship application. Section 10 lays down the form of the application and s 11 prescribes the procedure on admission of the application. Section 13 lays down the requirement of hearing of evidence before making of an order under the Act and s 26 permits the removal of a ward from the jurisdiction of the court. This is the second possible option which can be availed of by the biological father in the present case for enforcement of his rights arising from the surrogacy arrangement or agreement existing in the present case.

II FACTS AND LAW RELATING TO JAPANESE BABY MANJI YAMADA BORN IN INDIA ON 25 JULY 2008 BY SURROGACY ARRANGEMENT

Since there is no statutory codified law governing surrogacy in India, there is only a 126-page document regulating the technologies used in surrogacy. The Indian Council of Medical Research (ICMR) issued the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India in 2005, but the guidelines being non-statutory have no legal sanctity and are not binding. They are hazy on issues like the right of the surrogate, the minimum age of the surrogate, details about the contracts, informed consent, adoption requirements etc. The issue of legal parentage has been particularly contentious in the absence of any law.

Dr Ikufumi Yamada (45), an orthopaedic surgeon attached to a Tokyo hospital and his former wife Dr Yuki Yamada came to India in 2007 and had chosen a surrogate mother in Anand, Gujarat. When Dr Yuki Yamada could not

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conceive, the couple had chosen the surrogate mother in Ahmedabad to carry the child. They signed an agreement of surrogacy with Dr Nayanaben Patel of Akansha IVF Centre, an Ahmedabad Hospital on 22 November 2007.

The surrogacy agreement was entered into between the biological father and biological mother on one side and the surrogate mother on the other side. Pritiben Mehta, wife of Brijeshbhai Mehta also from Ahmedabad, signed the agreement to serve as the surrogate mother. The fertilisation process of Yuki's eggs with Ikufumi's sperm was completed in Tokyo and the embryo was brought to Ahmedabad to be implanted in the surrogate mother. The embryo transfer was done at Dr Nayanaben's Hospital on 22 November 2007 in the presence of the Japanese couple. After that they left for Tokyo and the child was born on 25 July 2008 in Anand, Gujarat. However, a month before that Yuki divorced her husband Ikufumi Yamada and she subsequently disowned the child.

On 3 August 2008, the child was moved to Arya Hospital in Jaipur following a law and order situation in Gujarat and she was provided with much needed care including being breast-fed by a woman who had given birth to a baby girl as the surrogate mother had also abandoned the baby. A friend of Ikufumi, Mr Kamal Vijayvargiya, a jeweller from Jaipur and settled in Tokyo, was instrumental in getting the baby shifted to Arya Hospital in Jaipur and also to get Ikufumi's mother to come down and take care of the child.

It transpired that the biological father Ikufumi had come to take custody but had to return to Japan before his visa expired. Custody was denied even to the grandmother (Ikufumi's mother) after a habeas corpus petition was filed in the Jaipur Bench of the Rajasthan High Court by an NGO, Satya, who claimed that in the absence of surrogacy laws in India, the custody of the child should not be given to the grandmother. To complicate things further, before the Rajasthan High Court, neither the biological father nor the surrogate mother had moved an application seeking custody of the child. The Municipal Council at Anand in Gujarat had issued a birth certificate to the baby indicating the name of the genetic father.

Against the directions of the Rajasthan High Court, the grandmother, Emiko Yamada filed a writ petition in the Supreme Court. It was contended in the Supreme Court that under the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India 2005 ('the ICMR 2005 Guidelines') the surrogate child is the legitimate child of its genetic parents. Paragraph 3.16.1 of the ICMR 2005 Guidelines in Chapter 3 entitled Code of Practice, Ethical Considerations and Legal Issues states:

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> **'3.16 Legal Issues**
>
> **3.16.1 Legitimacy of the child born through ART**
>
> A child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance. Sperm/oocyte donors shall have no parental right or duties in relation to the child, and their anonymity shall be protected except in regard to what is mentioned under item 3.12.3.'

In accordance with the pleadings before the Supreme Court of India, when the matter first came before it on 14 August 2008, the Court by an interim order allowed the grandmother to take care of the baby until the legal wrangles were sorted out by the Court.

Ultimately, on 29 September 2008, the Supreme Court of India disposed of the writ petition filed by the grandmother with directions that, if any person has any grievance or complaint relating to the child, it can be vented in accordance with the Commission for Protection of Child Rights Act 2005. This was with regard to the allegations of the Jaipur NGO 'Satya' that the child was abandoned as neither the natural parents nor the surrogate mother were taking care of the child.

In relation to the grievance of the grandmother that the permission to travel to Japan including issuance of a passport to the child was under consideration of the central government and that no orders had been passed in that regard, the Supreme Court directed that if a comprehensive application as required under law is filed, it was to be disposed of expeditiously. All proceedings pending in the High Court relating to the matter which had been dealt with stood disposed of by the Supreme Court order of 29 September.

Following the directions of the Supreme Court, the Regional Passport Office in Jaipur on 17 October 2008 issued an 'Identity Certificate' to the baby allowing her to travel to Japan to meet her father Ikufumi Yamada. However, the baby's citizenship status still remained unclear. Reportedly, the baby Manji Yamada and her Japanese grandmother Emkio Yamada who had been looking after her left India to go to Japan on 1 November 2008.

The ICMR Guidelines say that the child born through surrogacy must be adopted by genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting that the child is not theirs. This is a legal parenthood option arising out of surrogacy arrangements. Paragraph 3.10.1 of the ICMR 2005 Guidelines in Chapter 3 entitled Code of Practice, Ethical Considerations and Legal Issues states:

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> **'3.10 Surrogacy: General Considerations**
>
> 3.10.1 A child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting (of which the records will be maintained in the clinic) that the child is theirs.'

However, it may be clarified that the legal process of adoption in India by any foreign parents is itself not possible since the Guardian and Wards Act 1890 permits guardianship orders only and adoption processes have to follow in the respective countries of the nationality or permanent residence of the proposed adoptive parents. Hence, no legal adoption can take place in India by foreign parents except those who are Hindus by religion and are governed by Hindu laws in this regard.

It may also be pointed out that the Indian law on the subject of adoption, entitled 'the Hindu Adoption and Maintenance Act 1956', is an Act to amend and codify the law relating to adoptions and maintenance among Hindus only. Likewise, 'the Hindu Minority and Guardianship Act 1956', is an Act to amend and codify certain parts of the laws relating to minority and guardianship among Hindus. These personal laws governing Hindus permit adoption as laid down in the said laws.

III VALIDITY OF GUARDIANSHIP PROCEEDINGS

The Indian law applicable in the present case is the Guardians and Wards Act 1890 (GWA) which is the legislation meant to consolidate and amend the law relating to guardians and wards in India. This is because under the Hindu Minority and Guardianship Act 1956 (HMGA) and under the Hindu Adoptions and Maintenance Act 1956 (HAMA) only those persons in India who are Hindu by religion can adopt or be appointed as guardians of Hindu minor children.

In the case of normal inter-country adoptions, to enable any foreign adoptive parents to take a Hindu child in adoption from India, such parents would be required to obtain a guardianship order from the Court of the Guardian Judge in the appropriate jurisdiction within India and thereafter obtain adoption orders in accordance with the law applicable to such foreign parents in the country of their nationality. The position therefore in this regard can be summed up as follows:

(a) In so far as the law in India is concerned, only persons who are Hindus by religion can adopt children in India since s 2 of the HAMA and s 3 of HMGA make it explicitly clear that the respective Acts are applicable only to those persons who are Hindus by religion.

(b) As per the provisions of the GWA applicable to all persons in India, the adoptive parents are permitted to be appointed as guardians of minor

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children in India and are thereafter free to adopt them in the country of their nationality to which they are allowed to take the children for adoption by the Guardian Judge in India.

(c) It is relevant to quote and extract ss 7, 8, 9, 10, 11, 13, 17 and 26 of the GWA which are relevant in the present case as follows:

'7. Power of the Court to make order as to guardianship.

(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

(a) appointing a guardian of his person or property, or both, or
(b) declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

8. Persons entitled to apply for order.

An order shall not be made under the last foregoing section except on the application of—

(a) the person desirous of being, or claiming to be, the guardian of the minor, or
(b) any relative or friend of the minor, or
(c) the Collector of the district or other local area within which the minor ordinarily resides or in which he has property, or
(d) the Collector having authority with respect to the class to which the minor belongs.

9. Court having jurisdiction to entertain application.

(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where

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the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.

10. Form of application.

(1) If the application is not made by the Collector, it shall be by petition signed and verified in manner prescribed by the 1* Code of Civil Procedure (14 of 1882), for the signing and verification of a plaint, and stating, so far as can be ascertained—

(a) the name, sex, religion, date of birth and ordinary residence of the minor;
(b) where the minor is a female, whether she is married, and, if so, the name and age of her husband;
(c) the nature, situation and approximate value of the property, if any, of the minor;
(d) the name and residence of the person having the custody or possession of the person or property of the minor;
(e) what near relations the minor has, and where they reside;
(f) whether a guardian of the person or property, or both, of the minor has been appointed by any person entitled or claiming to be entitled by the law to which the minor is subject to make such an appointment;
(g) whether an application has at any time been made to the Court or to any other Court with respect to the guardianship of the person or property, or both, of the minor, and, if so, when, to what Court and with what result;
(h) whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property, or of both;
(i) where the application is to appoint a guardian, the qualifications of the proposed guardian;
(j) where the application is to declare a person to be a guardian, the grounds on which that person claims;
(k) the causes which have led to the making of the applications; and
(l) such other particulars, if any, as may be prescribed or as the nature of the application renders it necessary to state.

(2) If the application is made by the Collector, it shall be by letter addressed to the Court and forwarded by post or in such other manner as may be found convenient, and shall state as far as possible the particulars mentioned in sub-section (1).

(3) The application must be accompanied by a declaration of the willingness of the proposed guardian to act and the declaration must be signed by him and attested by at least two witnesses.

11. Procedure on admission of application.

(1) If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof, and cause notice of the application and of the date fixed for the hearing—

(a) to be served in the manner directed in the Code of Civil Procedure (14 of 882) on—

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(i) the parents of the minor if they are residing in any State to which this Act extends,
(ii) the person, if any, named in the petition or letter as having the custody or possession of the person or property of the minor,
(iii) the person proposed in the application or letter to be appointed or declared guardian, unless that person is himself the applicant, and
(iv) any other person to whom, in the opinion of the Court, special notice of the application should be given; and

(b) to be posted on some conspicuous part of the courthouse, and of the residence of the minor, and otherwise published in such manner as the Court, subject to any rules made by the High Court under this Act, thinks fit.

(2) The State Government may, by general or special order, require that, when any part of the property described in a petition under section 10, sub-section (1), is land of which a Court of Wards could assume the superintendence, the Court shall also cause a notice as aforesaid to be served on the Collector in whose district the minor ordinarily resides, and on every Collector in whose district any portion of the land is situate, and the Collector may cause the notice to be published in any manner he deems fit.

(3) No charge shall be made by the Court or the Collector for the service or publication of any notice served or published under sub-section (2).

13. Hearing of evidence before making of order.

On the day fixed for the hearing of the application, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application.

17. Matters to be considered by the Court in appointing guardian.

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) Omitted

(5) The Court shall not appoint or declare any person to be a guardian against his will.

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26. Removal of ward from jurisdiction.

(1) A guardian of the person appointed or declared by the Court unless he is the Collector or is a guardian appointed by will or other instrument, shall not, without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.

(2) The leave granted by the Court under sub-section (1) may be special or general, and may be defined by the order granting it.'

A reading of the above provisions specifies the persons who are entitled to apply for guardianship, powers of the court to make an order for guardianship, the court having the jurisdiction to entertain the application, procedure on admission of application, leading of evidence before making of an order for guardianship and matters to be considered by the court in appointing a guardian. Likewise, the Guardian Court can permit the removal of the ward from its jurisdiction under s 26 of the GWA.

In relation to conventional inter-country adoption proceedings in India and following the landmark judgment of the Supreme Court of India in *Lakshmi Kant Pandey v Union of India*,[7] the Central Adoption Resource Agency (CARA) was established by the Ministry of Social Justice and Empowerment, Government of India, and guidelines were issued for adoption of children and for providing a uniform mechanism for processing cases of inter-country adoptions. With the Hague Convention on inter-country adoptions of 1993 coming into force in India with effect from 1 October 2003, it has been obligatory for CARA to produce guidelines on family adoptions. The process of inter-country adoptions in the CARA guidelines was streamlined in accordance with the requirements of the Hague Convention. Revised guidelines were accordingly laid down by CARA in 1995 which were again revised in 2006, 2007, 2008 and 2010.

However, in so far as the provisions of the GWA are concerned there is no change and the same provisions are still applicable. However, in view of the mandate of the Supreme Court of India in the above decision, adherence to the provisions of the CARA guidelines is compulsory in conventional inter-country adoptions from India. Hence, all clearances and permissions which have to be obtained under CARA besides adherence to the procedure for conventional inter-country adoptions must be followed strictly.

In so far as the guardianship proceedings are concerned, the Guardian Judge under the GWA is competent to make a decision on the guardianship application presented to him. Detailed provisions in this regard have been quoted above. Once permission has been granted by the Guardian Judge to take the child out of the country under s 26 of the GWA, and the guardianship order has been made by the Guardian Judge under the GWA in India,

[7] All India Reporter 1984 Supreme Court 469.

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thereafter, the competent foreign court would be empowered to make a decision in the adoption case before such court. This is because there can be no adoption application or order for adoption in India in respect of the foreign adoptive father. Hence, the courts in India in the present case will confine themselves to the guardianship proceedings only.

IV RIGHTS OF SAME-SEX COUPLES SEEKING PARENTHOOD IN INDIA

Israeli gay couple Yonatan and Omer Gher became parents in India on 12 October 2008 when their child was conceived with the help of a Mumbai-based surrogate mother in a fertility clinic in Bandra. It is reported that a 3.8 kg baby boy was born to them at Hiranandani Hospital in Powai (Mumbai).

Reportedly, Yonatan and Omer had been together for 7 years and had decided to start a family. But since Israel does not allow same-sex couples to adopt or have a surrogate child, India became their choice to find a surrogate mother. Yonatan and Omer first came to Mumbai in January 2008 for an IVF cycle when Yonatan is stated to have donated his sperm. Thereafter, they selected an anonymous 'mother'. Accordingly, the child was conceived with the help of a Mumbai-based surrogate mother in a fertility clinic in Bandra. After the child was born, the gay couple left for Israel with the child on 17 November 2008.

Even though homosexuality is an 'unnatural offence' under s 377 of the Indian Penal Code as Indian law criminalises homosexuality, there is no bar to gay couples hiring a surrogate mother to deliver children for them in India. Thus, there are reports in the media that there are numerous gay couples coming to India to look for surrogate mothers as India does not disallow such surrogacy arrangements.

V FACTUAL AND LEGAL POSITION FOR SINGLE OR GAY FOREIGN CITIZENS IN INDIA

One conclusion that can be made is that a single or a homosexual man can be considered to be the custodial parent of a child by virtue of being the genetic or biological father of the surrogate child born out of a surrogacy arrangement. The Japanese baby's case and relevant rules are relied upon in the following submissions which are made in support of this answer.

The answer above is straightaway supported by two recent examples of a single/homosexual parent (in both cases it was the father) in which the children were born by surrogate arrangements. In the case of Baby Manji Yamada, the Municipal Council at Anand in Gujarat had issued a birth certificate to the baby indicating the name of the genetic father. In the case of the Israeli gay couple mentioned above, India permitted the surrogacy arrangement which was

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fathered with the sperm of Yonatan, the genetic or biological father of the child. These two instances, in which after their birth the babies were allowed to be taken away to Japan and Israel respectively, show that in India a single or a homosexual man can be considered as the custodian parent of the surrogate child by virtue of being the genetic or biological father of the child fathered by him and mothered by a surrogate mother through a surrogacy arrangement.

It may also be added that the Supreme Court of India, in its judgment in *Baby Manji Yamada v Union of India and Another*,[8] after discussing various forms of surrogacy arrangements held:

> '11. Alternatively, the intended male parent may be a single male or a male homosexual couple.'

A reading of the above and an analysis of the complete judgment of the Supreme Court of India, support the answer given above and confirms that a single or a homosexual man can be considered to be the custodial parent of a surrogate child.

The above conclusion is also supported by the ICMR 2005 Guidelines where in para 3.16.1 dealing with legitimacy of the child born through ART, it is stated that:

> 'A child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance. Sperm/oocyte donors shall have no parental right or duties in relation to the child, and their anonymity shall be protected except in regard to what is mentioned under item 3.12.3.'

Even though these guidelines are non statutory, but all the same they were the basis of the claim in the Supreme Court of India in Baby Manji Yamada's case. Hence, even under the prevalent guidelines, the claim can be made by the biological father to be considered as the custodial parent of the surrogate child as in the case of single male parent there will be no other spouse to stake any joint claim.

It is further important to supplement the above proposition with the draft Assisted Reproductive Technology (Regulation) Bill & Rules 2010, as in Chapter VII dealing with Rights and Duties of Patients, Donors, Surrogates and Children, in para 35(3), it is stipulated as follows:

> '35. Determination of status of the child –
>
> (3)In the case of a single woman the child will be the legitimate child of the woman, and in the case of a single man the child will be the legitimate child of the man.'

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[8] Judgments Today 2008 (11) Supreme Court 150.

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From this, it is clear that a single parent or gay or lesbian parents who have contributed either the egg or the sperm in the birth of a surrogate child can stake their claim for custody on the basis of the legitimacy of their offspring born by surrogacy arrangements. Even though this law is still in the Bill stages, the fact remains that the Supreme Court of India in Baby Manji Yamada's case opined that commercial surrogacy medical procedures are legal in India and that the intended male parent may be a single male or a male homosexual couple. Hence, the above provision will have persuasive value even though it is still not declared to be statutory law. Thus, a single male can be the custodial parent of a surrogate child.

However, the issue of exclusive custodial rights of a foreign single parent in India may require a judicial verdict for determination of the parties' rights in a surrogacy arrangement. Hence, only in a petition for guardianship under the GWA and/or in a suit for a declaration in an Indian civil court can the exclusive custodial rights be adjudicated by a court of competent jurisdiction upon appreciation of the evidence and considering claims, if any, of other parties to such surrogacy arrangements.

The above process of adjudication by a court of competent jurisdiction in either or both of the two processes is in no way a bar for a single male or homosexual parent to be recognised as the biological or genetic father of the surrogate child. The Supreme Court of India in its judgment in *Baby Manji Yamada v Union of India and Another*[9] held that the medical procedure of surrogacy is legal in India. Hence, it can be safely concluded that a single male or homosexual parent who is the biological or genetic father has clear rights to be recognised in such a capacity.

As a note of caution it may also be clarified here that any single male or homosexual foreign parent who has fathered a child in India by virtue of a surrogacy arrangement can only claim guardianship of such a child under the GWA. The adoption process can only take place in the foreign parent's country of nationality or permanent residence as the case may be. This is because the HMGA and HAMA do not allow any adoption proceedings to non-Hindus and any foreign parent who is a non-Hindu cannot invoke the above personal laws for carrying out adoption proceedings in India. Therefore, any single male or homosexual foreign parent can by virtue of having been appointed a guardian under the GWA claim exclusive custody and leave of the Court to remove the ward to the country of his nationality or his permanent residence for adoption in accordance with the laws of such country by virtue of being the biological/genetic father.

The ultimate right of a single male or a homosexual biological or a genetic parent of adopting a child born from a surrogacy arrangement will have to be determined in accordance with the adoption laws of the country of the nationality or the permanent residence of such single parent. Also, the weight

[9] Judgments Today 2008 (11) Supreme Court 150 at para 5, pp 152 and 153.

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which the foreign court will give to a guardianship order and exclusive custody rights granted in India under GWA will have to be determined in accordance with the laws and procedures of the foreign country.

In case of Japanese baby Manji Yamada, from a reading of the judgment of the Supreme Court of India, it appears that no custody proceedings were taken out either by the biological father or the surrogate mother. On the contrary the NGO by the name of Satya had invoked the jurisdiction of the High Court of Rajasthan by claiming that the child was abandoned as neither the natural parents nor the surrogate mother were taking care of the child. However, the Supreme Court of India observed that no complaint had been made by anybody relating to the child and permission was granted to any person with a grievance to vent it before the Commission for Protection of Child Rights. The grandmother who had petitioned the Supreme Court of India challenging the orders of the Rajasthan High Court was granted interim custody and liberty to approach the central government for issuance of a passport and permission for the child to travel with her to Japan. These having been granted, the Regional Passport Officer in Jaipur issued an 'Identity Certificate' to the baby allowing her to travel to Japan with the grandmother.

An examination of the available documents and the judgment of the Supreme Court of India in Baby Manji Yamada's case shows that there was no court order by which the biological father was declined the custody of his daughter born out of the surrogacy arrangement. In fact it is borne out from the available information that the biological father returned to Japan before his visa expired. There is no record of any court proceeding by which the custody of his biological daughter was denied to him. Moreover, from what is seen from the available information, the fertilisation process by the biological parents was done in Tokyo and the fertilised embryo was brought to Ahmedabad to be implanted in the surrogate mother. Therefore, there must have been an agreement between the parties for some possible joint custody arrangement which was perhaps not possible to be executed since the biological parents had divorced when the child was born and the biological mother had disowned the child. In these circumstances it is difficult to comment as to why the Japanese father could not get the custody as there is no record available in the Supreme Court order of the father claiming or being declined the custody rights of the baby.

In Baby Manji Yamada's case, the custody ended up with the grandmother Emiko Yamada because she approached the Supreme Court of India to challenge the directions given by the Rajasthan High Court relating to production and custody of the baby. It is borne out from the judgment of the Supreme Court of India that the genetic father Dr Ikufumi Yamada had to return to Japan due to expiration of his visa. It is perhaps this situation which had prompted the NGO 'Satya' to file a habeas corpus petition in the High Court of Rajasthan seeking custody of the baby on the alleged ground that neither the biological parents nor the surrogate mother were allegedly taking care of the child. However, the Supreme Court of India did not accept any of

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these allegations and granted interim custody of Baby Manji Yamada to the grandmother Emiko Yamada by an interim order on 14 August 2008. This position continued until the conclusion of the case on 29 September 2008 and until 1 November 2008 when the baby and the grandmother left the country for Japan after being permitted to do so.

Hence, if a single or a homosexual man who is the genetic father of the surrogate baby petitions the Guardian Judge under the GWA, then, upon presentation of relevant evidence to prove the genetic material, the father can stake his claim for guardianship of the surrogate child. The surrogate mother who can be arrayed as a respondent can certify this claim which can be established by genetic evidence. The surrogate mother can concede her custodial claim in favour of the genetic father and, if desired, this can also be done by the ovum donor. Upon a presentation of the total facts, the single male or homosexual parent can plead before the Guardian Judge that he should be appointed the custodial parent as a guardian of the child and be able to take the child out of the country for adoption in accordance with the laws of the nationality of his country or permanent residence as the case may be. Therefore, the above custodial rights can be enforced in a petition under GWA by the single male or homosexual parent in respect of his surrogate child.

A second conclusion that can be made is that the biological father is considered the legal parent of the children under Indian law by virtue of the surrogacy agreement executed between the parties. The following submissions are made in support of this conclusion.

The surrogacy agreement is a contract in terms of s 10 of the Indian Contract Act. Therefore, the surrogacy agreement dated 18 July 2008 is an enforceable and valid contract under Indian law. The validity of a surrogacy agreement in India has already been commented upon at length and hence it can be safely concluded that the terms and conditions of the said agreement between the parties legally confers all rights vested upon the parties as stated in the agreement. Therefore, the biological father as per the agreement is the legal parent of the proposed surrogate children as their genetic father.

An agreement between the parties and its terms and conditions are governed by Indian laws and the parties can agree to submit to the exclusive jurisdiction of the appropriate courts in India. Under Indian law the biological father would be entitled to enforce his rights as a legal parent of the children by virtue of the agreement between the parties.

An agreement between the parties can in no uncertain terms set out the stipulation that the surrogate mother agrees and undertakes cooperation before the government offices/authorities/local bodies and also appear before appropriate judicial authorities to give full effect to the agreement and to ensure that the intending father gets legal custody and rights of parentage of the child. This unequivocal statement by the surrogate mother is an admission of rights of the biological father. If this is in any way retracted, changed,

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modified, withdrawn or resiled from by the surrogate mother, the biological father has a clear remedy in law by filing a suit for declaration and permanent injunction to enforce his rights as legal parent of the children.

An agreement between the parties can also contain clauses as follows:

- It is clearly understood and unequivocally confirmed that neither the surrogate mother nor her husband shall have any physical or legal custody of or any parental rights or duties with respect to the child born out of this surrogacy process and that the Intended father shall exclusively have such custody and all parental rights and duties from the moment of the child's birth.

- The surrogate mother will relinquish physical custody of the child to intended father upon birth. The surrogate mother will, however, cooperate in all proceedings, if so required, for legal custody of the child by intended father and getting her surrogate motherhood perpetually severed from and disassociated with the child. This will include but not be limited to legal agreements/documents that need to be presented to the court, legal bodies/official, and/or hospital prior to/after the delivery of the child.

- Notwithstanding the foregoing or any other provision of this agreement, it is expressly understood and agreed that this agreement does not warrant or condition payment of any compensation or any valuables to the surrogate mother for her handing over the child to the intended father together with relinquishment of her parental right, if any, over the child unto the intended father, since it is clearly understood and agreed by the surrogate mother pursuant to this agreement that the child genetically and contractually belongs to the intended father, who has the physical and legal custody of the child and it is in the best interests of the child that the child be brought up by the intended father only.

- The surrogate mother and/or her husband shall never assert any right over the child nor shall they or any one of them claim the custody of the child in any manner whatsoever nor make any attempt to form any parental relationship with the child.

- The intended father will take full custody of the child as soon as it is medically practicable following the child's birth and will bring up the child without any kind of interference from the surrogate mother and/or her husband. The surrogate mother and/or her husband shall be bound to take any further lawful action, if and as may be necessary, to enable the Intended father to become the physical and legal custodian and natural guardian of the child.

- The surrogate mother shall have no right and waives the right to make any medical or other decisions regarding the child after birth. Medical or

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other decisions regarding the child after birth will be made by the intended father or his designated representative.

- The birth certificate of the child given birth pursuant to this agreement shall bear the names of the intended father as the legal parent and natural guardian of the child. The surrogate mother and/or her husband shall have no say nor shall make any objection whatsoever to the issuing of birth certificate of the child carrying the name of the intended father as the parent of the child. In order to ensure issuance of the birth certificate of the child in the aforesaid manner, the surrogate mother will take whatever steps necessary to have the names of the intended father recorded as legal parents and natural guardian of the child.

In view of what is stated above, it is established beyond doubt that the surrogate mother will relinquish, surrender, give up, waive and not assert any rights in respect of the surrogate child as also that the exclusive parental rights of care custody and control will vest in the biological father for all intents and purposes. Hence, in terms of the conclusive contract between the parties, there is no doubt that the biological father would be the legal parent of the child in terms of the surrogacy agreement between the parties.

At the cost of repetition, it may be stated that, if any terms, conditions or stipulations between the parties are violated, infringed or contravened, the biological father has clear legal remedies to seek necessary relief. Additionally or optionally, the biological father is at liberty to invoke the provisions of the GWA through a guardianship petition for being appointed as the sole legal guardian of the child and for being granted permission to take the child out of India for the purposes of adoption in the country of his nationality of permanent residence. Therefore, in any eventuality, the biological father under Indian law can exercise his legal rights as the sole parent of the child born to him by surrogacy.

An agreement can also be duly supported by an affidavit of the husband of the surrogate mother by which he fully agrees that since he is not the biological father of the children, he shall not assert any parental or custody rights whatsoever in respect of the said child and that he will assist his wife in fully implementing in terms of the agreement. This fortifies the agreement made by the parties and reinforces the rights of the biological father as the sole legal parent of the surrogate children.

In addition to the contractual terms and agreement between the parties, under the permissible medical legal procedure of commercial surrogacy, the biological father has full legal rights over his surrogate child. In the judgment of the Supreme Court of India in Baby Manji Yamada's case, the legality of the medical procedure of commercial surrogacy is accepted and, alternatively, the intended parent may be a single male or a male homosexual couple. This shows that, even otherwise, the biological father under Indian law would be considered to be the legal parent of the children.

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Both under the ICMR 2005 Guidelines and under the draft Assisted Reproductive Technology (Regulation) Bill & Rules 2010, the fact of the legal rights of the biological father as the legal parent of the child born out of surrogacy arrangement are recognised irrespective of whether the father is a single or a homosexual man. In practice, the case of Japanese Baby Manji Yamada born on 25 July 2008 and the child born to the Israeli gay couple on 12 October 2008 bear testimony to the fact that in such instances parental rights have been enforced in relation to children born out of surrogacy arrangements.

Thus, under Indian Law, be it the law of contract or the GWA, the biological father has clear remedies in law to enforce the contract, seek a declaration of his rights as a single parent and obtain guardianship orders in this regard. Hence, under the existing legal position, the father has clear and unequivocal rights which can be established by invoking the judicial machinery in India.

In enforcing the biological rights as a father, reliance can be placed upon genetic evidence to establish the rights of the biological father. Aided and abetted by relevant medical data and genetic details, the father can establish his biological rights as the father. This is permissible under the medical procedures of legal surrogacy in India. Hence, viewed from any angle, the biological father has clear rights as a legal parent of his unborn child which he can establish upon their birth in India.

VI SPEED BREAKERS ON THE ROAD TO SURROGACY

(a) Burgeoning surrogacy industry is propelled by absence of cohesive legislation and mushrooming IVF and ART clinics wantonly advertising services for providing wombs for rent

The unregulated reproductive tourism industry procreating surrogacy is booming, with India being the first country proposing to legalise commercial surrogacy. Whilst, the new Assisted Reproductive Technology (Regulation) Bill & Rules 2010, are still in the womb, the non-statutory ICMR 2005 Guidelines rule the roost. The Indian entrepreneurial industry spirit has catapulted the business of providing ‘wombs for rent’ to a whopping trade valued at rupees 25,000 crores. Despite legal, moral and social complexities that shroud surrogacy, economic necessity stimulates women to shake off their inhibition and fear of social ostracism to be lured by agents or corporate surrogacy consultants for international markets. Free availability of a large pool of women willing to be surrogates, a good medical infrastructure, fractional costs, less waiting time, close monitoring of surrogate mothers by over 200,000 in vitro fertilization (IVF) clinics and no check of any law restricting single, gay or unmarried couples becoming parents by surrogacy, has made this unethical trade in India skyrocket to spiralling heights.

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(b) New Indian medical visa regulations will cap surrogacy

However, soon, the business of surrogacy will plummet and boomerang. Under the latest and new Indian visa regulations, effective 15 November 2012, onwards, all foreigners visiting India for commissioning surrogacy will be required to apply for 'medical visas' and cannot avail of simple tourist visas for surrogacy purposes. The Ministry of Home Affairs, by a letter of 9 July 2012, has stipulated mandatory conditions for such medical visas, which, if not fulfilled, will lead to visa rejection. These new medical visa regulations stipulate that a letter from the embassy of the foreign country in India or its foreign ministry should be enclosed with the visa application stating clearly that such country recognises surrogacy and that the child to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child of the couple commissioning surrogacy who will undertake to take care of their surrogate child. The treatment will be done only at registered ART Clinics in India recognised by the ICMR and the foreign commissioning couple must produce a duly notarised agreement between them and the prospective surrogate Indian mother.

After the surrogate baby is born, an exit permission for a commissioning couple before leaving India will be required from the Indian Foreigners Regional Registration Office (FRRO) to verify issuance of a certificate from the ART Clinic confirming discharge of liabilities of the Indian surrogate mother and ensuring custody of the child with the commissioning parents. Clearly, the safeguards, checks, balances besides moral and ethical dimensions, which to date remain unaddressed through any legislation, have been administratively put in place to aptly regulate the surrogacy industry. The dam built with the strong bricks of the conditions of medical visas will prevent the gushing flow of unrestricted, pouring and muddled surrogate waters which had polluted India by becoming a bane for women's health, their basic dignity and human fundamental rights.

(c) Medical visa regulations will harmonise with existing Indian and foreign law of countries of commissioning parents

Commercial surrogacy is illegal in the United Kingdom, though permissible under British law, on payment of reasonable expenses to the surrogate mother. In most US states, compensated surrogacy agreements are either illegal or unenforceable. In some Australian states, arranging commercial surrogacy is a criminal offence and surrogacy agreements giving custody to others are void. In New Zealand and Canada, commercial surrogacy is illegal, although altruistic surrogacy is allowed. In Italy, Germany and France, commercial or other surrogacy is unlawful, in Israel, commercial surrogacy is illegal and the law only accepts the surrogate mother as the real mother. India, in total contrast, accepts commercial surrogacy and no law declares it illegal. The Supreme Court on 29 September, 2008, in *Baby Manji Yamada v Union of India and*

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Another,[10] observed that 'Commercial Surrogacy [reaching] industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms: wombs for rent, outsourced pregnancies or baby farms.' However, the new Indian Medical Visa Regulations by disallowing Indian visas to foreigners whose countries prohibit surrogacy will ensure that we harmonise and fall in tandem internationally with those foreign nations whose overseas citizens wish to wrongfully patronise surrogacy in India. Of our own, we have banned foreign single, unmarried or gay parents by restricting surrogacy to couples constituted by a foreign man and woman only who have been married for at least 2 years. Operations of unethical, unregistered and unrecognised ART shops cannot be availed of any more.

(d) Reactions and responses of foreign governments

Most foreign embassies have indicated on their websites that the Indian government now requires medical visas for foreigners coming to India for surrogacy. Besides, stringent DNA tests are already in place to establish genetic connections for parentage and foreign nationality. Indian consulates overseas and Visa Facilitation Services (VFS) have also notified that foreign nationals must ascertain beforehand whether their country permits surrogacy and that they cannot enter India for surrogacy purposes by tourist visas. The British High Commission, New Delhi, in advance preparation, by its letter of 30 October 2012 to the Indian High Commission, London, states that the British government recognises surrogacy and makes provisions for commissioning couples for children born overseas through surrogacy. The UK Human Fertilization and Embryology Act 1990 is cited in support. It allows surrogacy if one parent is genetically related to the surrogate child and no money other than reasonable expenses is paid in respect of the surrogacy arrangement. Alternatively, the letter uses the UK Human Fertilization and Embryology Act 1990 for providing parental orders to commissioning parents. This letter is stated to be a request for entertaining applications for medical visas for purposes of surrogacy in India as per the requirements of the new Indian Medical Visa Regulations.

VII CONCLUSION

Rather than the Indian Parliament catching up to make a law to regulate the unscrupulous surrogacy trade, the new Medical Visa Regulations have stepped in to do what the law ought to have done. Rather than permitting surrogate children to be born in India with the risk of being stateless persons and being denied entry into foreign countries where their commissioning parents reside, it is apt and necessary that such unethical practices leading to such disastrous situations must be pre-empted and prevented. The Indian government in its administrative wisdom has stepped in at a time when the regulatory law is nowhere near the horizon. Recent instances of surrogate children from

[10] All India Reporter 2009 Supreme Court 84.

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Germany, Japan and Israel born in India and leaving upon court intervention should well make legislators think of enacting a strict surrogacy monitoring law. The Assisted Reproductive Technology (Regulation) Bill & Rules 2010 itself has legal lacuna, lacks creation of a specialist legal authority for determination and adjudication of legal rights of parties, in addition to falling in conflict with existing family laws. These pitfalls should not become a graveyard for a law which is yet to be born. Surrogacy needs to be checked and regulated by a proper statutory law. Until then, the much needed medical visa regulations will provide succour and relief. What cannot go on must not be allowed to be carried on if there is no law.

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INDIA

SURROGACY FOR SINGLE AND UNMARRIED FOREIGN PERSONS: A CHALLENGE UNDER INDIAN LAW

Anil Malhotra and Ranjit Malhotra[*]

Résumé

La procréation assistée, incluant la gestation pour autrui, est en vogue en Inde depuis 1978, alors qu'on estime a 200 000 le nombre de cliniques qui, à travers le pays, offrent actuellement des services d'insémination artificielle, de fertilisation in vitro et de gestation pour autrui. Dans la foulée de leur contribution à l'édition 2013 du International Survey, les auteurs discutent de quelques récentes décisions en matière de gestation pour autrui, notamment dans des cas qui impliquent des étrangers, et ils analysent les réponses juridiques dominantes en la matière. Des directives administratives émises le 9 juillet 2012 par le ministère de l'Intérieur, stipulent que seuls les hommes et le femmes mariés depuis au moins deux ans peuvent soumettre une demande de visa médical en vue d'une gestation pour autrui projetée en Inde. Cette exigence affecte directement les célibataires et les couples non mariés qui voudraient obtenir de tels visas. Les auteurs sont d'avis que ces directives sont illégales et qu'elles sortent du champ de compétence du ministère.

I INTRODUCTION

At a time when the world's first test-tube baby (Louise Brown, born in 1978 in the United Kingdom), has now herself become a mother and high profile international adoptions by celebrities like Madonna and Angelina Jolie are glorifying international adoption, India does not lag behind. Noted Indian film actress Sushmita Sen inspires single women both in India and abroad to adopt children breaking conventional taboos and age-old practices. As a result, orphan girls are finding mothers in India and abroad. However, genuine adoptive foreign and non-resident would-be parents too are pitted against an insurmountable wall. Child adoption in India is a complicated issue. It is over-burdened with knotty legal processes and complicated lengthy procedures for those who want to give a new home and a new life to the reported 12 million Indian orphans. Even though the Indian Constitution ordains it to be a sovereign, socialist, secular, democratic republic, 65 years of independence have

* Malhotra & Malhotra Associates, India (Email: anilmalhotra1960@gmail.com).

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not given a comprehensive adoption law applicable to all its citizens, irrespective of the religion they profess or the country they live in as non-resident Indians (NRIs), persons of Indian origin (PIOs) or overseas citizens of India (OCIs). Thus, those who cannot by law adopt and can be appointed only as guardians under personal Indian laws turn to options of IVF clinics or rent surrogate wombs. It is from this perspective that India now needs to adopt another law to turn to actual reality the dreams of those who live abroad rather than turning to unhappy and sometimes unethical practices.

A silent revolutionary change is fast heralding a new dawn in the matter of inter-country adoptions. However, the plethora of Indian laws does not improve the plight of 12 million orphaned children in India who need adoptive parents. The Guardian and Wards Act (GWA), 1890 permits guardianship and not adoption. The Hindu Adoption and Maintenance Act (HAMA), 1956 does not permit non-Hindus to adopt a Hindu child. Requirements of immigration create further hurdles even after adoption. May be the urge to be a parent has now taken over in the form of 'embryo adoption' whereby fertilized sperms and eggs developed into an embryo are successfully implanted in Indian clinics and nurtured by foreign mothers in their homeland ensuring hassle-free adoption of Indian embryos without complicated procedures. Technology has overtaken law.

As a background to the practice of surrogacy today, mythological surrogate mothers in the past are well known in India. Yashoda played mother to Krishna though Devki and Vasudeva were the biological parents. Likewise, in Indian mythology Gandhari made Dhritarashtra the proud father of 100 children though he had no biological relation with them. The primordial urge to have a biological child of one's own flesh, blood and DNA aided with technology and the purchasing power of money coupled with the Indian entrepreneurial spirit has generated the 'reproductive tourism industry'. This comes as a boon to childless couples all round the world. Clinically called 'assisted reproductive technology' (ART), it has been in vogue in India since 1978 and today an estimated 200,000 clinics across the country offer artificial insemination, in vitro fertilization (IVF) and surrogacy.

II RECENT CASES

In the decision of the Supreme Court on 29 September 2008 in *Baby Manji Yamada v Union of India & Anr*,[1] a Japanese baby Manji, born on 25 July 2008 to an Indian surrogate mother with IVF technology upon fertilization of her Japanese parents' eggs and sperm in Tokyo and the embryo being implanted in Ahmedabad, triggered off complex, knotty issues. The Japanese biological parents got divorced and the mother disowned the infant upon her birth in India. The grandmother of the infant petitioned the Supreme Court challenging the directions given by the Rajasthan High Court relating to the reproduction

[1] *Baby Manji Yamada v Union of India & Anr* AIR 2009 SC 84.

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and custody of baby Manji Yamada. The grandmother's request to the Apex Court for permission for the infant to travel with her and for issuance of a passport under consideration with the central government was directed to be disposed of expeditiously. Following the directions of the Supreme Court, the Regional Passport Office in Jaipur issued an 'Identity Certificate' to the baby. Hence, there was an implied recognition of the status of single parent since the divorced father as a single parent got custody of the child after which he flew to Japan.

In another case, Israeli gay couple, Yonatan and Omer Gher, became parents in India on 12 October 2008, when their child was conceived with the help of a Mumbai based surrogate mother in a fertility clinic in Bandra. It is reported that a 3.8 kilo baby boy was born to them at Hiranandani Hospital in Powai (Mumbai). Reportedly, Yonatan and Omer had been together for the past seven years and had decided to start a family. But since Israel reportedly does not allow same-sex couples to adopt or have a surrogate child, India became their choice to find a surrogate mother. Yonatan and Omer reportedly first came to Mumbai in January 2008 for an IVF cycle when Yonatan is stated to have donated his sperm. Thereafter, they selected an anonymous 'mother'. Accordingly, the child was conceived with the help of a Mumbai based surrogate mother in a fertility clinic in Bandra. After the child was born, the gay couple left for Israel with the child. In this case, a same-sex couple was able to achieve surrogacy arrangements in India without any objections.

Subsequently, in the year 2010, another gay couple, Dan Goldberg and Arnon Angel from Israel to whom twin baby boys were born in Mumbai from an Indian surrogate mother, were stranded in India after the refusal of the Jerusalem Family Court to allow a paternity test to initiate the process for Israeli citizenship for the twins. The issue was debated in The Knesset (Israeli Parliament) where Prime Minister Benjamin Netanyahu had to intervene so that the infants could be brought to Israel following legal procedures. Ultimately, on appeal, the Jerusalem District Court accepted the claim that it was in the best interest to hold a DNA paternity test to establish that Dan Goldberg was the father of the twin baby boys, Itai and Liron. The DNA samples of Goldberg and the twins were brought to the Sheeba Medical Centre in Israel which established Goldberg as the father of the infants. After being stranded in Mumbai for over 3 months, Goldberg and his twin baby boys returned to Israel in May 2010 after being granted Israeli passports.

After a frustrating two year legal battle in India on behalf of their surrogate sons – Nikolas and Leonard – German couple, Jan Balaz and Susan Anna Lohald, got to go to Germany after the Supreme Court of India intervened and in a Court hearing on 26 May 2010, the Indian Government agreed to provide them exit permits. The twin babies were born in the State of Gujarat in January 2008 and registered as children born of a foreign couple through an Indian surrogate mother. Upon being declined birth certificates, Jan Balaz moved the Gujarat High Court which ruled that since the surrogate mother is an Indian national, therefore, the children would also be treated as Indian nationals and

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would be entitled to Indian passports. However, the Government of India challenged this decision stating that the toddlers, being surrogate children, could not be granted Indian citizenship, which rendered the twins stateless as they got neither German nor Indian citizenship. The German authorities had also refused visas to the twins on the ground that German law did not recognize surrogacy as a means to parenthood. Ultimately, Jan Balaz and Susan Lohald went through an inter-country adoption process in India, upon which the Indian Government granted exit permits to the German surrogate twins to enable their journey back home to Germany.

III PREVAILING LEGAL POSITION

In the absence of any law to govern surrogacy the Indian Council of Medical Research (ICMR) issued *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005* [Guidelines], to check the malpractices of ART. The preface of these guidelines clearly states that in the Indian context, where barrenness is looked down upon, infertile parents look up to ART as the last resort for parenthood. These Guidelines are said to be widely publicized, discussed and debated by experts and practitioners of ART involving over 4000 participants. Para 3.5.2 of these Guidelines, setting out 'Desirable Practices/Prohibited Scenarios', states that there would be no bar to use of ART by single women and the child thus born will have all the legal rights in relation to the woman or the man, as follows:

> '3.5.2 There would be no bar to the use of ART by a single woman who wishes to have a child, and no ART clinic may refuse to offer its services to the above, provided other criteria mentioned in this document are satisfied. The child thus born will have all the legal rights on the woman or the man.'

A reading of the above indicates that these Guidelines clearly permit single parents to commission surrogacy and prescribe that no ART clinic may refuse to offer it services to single women/men. These Guidelines are still prevalent to date.

In a phenomenal exercise to legalise commercial surrogacy, the Assisted Reproductive Technology (Regulation) Bill and Rules, 2010 (ART Bill), a draft bill prepared by a 12-member committee including experts from ICMR, medical specialists and other experts from the Ministry of Health and Family Welfare, Government of India, has been posted online for feedback. Also earlier floated in 2008 for comment, the ART Bill is stated to be an Act to provide for a national framework for the regulation and supervision of assisted reproductive echnology and matters connected therewith or incidental thereto as a unique proposed law to be put before the Indian Parliament. Abetting surrogacy, it legalizes commercial surrogacy stating that the surrogate mother may receive monetary compensation and will relinquish all parental rights. Single parents can also have children using a surrogate mother. Foreigners, upon registration with their embassy, can seek surrogate arrangements. It also

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legalizes commercial surrogacy for single persons and married or unmarried couples, stating that the surrogate mother shall enter into a legally enforceable surrogacy agreement. The 2010 draft bill states that foreigners or NRIs coming to India to rent a womb shall have to submit documentation confirming that their country of residence recognizes surrogacy as legal and that it will give citizenship to the child born through the surrogacy agreement from an Indian mother.

The proposed bill which is called an Act 'to provide for a national framework for the regulation and supervision of assisted reproductive technology and matters connected therewith or incidental thereto' provides the constitution of a National Advisory Board for Assisted Reproductive Technology, comprising of members not exceeding 21, whose functions are confined to promoting the cause of reproductive technology. The salient details are:

- The new Assisted Reproductive Technology (Regulation) Bill and Rules, 2010, legalises commercial surrogacy, stating that the surrogate mother may receive monetary compensation for carrying the child in addition to health-care and treatment expenses during pregnancy.
- Both the couple or individual seeking surrogacy through the use of ART, and the surrogate mother shall enter into a surrogacy agreement which shall be legally enforceable.
- The surrogate mother will relinquish all parental rights over the child once the amount is transferred and birth certificates will be in the name of commissioning parent/s.
- The prescribed age-limit for a surrogate mother is between 21–35 years. The proposed bill also states that no women shall act as a surrogate mother for more than five children including her own.
- Single persons, men or women or single parents, and unmarried couples can also have children using a surrogate mother. In the case of a single man or a woman, the baby will be his or her legitimate child. A child born to an unmarried couple using a surrogate mother and with the consent of both the parties shall be their legitimate child.
- All foreigners seeking infertility treatment in India will first have to register with their embassy. Their notarised statement will then have to be handed over to the treating doctor. The foreign couple will also state whom the child should be entrusted to in case of an eventuality such as a genetic parent's death.
- A foreigner or foreign couple not resident in India or an NRI individual or couple seeking surrogacy in India shall appoint the local guardian legally responsible for taking care of the surrogate child during and after pregnancy.
- The party seeking surrogacy must ensure and establish to the ART clinic that the party would be able to take the child born through surrogacy outside India to the country of the party's origin or residence as the case may be.

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- A child born out of surrogacy shall be the legitimate child of both the parties or of the single man or woman as the case may be. The birth certificate will contain the name or names of the genetic parent or parents (as the case may be) who sought such use. If parties get divorced or separated, the child shall be the legitimate child of the couple. The birth certificate of a child born through the use of ART shall contain the name or names of the parent or parents, as the case may be, who sought such use.
- If a foreigner or a foreign couple seeks sperm or egg donation, or surrogacy, in India, and a child is born as a consequence, the child, even though born in India, shall not be an Indian citizen.
- Foreigners or NRIs coming to India seeking surrogacy in India shall appoint a local guardian who will be legally responsible for taking care of the surrogate during and after pregnancy until the child is delivered to the foreigner or foreign couple or the local guardian. Further, the party seeking surrogacy must ensure and establish through proper documentation that the country of their origin permits surrogacy and that the child born through surrogacy in India will be permitted entry in the country of their origin as a biological child of the commissioning couple/individual. If the foreign party seeking surrogacy fails to take delivery of the child born to the surrogate mother, the local guardian will be legally obliged to take the child and be free to hand over the child to an adoption agency. In the case of adoption or the legal guardian having to bring up the child in India, the child will be given Indian citizenship.
- Surrogacy may be recommended for patients for whom it is medically impossible/undesirable to carry a baby to term.
- ART clinics must not advertise surrogacy arrangements. The responsibility should rest with the couple or a semen bank.
- ART clinic must ensure that the surrogate woman satisfies all the testable criteria (no sexually transmitted or communicable disease that may endanger the pregnancy).
- A prospective surrogate mother must be tested for HIV and shown to be seronegative for this virus just before embryo transfer.

A reading of the above bill, which recognises the rights of individuals as well as couples to commission surrogacy by approaching ART clinics, identifies even unmarried couples and individuals besides married couples as prospective parents. The ART Bill in Chapter IV dealing with duties of an ART clinic clearly stipulates that individuals or couples will be provided with professional counselling, knowledge about choices of treatment and other information to create awareness about ART. Likewise, Chapter VII dealing with Rights and Duties of Patients, Donors, Surrogates and Children in Section 32 states as follows:

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> **'32.Rights and duties of patients –**
>
> (1)Subject to the provisions of this Act and the rules and regulations made thereunder, assisted reproductive technology shall be available to all persons including single persons, married couples and unmarried couples.'

It is abundantly clear that the competent authority in the matter has spelt out the legislative intent of making ART available to all persons including single persons, married couples and unmarried couples. This policy decision is already clearly in vogue today in the shape of the ICMR Guidelines. Hence, surrogacy and ART, which is a subject-matter to be dealt with as a portfolio, have been appropriately dealt with by the Ministry of Health and Family Welfare, which is competent to take decisions with respect to issues pertaining to them.

It is also pertinent to point out that the Law Commission of India in Report No 228 of August 2009 entitled '*Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy*'[2] has given its views on surrogacy achieved through ART. After examining all the issues and various viewpoints besides discussing actual cases of foreign nationals who have utilised ART for commissioning surrogacy in India, various recommendations have been made by the Law Commission of India in its said Report and in Chapter IV of the Report dealing with conclusions and recommendations, para 4.2 reads in the following terms:

> '4.2 The draft Bill prepared by the ICMR is full of lacunae, nay, it is incomplete. However, it is a beacon to move forward in the direction of preparing legislation to regulate not only ART clinics but rights and obligations of all the parties to a surrogacy including rights of the surrogate child. Most important points in regard to the rights and obligations of the parties to a surrogacy and rights of the surrogate child the proposed legislation should include may be stated as under:
>
> [1] to [3] xxxxxx
>
> [4] One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various children of child-abuse, which have been noticed in case of adoption, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogacy child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.'

Clearly, the Law Commission of India which recommends that a pragmatic approach should be adopted by legalising altruistic surrogacy arrangements recommends and approves of surrogacy arrangements for single parents as well. Hence, there is no move indicated by the Law Commission to propose that single parents should not be allowed use of ART for surrogacy and its position is to the contrary.

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[2] http://lawcommissionofindia.nic.in/reports/report228.pdf. Law Commission of India, New Delhi, 2009.

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IV LAW FOR ENTRY OF FOREIGNERS INTO INDIA

The entry, stay and exit of foreigners into India is governed by the Passport (Entry into India) Act, 1920, the Passport (Entry into India) Rules, 1950, the Foreigners Act, 1946, and the Registration of Foreigners Rules, 1992. The Policies, Acts and Rules relating to entry of foreigners into India are framed by the Ministry of Home Affairs, Government of India. To facilitate an easy understanding of purposes of the above Acts, a tabulated account is as below:

1	The Passport (Entry in India) Act, 1920 and the Passport (Entry into India) Rules, 1950.	It prescribes specific authorization of foreign nationals on their valid travel documents/passports for allowing entry into the country. Under this Act and the Rules made thereunder, the foreigners coming to India are required to get visa from Indian Missions/Posts
2	The Foreigners Act, 1946 and the Foreigners Order, 1948.	It regulates the entry of foreigners into India, their presence therein and their departure therefrom.
3	The Registration of Foreigners Act, 1939 and the Registration of Foreigners Rules, 1992.	It mandates that certain categories of foreigners whose intended stay in India is for more than the specified period, or as provided in their visa authorization, are required to get themselves registered with the Registration Officer.

From a reading of the above, it is evident that under the provisions, the Ministry of Home Affairs can make provisions for prohibiting, regulating or restricting the entry, departure and presence of foreigners into India by enacting justifiable and legitimate Visa Rules and Regulations with a classification for different purposes. The basic principles of the visa policy is non-discrimination. Though the decision to grant a visa in a particular category may depend upon requisite conditions, it cannot create an unjust classification by debarring any category of persons from being ineligible to apply for a particular category of a specific visa in violation of Articles 14 & 21 of the Constitution of India which provides equality of laws besides protection of life and personal liberty to all persons including foreign nationals.

V BAR ON SINGLE AND UNMARRIED PERSONS

Even though the Ministry of Health and Family Welfare does not prohibit or debar single persons or unmarried couples from commissioning surrogacy through ART in India, the Ministry of Home Affairs by administrative guidelines dated 9 July 2012 has stipulated that only married foreign men and women whose marriage has sustained for at least two years would be eligible to apply for medical visas for the purposes of surrogacy in India. Consequently, all

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single persons and unmarried couples have been declared ineligible from even applying for a visa in any category whatsoever for coming to India for the purposes of surrogacy. This unreasonable classification, violative of Articles 14 and 21 of the Constitution, has no nexus with the object sought to be achieved and directly curtails/ interferes with 'the right of reproductive autonomy' which is a facet of the 'right of privacy' under Article 21 of the Constitution. No reasons, justification, logic or explanation is forthcoming as to why single persons or unmarried couples have been debarred and excluded from commissioning surrogacy in India. None of the grounds made out in the impugned Guidelines justify or validate this arbitrary exclusion and unfounded ineligibility of single persons/unmarried couples who have been debarred from even applying for visas to India even though the ICMR Guidelines, ART Bill, and Law Commission Report do not contemplate any such restrictions.

VI INDIAN LAW ON SURROGACY

(a) Surrogacy in India is legitimate for married couples/unmarried couples/single persons because no Indian law prohibits surrogacy. To determine the legality of surrogacy agreements, the Indian Contract Act would apply and thereafter the enforceability of any such agreement would be within the domain of Section 9 of The Indian Code of Civil Procedure (CPC). Alternatively, the biological parent/s can also move an application under the Guardian and Wards Act seeking an order of appointment to be declared the guardian of the surrogate children.

(b) In the absence of any law to govern surrogacy, the 2005 ICMR Guidelines apply to all couples/single persons. Under para 3.10.1 a child born through surrogacy must be adopted by the genetic (biological parents). However, this may not be possible in the case of non-Hindu foreign parents who cannot adopt in India but can be appointed as guardians under the Guardians and Wards Act. Under para 3.5.2 of the ICMR Guidelines, there would no bar to the use of ART by single women and a child born will have all the legal rights as against the woman or man as the case may be.

(c) Under Section 10 of the Indian Contract Act, 1872 all agreements are contracts, if they are made by free consent of parties competent to contract, are for a lawful consideration, are with a lawful object, and are not expressly declared to be void. Therefore, if any surrogacy agreement of a married/unmarried couple/single parent satisfies these conditions, it is an enforceable contract. Thereafter, under Section 9 of the Code of Civil Procedure, 1908 prescribing that the Courts may try all civil suits unless barred, it can be the subject of a civil suit before a civil Court to establish all/any issues relating to the surrogacy agreement and for a declaration/injunction for the relief prayed for.

(d) Other issues, which have now cropped up for opinion, are as to whether a single parent or unmarried couple can be considered to be the custodial parent of a surrogate child. As of today, it may be stated that a single

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parent or unmarried couple can be considered to be the custodial parent by virtue of being the genetic or biological father of the surrogate child born out of a surrogacy arrangement. Japanese baby Manji Yamada's case[3] and the Israel gay couple's case who fathered the child in India are clear examples to establish that this is possible. Under paras 3.16.1 and 3.5.2 of the 2005 ICMR Guidelines dealing with legitimacy of children born through ART (which were the basis of the claim in the Japanese baby's case in the Supreme Court), this claim can be made. However, only in a petition for guardianship under GWA and/or in a suit for declaration in a civil Court can the exclusive custodial rights be adjudicated by a court of competent jurisdiction upon appreciation of the evidence and considering all claims made in this regard.

(e) What would be the status of divorced biological parents in respect of the custody of a surrogate child? Essentially, this is a question which will require determination in accordance with the surrogacy agreement between the parties. There would be apparently no bar to either of the divorced parents claiming custody of a surrogate child if the other parent does not claim the same. However, if the custody is contested, it may require adjudication by a court of competent jurisdiction under the provisions of Civil Procedure Code.

(f) Would biological parent/s be considered the legal parent of the children? In answer to this question it can be stated that the biological parents would be considered to be the legal parents of the children by virtue of the surrogacy agreement executed between the parties and the surrogate mother. Under para 3.16.1 of the 2005 ICMR Guidelines dealing with legitimacy of the child born through ART, it is stated that 'a child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance'. Under para 3.5.2 of the ICMR Guidelines a single man/woman can have a child by ART through surrogacy. Even in the 2010 Draft Bill and Rules, a child born to a married couple, an unmarried couple, a single parent or a single man or woman shall be the legitimate child of the couple, man or woman as the case may be.

(g) The Law Commission of India Report, in its conclusions and recommendations in para 4.2 (4), stated that, where the intended parent is single, he or she should be a donor to be able to have a child through surrogacy. Clearly, in the views of the Law Commission, there is a clear recommendation to the Government of India to permit surrogacy for single parents.

(h) POSITION OF LAW UNDER THE 2010 BILL
Under the ART Regulation Bill 2010, 'assisted reproductive technology', 'surrogacy', 'gamete', and 'surrogacy agreement' have been defined as follows:

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[3] JT 2008 (11) SC 150.

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> 'assisted reproductive technology', with its grammatical variations and cognate expressions, means all techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body, and transferring the gamete or the embryo into the reproductive tract;
>
> 'surrogacy', means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate;
>
> 'gamete', means sperm and oocyte (that is egg);
>
> 'surrogacy agreement', means a contract between the person(s) availing of assisted reproductive technology and the surrogate mother.

Chapter 2 of the Bill describes the constitution of authorities to regulate assisted reproductive technology. A 21-Member National Advisory Board comprising of various experts is sought to be created with functions to promote assisted reproductive technology related issues. State Boards are recommended in States and State Registration authorities are sought to be created for procedural purposes. Proceedings before the National and State Boards are deemed to be Civil Court Proceedings for limited purposes and are sought to be treated as Judicial Proceedings even though the constitution of the National or State Advisory Board have no Judicial Officers, Judges or Designated Courts as constituents.

Chapter 3 of the Bill sets out procedures for registration and complaints in respect of assisted reproductive technology clinics. Chapter 4 sets out the duties of such clinics. Chapter 5 talks of sourcing, storage, handling and record-keeping for gametes, embryos and surrogates. Chapter 6 relates to 'Regulation of Research on Embryos'.

Chapter 7 discusses 'Rights and Duties of Patients, Donors, Surrogates and Children' in extenso. The rights and duties are well defined and determination of the status of the child is laid out in detail irrespective of the status of parties as a couple, as an unmarried couple, as single parents, gay parents or otherwise. The duty to take children born through surrogacy from India to the country of origin or residence of the biological parents or residence is spelt out.

Chapter 8 is about 'Offences and Penalties' for contravening the provisions of the Act and Chapter 9 in the miscellaneous part covers maintenance of records, power to search and seize, power to make regulations and rules. The Bill is stated to be in addition to and not in derogation with any other law for the time being in force.

The National and State Advisory Boards are only authorities which will promote ART, surrogacy arrangements and related procedures. The proceedings of these Boards have been deemed to be 'Judicial Proceedings' before civil courts for limited purposes.

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VII CHALLENGES TO RESTRICTIONS ON SURROGACY BY SINGLE AND UNMARRIED FOREIGN PERSONS

In the face of the above factual and legal position enunciated by the ICMR Guidelines, ART Bill, 2010 and the Law Commission Report, which reflect the policies, decisions and the mandate of the Ministry of Health and Family Welfare, who are competent and authorised to opine and decide such matters, there is no bar on surrogacy in India for foreign single persons or foreign unmarried couples. In fact, there is no statutory law made or policy decision taken by the Ministry of Health and Family Welfare, whereby surrogacy by single persons or unmarried couples of foreign nationality has been prohibited or banned. In the face of such a factual situation, the Ministry of Home Affairs has no authority under law to lay down the Guidelines restricting surrogacy only to married foreign couples with two years of marriage. Hence, the Guidelines to this extent are illegal, without any authority of law and are beyond the competence of the Ministry of Home Affairs. Therefore, para 2(i) restricting surrogacy only to married foreign men and women is illegal without sanction of law and it is beyond the competence to make such guidelines. The following points reinforce this position.

(a) Under the 1920 Act read with the 1950 Rules, the Foreigners Act, 1946, read with the Foreigners Order, 1948 and the provisions of the Registration of Foreigners Act, 1939 read with the Registration of Foreigners Rules, 1992, it is beyond the competence, authority and power of the Ministry of Home Affairs to debar, prohibit and exclude single persons and unmarried couples from commissioning surrogacy agreements through ART. Under the above provisions the entry of foreigners into India can be regulated and conditions can be prescribed for their stay in India on valid travel documents thereby restricting the entry, departure and presence of foreigners into India by making justifiable and legitimate visa regulations. This however cannot empower the Ministry of Home Affairs to restrict the entry of single persons or unmarried couples into India for surrogacy purposes. It is beyond the competence and authority of the Ministry of Home Affairs to lay down any guidelines to impose any such restriction debarring single persons or unmarried couples from coming to India for surrogacy. No such power or authority is vested in law under the enactments/rules whereby such a bar can be imposed by the Ministry of Home Affairs. Therefore, para 2(i) of the Guidelines is illegal and ultra vires the provisions of Articles 14 and 21 of the Constitution of India since they take away the protection of law and invade the right of privacy guaranteed to people and thus deserve to be struck down.

(b) The Ministry of Home Affairs cannot interfere with and abrogate to itself functions and powers which cannot be attributed to it. The Ministry of Health and Family Welfare is the competent authority which is duly empowered under the Rules of Business of the Government of India to enact laws and make policies which are within the domain of their appropriate functions dealing with subjects under the portfolio of Health and Family Welfare. The Ministry of Home Affairs cannot take over the

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functions of the Ministry of Health and Family Welfare nor the Indian Council of Medical Research. A team of dedicated experts has enacted the Guidelines and a similar team of experts has made the ART Bill. The Law Commission itself through its members appointed by the Government of India has given its recommendations to the Government in its Report. The Ministry of Home Affairs therefore cannot start taking decisions beyond its competence and start dictating policies which run contrary to the mandate of the Ministry of Health and Family Welfare. Therefore, para 2(i) of the Guidelines are illegal, beyond the authority of law and are ultra vires the provisions of the Constitution of India since the Ministry of Home Affairs cannot usurp powers and functions of the Ministry of Health and Family Welfare, to make policies in contravention of Articles 14 and 21 of the Constitution of India.

(c) Para 2(i) of the Guidelines infringe upon the right of privacy guaranteed to foreign nationals under Article 21 of the Constitution of India. The right of privacy is a facet of Article 21 of the Constitution. The Apex Court in *Govind v State of MP*[4] and *Kharak Singh v State of UP*[5] have identified the right of privacy as a constitutionally protected right as a facet of Article 21 of the Constitution. The personal decision of a single person about the birth of a baby through surrogacy called 'the right of reproductive autonomy' is a facet of the right of privacy guaranteed under Article 21 of the Constitution. Thus, the right of privacy of a single person to be free from unwarranted governmental intrusion into matters fundamentally affecting a single man and his decision to bear or beget a child through surrogacy cannot be taken away by the Ministry of Home Affairs, particularly when the Ministry of Health and Family Welfare does not bar or restrict any such right of single persons or unmarried couples. Therefore, this discriminatory policy advocated by the Ministry of Home Affairs infringes the right of privacy under Article 21 of the Constitution, has no nexus with the objects sought to be achieved and is invading the protection of Article 14 of the Constitution. Para 2(i) of the Guidelines directly curtails and interferes with the right to make a decision in the matter of procreation by banning a man's entry into India for the purposes of surrogacy as a single person. Such a restriction is constitutionally impermissible in the context of the rights guaranteed under Article 21 of the Constitution. Hence, para 2(i) of the Guidelines are ultra vires the provisions Article 21 of the Constitution and deserve to be struck down since they create an unreasonable restriction on the right of procreation by surrogacy of a single parent in India.

(d) Para 2(i) of the Guidelines create an unjust and arbitrary classification by meting out unequal treatment to equals. In effect, para 2(i) of the Guidelines discriminates between Indian nationals and foreign citizens by debarring only foreign single men/women and unmarried couples from commissioning surrogacy through ART in India. Single Indian men/women or unmarried Indian couples can commission surrogacy

[4] *Govind v State of MP* AIR 1975 SC 1378.
[5] *Kharak Singh v State of UP* AIR 1963 SC 1295.

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arrangements in India through ART since the Ministry of Health and Family Welfare does not impose any bar or embargo on surrogacy for single Indian nationals or unmarried Indian couples. Hence, the ban by the Ministry of Home Affairs on foreign single persons or foreign unmarried couples from commissioning surrogacy in India through ART is wholly unjustified, illegal, arbitrary, discriminatory and is a wholly unjust classification, not authorised by any law. The Ministry of Home Affairs which has no competence to take a policy decision on the subject of surrogacy within the domain and portfolio of Health and Family Welfare has thus made a policy decision which beyond the law. This classification treats equals unequally thereby violating equality of law and equal protection of laws. Foreign nationals, overseas citizens of India, and person of Indian Origin cannot be discriminated in the matter of surrogacy upon comparision with Indian nationals. Therefore, imposing a ban on surrogacy by foreign single persons or foreign unmarried couples under para 2(i) of the Guidelines amounts to an unreasonable, unjust and arbitrary classification which has no nexus with the object sought to be achieved. The purpose, if any, of protection and other suggested beneficial factors are adequately taken care of by the other conditions contained in para 2 of the Guidelines. Therefore there is no justification for imposing restrictions on foreign single persons or unmarried couples in commissioning surrogacy in India.

(e) It is not within the authority of the Ministry of Home Affairs to enact rules, make policies or issue guidelines which impinge upon the functions, duties, portfolios and subjects of the Ministry of Health and Family Welfare. At the most, the Ministry of Home Affairs can issue Guidelines requiring all foreign applicants to apply for a medical visa if they want to visit India for purposes of surrogacy through ART. However, it is not within the domain or authority of the Ministry of Home Affairs to issue guidelines to state that single foreign persons or unmarried couples will not be granted medical visas for purposes of surrogacy in India. Such a guideline contained in para 2(i) of the Guidelines is unjustified, beyond the authority of law and violates Article 14 of the Constitution. This classification is wholly beyond the scope of power of the Ministry of Home Affairs. Therefore, the Guidelines are not authorised by virtue of the powers conferred upon the Ministry of Home Affairs under the Enactments, Orders and Rules.

(f) Para 2(i) of the Guidelines clearly militates against the position of law stated by the Apex Court in *Baby Manji Yamda*, the judgment in which a single divorced parent was allowed to take a surrogate baby to Japan.[6]

From a reading of the above, it is evident that under the above provisions, the Ministry of Home Affairs can make provisions for prohibiting, regulating or restricting the entry, departure and presence of foreigners into India by enacting justifiable and legitimate visa rules and regulations with a classification for different purposes. The basic principles of the visa policy is non-discrimination.

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[6] See above n 1.

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The decision to grant a visa in a particular category may depend upon requisite conditions, but it cannot create an unjust classification by debarring any category of persons from being ineligible to apply for a particular category of a specific visa in violation of Articles 14 and 21 of The Constitution of India which provides equality of laws besides protection of life and personal liberty to all persons including foreign nationals.

VIII CONCLUSION: AN UNJUSTIFIED BAR ON SINGLE AND UNMARRIED PERSONS

Even though the Ministry of Health and Family Welfare does not prohibit or debar single persons or unmarried couples from commissioning surrogacy through ART in India, the Ministry of Home Affairs by administrative guidelines dated 9 July 2012, has stipulated that only married foreign men and women whose marriage has sustained for at least two years are eligible to apply for medical visas for the purposes of surrogacy in India. Consequently, all single persons and unmarried couples have been declared ineligible from even applying for a visa in any category whatsoever for coming to India for the purposes of surrogacy. This unreasonable classification violative of Articles 14 and 21 of the Constitution has no nexus with the object sought to be achieved and directly interferes with 'the right of reproductive autonomy' which is a facet of the 'right of privacy' under Article 21 of the Constitution. No reasons, justification, logic or explanation are forthcoming as to why single persons or unmarried couples have been debarred and excluded from commissioning surrogacy in India. None of the grounds made out in the impugned Guidelines justifies or validates the arbitrary exclusion and unfounded ineglibility of single persons and unmarried couples who have been debarred from even applying for visas to India, and the ICMR Guidelines, the ART Bill, and the Law Commission Report do not contemplate any such restrictions.

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INDIA

MARRIAGE AND DIVORCE – COMPLETE CONSTITUTIONAL JUSTICE

Anil Malhotra and Ranjit Malhotra[*]

Résumé

Dans la société indienne l'institution du mariage est considérée bien plus comme un sacrement que comme un contrat et cela explique que toute réforme importante risque d'être en porte-à-faux avec le concept même du mariage hindou. Quelques récentes décisions indiquent clairement que la rupture irrémédiable du mariage ne devrait que rarement pouvoir être invoquée comme motif de divorce étant donné le silence de la loi sur ce point. Cependant, la Cour suprême détient le pouvoir constitutionnel de prononcer des divorces par consentement mutuel. Ce chapitre analyse le droit du divorce en Inde, incluant la question de la reconnaissance des divorces étrangers, dont certains sont précisément fondés sur le motif de la rupture irrémédiable du mariage. Une intervention du législateur est nécessaire, particulièrement en ce qui concerne les divorces prononcés à l'étranger

'Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law.'[1]

I DIVORCE BY IRRETRIEVABLE BREAKDOWN OF MARRIAGE – A NON-STATUTORY GROUND

Keeping in mind that the institution of marriage in Indian society is largely still a sacrament and not a contract, especially under the Hindu Marriage Act, 1955 (hereinafter HMA, 1955), any major overhaul may be counter-productive to the very concept of a Hindu marriage. The existing three-tier divorce structure in India, largely applicable to all communities, ie fault grounds, artificial breakdown theory on non-resumption of cohabitation upon judicial separation or restitution of conjugal rights, and the mutual consent principle, provides the existing codified and statutory grounds for divorce in Indian courts. Some

* Malhotra & Malhotra Associates, India (email: anilmalhotra1960@gmail.com).

1 Benjamin N Cardozo *The Nature of The Judicial Process* (Yale University Press, New Haven, 1921) at 129.

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recent decisions give a clear indication that the ground of irretrievable breakdown of marriage should be rarely used, not being on the statute book. But then, to do complete justice to warring spouses, the Apex Court, using its extraordinary and frequent invocation of Art 142(1) of the Constitution of India (hereinafter Art 142), may be found to be helping families in burying the hatchet in passing decrees of divorce by mutual consent to harmoniously put matrimonial feuds to a final rest. Some recent decisions indicating such a precedent have come forth, but simultaneously, a note of caution is sounded in some other verdicts where the backdoor entry of irretrievable breakdown of marriage as an alleged ground for divorce to dissolve an inconvenient marriage is sought by praying that Art 142 be invoked. Denouncing such averments, the Apex Court has also held that irretrievable breakdown cannot be added as a ground for divorce on the statute book in exercise of the powers of the final Court under Art 142.

(a) Problems faced in domestic and cross-border marriages

There are four specific areas in this realm of divorce law which are of main concern both to domestic and non-resident Indians as also to their foreign lawyers, ie irretrievable breakdown of marriage, divorce by mutual consent, recognition of divorce decrees passed by foreign courts and inter-parental cross-border child custody conflicts. Validity of foreign divorce decrees is of immense concern to Indian spouses married to non-resident Indians (hereinafter NRIs), which is discussed in the subsequent portion of this chapter.

(b) Irretrievable breakdown of marriage

A marriage under the provisions of the Special Marriage Act, 1954 (hereinafter SMA, 1954) or the HMA, 1955 cannot be dissolved by a decree of divorce on the ground of irretrievable breakdown of marriage. It is not a ground of dissolution of marriage either in s 13 of the HMA, 1955 or s 27 of the SMA, 1954, respectively. Recent Supreme Court judgments are seriously addressing this issue, which has become very relevant because of changing social conditions especially in urban India and metropolitan cities. The irretrievable breakdown ground could be of immense help where either of the spouses is a non-resident Indian or a foreign national and the marriage has not worked out. Obviously, this will depend upon the facts and circumstances of each case. One has to tread with caution. This weapon in the armoury of divorce law, can work as a double-edged sword, facilitating the dumping of spouses from India married to NRIs. One has also to bear in mind that it is very difficult to access social welfare measures in India or find funding to finance litigation in foreign jurisdictions. Neither are state run pensions disbursed to unemployed or deserted spouses.

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(c) Precedents

(i) The Supreme Court of India has held in *Chetan Dass v Kamla Devi*[2] that is not appropriate to apply the irretrievable breakdown as a straight-jacket formula for the grant of relief of divorce. *Chetan Dass* is one of the leading decisions highlighting the legal position in Indian law that breakdown of marriage is not in itself a ground for divorce. It may be a governing factor to be borne in mind at the time of adjudication by the Court. From the catena of leading cases discussed on this issue, it emerges that the irretrievable breakdown principle is a cautious import of judge-made law into family law jurisprudence. But, the rider 'in facts and circumstances of each case', firmly continues to be in place.

(ii) A few excerpts from the 71st Report of the Law Commission of India on the Hindu highlighted in a Supreme Court of India decision, *Ashok Hurra v Rupa Bipin Zaveri*.[3] The relevant extracts of this Law Commission Report appear in para 23 at pp 1273–1274 of this judgment and are reproduced below:

> 'Irretrievable breakdown of marriage is now considered, in the laws of a number of countries, good ground of dissolving the marriage by granting a decree of divorce …
>
> Proof of such a breakdown would be that the husband and wife have separated and have been living apart for, say, a period of five or ten years and it has become impossible to resurrect the marriage or to reunite the parties. It is stated that once it is known that there are no prospects of the success of the marriage, to drag the legal tie acts as cruelty to the spouse and gives rise to crime and even abuse of religion to obtain annulment of marriage …
>
> The theoretical basis for introducing irretrievable breakdown as a ground of divorce is one with which, by now, lawyers and others have become familiar. Restricting the ground of divorce to a particular offence or matrimonial disability, it is urged, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked. The marriage has all the external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bounds which are of the essence of marriage have disappeared.
>
> After the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce. The parties alone can decide whether their mutual relationship provides the fulfillment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with

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2 *Chetan Dass v Kamla Devi*, 2001 (4) SCC 250.
3 *Ashok Hurra v Rupa Bipin Zaveri*, AIR 1997 SC 1266.

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> bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances …
>
> Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one's offspring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage "breakdown" and if it continues for a fairly long period, it would indicate destruction of the essence of marriage "irretrievable breakdown".'

(iii) The Supreme Court of India way back in 1985 in *Ms Jorden Diengdeh v SS Chopra*[4] forcefully made a judicial recommendation for a complete reform of the law of marriage and also for introducing irretrievable breakdown of marriage as a ground for divorce. Justice O Chinnappa Reddy lamented:

> 'It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present find themselves in. We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such action as they may deem fit to take. In the meanwhile, let notice go to the respondents.'

(iv) In *Bhagat v Bhagat*,[5] the court held:

> 'Merely because there are allegations and counter-allegations, a decree of divorce cannot follow. Nor is mere delay in disposal of the divorce proceedings by itself a ground. There must be really some extraordinary features to warrant grant of divorce on the basis of pleadings (and other admitted material) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself. But while scrutinising the evidence on record to determine whether the ground(s) alleged is made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluble mess, when the Court finds it in the interest of both the parties.'

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4 *Ms Jorden Diengdeh v SS Chopra*, 1985 (2) HLR 199 at penultimate para, p 207.

5 *Bhagat v Bhagat*, AIR 1994 SC 710 at [23], pp 720–721.

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The Supreme Court of India while exercising its inherent powers under Art 142 in several cases has held that, where the marriage is dead and there is no chance of its retrieval, it is better to bring it to an end. This was also the mandate of law laid down in *Chanderkala Trivedi v Dr SP Trivedi*.[6]

(v) A similar situation warranting exercise of the Apex Court's inherent powers arose in *Romesh Chander v Savitri*.[7] In this case the husband and the wife had been litigating for 25 years. The court held:

> 'In this case the marriage is dead both emotionally and practically. Continuance of marital alliance for name-sake is prolonging the agony and affliction. It cannot be disputed that the husband has not been dutiful and conscious of his responsibilities either towards his wife or his son. He did not contribute any thing towards upbringing of the child. Yet the marriage being dead, the continuance of it would be cruelty, specially when the child born out of the wedlock of the appellant and the respondent as far back as 1968 having now grown and being in service. The appellant has expressed remorse for his conduct and is willing to compensate for his past mistakes by transferring the only house in his name in favour of his wife.
>
> 4. Considering the facts and circumstances of this case we, in exercise of power under article 142 of the Constitution of India, direct that the marriage between appellant and the respondent shall stand dissolved subject to the appellant transferring the house in the name of his wife. The house shall be transferred within four months from today. The dissolution shall come into effect from the date the house is transferred and possession is handed over to the respondent.'

(vi) Similarly, in *Sneh Prabha v Ravinder Kumar*,[8] the Apex Court while exercising its powers under Art 142, in an appeal against an order confirming the decree of restitution of conjugal rights, despite conciliation and much efforts by the Supreme Court itself, tersely held that divorce should be granted as the marriage of the parties had irretrievably broken down and there were no chances of the husband and wife living together. Hence, the Supreme Court granted the divorce to the parties in invoking its jurisdiction to do complete justice under Art 142.

(vii) Furthermore, in *Chetan Dass v Kamla Devi*,[9] the Supreme Court came down very heavily on an erring adulterous husband. In this case the husband wanted to dump his wife on the ground of desertion. The wife's contention of adultery and the illegitimate relationship of the husband with another woman stood proved before the trial court. The high court upheld these findings and held that, given the circumstances of the case, a decree of divorce on the ground of irretrievable breakdown of marriage could not be granted. The husband contended before the Supreme Court that the marriage had broken down irretrievably and no purpose would be

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[6] *Chanderkala Trivedi v Dr SP Trivedi*, 1993 (4) SCC 232.
[7] *Romesh Chander v Savitri*, AIR 1995 SC 851 at [3] and [4], p 852.
[8] *Sneh Prabha v Ravinder Kumar*, AIR 1995 SC 2170.
[9] *Chetan Dass v Kamla Devi*, 2001 (4) SCC 250.

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served by prolonging the agony of the parties. The wife was still ready to live with the husband provided he discontinued the adulterous relationship. The court held that the appellant husband alone was to be blamed for such an unhappy and unfortunate situation. Brijesh Kumar J said:[10]

> '19. In the present case, the allegations of adulterous conduct of the appellant have been found to be correct and the courts below have recorded a finding to the same effect. In such circumstances, in our view, the provisions contained under section 23 of the Hindu Marriage Act would be attracted and the appellant would not be allowed to take advantage of his own wrong. Let the things be not misunderstood nor any permissiveness under the law be inferred, allowing an erring party who has been found to be so by recording of a finding of fact in judicial proceedings, that it would be quite easy to push and drive the spouse to a corner and then brazenly take a plea of desertion on the part of the party suffering so long at the hands of the wrongdoer and walk away out of the matrimonial alliance on the ground that the marriage has broken down. Lest the institution of marriage and the matrimonial bonds get fragile easily to be broken which may serve the purpose most welcome to the wrongdoer who, by heart, wished such an outcome by passing on the burden of his wrongdoing to the other party alleging her to be the deserter leading to the breaking point.'

Brijesh Kumar J also distinguished the three earlier Supreme Court cases cited by counsel for the appellant husband. The court was of the considered opinion that the facts of the case in *Chanderkala Trivedi (SMT) v Dr SP Trivedi*[11] were peculiar in nature. The court remarked that the factual position in that case was entirely different and hence it had no application to the present case.

Coming to the second case of *Romesh Chander v Savitri*,[12] the court observed that the order in this case was passed considering its facts and circumstances 'in exercise of inherent powers of the Supreme Court under article 142 of the Constitution of India'.

The third case, *Saroj Rani v Sudarshan Kumar Chadha*,[13] was also found to be inapplicable to the present case. There, the husband did not obey the decree of restitution of conjugal rights obtained by his wife to which he had initially not objected. But later on, he filed a petition for divorce under s 13(1A)(ii) of the HMA, 1955, on the ground that one year had passed from the date of decree of restitution of conjugal rights but no actual cohabitation had taken place between the parties. The wife raised a plea that the husband was taking advantage of his own wrong in terms of s 23(1)(a) of the HMA, 1955, as he had not resumed his matrimonial relationship even after the decree of restitution of conjugal rights was passed. The court held that the conduct of the

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10 At para 19, pp 260–261.
11 *Chanderkala Trivedi (SMT) v Dr SP Trivedi*, 1993 (4) SCC 232.
12 *Romesh Chander v Savitri*, AIR 1995 SC 851.
13 *Saroj Rani v Sudarshan Kumar Chadha*, 1984 (4) SCC 90.

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husband did not attract s 23(1)(a) of the HMA, 1955. The wife had also alleged maltreatment both by the husband as well as her in-laws. The court observed:[14]

> 'Furthermore we reach this conclusion without any mental compunction because it is evident that for whatever be the reasons this marriage has broken down and the parties can no longer live together as husband and wife, if such is the situation it is better to close the chapter.'

Hence, the observations in *Saroj Rani* were not accepted simpliciter as affording divorce on the ground of irretrievable breakdown in *Chetan Dass v Kamla Devi*.

(viii) In *Savitri Pandey v Prem Chandra Pandey*,[15] the wife was initially granted divorce by the Family Judge. Cross appeals were filed by both the parties. The high court disposed of both the appeals by setting aside the decree and holding that the appellant wife herself was the guilty party and that she had been unable to prove the allegations of cruelty and desertion. Before the Supreme Court it was argued that the appellant wife had remarried after the decree of divorce was granted by the Family Judge and also a child was born from the subsequent remarriage; the marriage ought to be dissolved in the interest of justice. The court did not sympathise at all with her conduct. The appellant wife was disentitled from claiming divorce on the ground of desertion. The court held that granting divorce to her would result in allowing her to take advantage of her own wrong. The court came down with a heavy hand and held as follows:[16]

> '17. The marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in *V. Bhagat v. D. Bhagat* held that irretrievable breakdown of the marriage is not a ground by itself to dissolve it.
>
> 18. As already held, the appellant herself is trying to take advantage of her own wrong and in the circumstances of the case, the marriage between the parties cannot be held to have become dead for invoking the jurisdiction of this Court under article 142 of the Constitution for dissolving the marriage.'

Hence, it is clear from the enunciation of law laid down by the Apex Court above that, under the guise of irretrievable breakdown of marriage, the Supreme Court cannot be asked to invoke its powers under Art 142 of the

[14] At para 9.
[15] *Savitri Pandey v Prem Chandra Pandey*, 2002 (2) SCC 73.
[16] At paras 17–18, pp 84–85.

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Constitution. Besides, the bar of s 23(1)(a) HMA, 1955 obstructs the grant of such relief. Moreover, in some cases, the policy of law does not seem to be to confer judicial recognition on the principle of irretrievable breakdown of marriage where the court is of the opinion that it is an abuse or misuse of the due process of law.

The Apex Court in this ruling of *Savitri Pandey v Prem Chandra Pandey* also distinguished the earlier cases from the facts of the case in hand. Counsel for the appellant cited the following authorities: *Anita Sabharwal v Anil Sabharwal*;[17] *Shashi Garg v Arun Garg*, *Ashok Hurra v Rupa Bipin Zaveri*, and *Madhuri Mehta v Meet Verma*.[18] The court opined:[19]

> 'In all the cases relied upon by the appellant and referred to hereinabove, the marriage between the parties was dissolved by a decree of divorce by mutual consent in terms of application under section 13B of the Act. This Court while allowing the applications filed under section 13B took into consideration the circumstances of each case and granted the relief on the basis of compromise. Almost in all cases the other side was duly compensated by the grant of lump sum amount and permanent provision regarding maintenance.'

The earlier observations of the Apex Court in *Jorden Deingdeh v SS Chopra*[20] regarding complete reform of the law of marriage, to make a uniform law applicable to all people irrespective of religion or caste and for introduction of the irretrievable breakdown theory, also finds mention in Pandey's judgment.[21]

Another very important issue that arises in this case is that the husband's appeal against the divorce decree was instituted 4 months after the limitation period had expired. Meanwhile, during the pendency of the appeal in the Supreme Court, the wife solemnised a second marriage. The Apex Court declared the second marriage of the appellant wife to be invalid as the same was solemnised during the pendency of appeal. The facts and circumstances of the case are not clear as to whether the wife had received notice of the appeal before her remarriage. However, the issue that emanates is the time frame during which the parties need to keep a check on the appellate legal recourse. After the divorce decree is granted and the limitation stands expired, before they get remarried, would the parties be required to wait still further? The Apex Court in Savitri Pandey's case has recommended to the Ministry of Law and Justice for appropriate changes in the legislation to increase the period of limitation from 30 days to 90 days since 30 days has been held to be insufficient and inadequate for filing the appeal.

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[17] *Sabharwal v Anil Sabharwal*, (1971) 1 SCC 490.

[18] *Anita Sabharwal v Anil Sabharwal*, (1971) 1 SCC 490; *Shashi Garg v Arun Garg*, (1997) 7 SCC 565; *Ashok Hurra v Rupa Bipin Zaveri*, (1997) 4 SCC 226; and *Madhuri Mehta v Meet Verma*, (1997) 11 SCC 81.

[19] At para 15; p 84.

[20] *Jorden Deingdeh v S.S. Chopra,* AIR 1985 SC 935.

[21] *Savitri Pandey v Prem Chandra Pandey,* 2002 (2) SCC 73 at [16]; p 84.

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(ix) In *GVN Kameswara Rao v G Jabilli*,[22] the Supreme Court came to the rescue of a highly educated couple who had been unsuccessfully litigating for the last 15 years. The court held that because of the non-cooperation and the hostile attitude of the respondent wife, the appellant husband had been subjected to a serious traumatic experience which could safely be termed as cruelty within the purview of s 13(1)(i–a) of the HMA, 1955. From the evidence on record, the court came to the conclusion that the relationship between the parties had irretrievably broken down. In this case, the main issue was that of mental cruelty inflicted upon the husband, while the court suo moto applied the breakdown theory in the facts and circumstances of the case.

(x) *Parveen Mehta v Inderjit Mehta*[23] is another case of a high degree of cruelty inflicted upon the husband. In this case the parties had been living separately for the last 10 years. The marriage took place in the year 1986, while the divorce petition was filed in the year 1996. All frantic compromise efforts failed to calm down the appellant wife. There was a long period of separation between the husband and the wife. The court inferred from the circumstances of the case that the marriage had broken down irretrievably without any fault of the respondent husband. The court concluded that on this ground the decision of the high court in favour of the respondent for the dissolution of the marriage should not be disturbed. Also, a very high degree of cruelty had been inflicted upon the respondent husband by his wife.

(xi) Another case where the Supreme Court refused to apply the irretrievable breakdown theory is *Vishnu Dutt Sharma v Manju Sharma*,[24] where the appellant husband was proved to have inflicted cruelty upon the respondent wife. The appeal was referred to the High Court and consequently to the Supreme Court, where it was dismissed. The High Court held that it would not be doing justice to the respondent if divorce were granted to the appellant despite his cruelty only on the ground of irretrievable breakdown. The Apex Court further rejected applying the irretrievable breakdown theory on the ground that s 13 does not provide for it and it is not the function of court to make or amend laws. The concluding paragraphs are:[25]

> '9. In this connection it may be noted that in section 13 of the Hindu Marriage Act, 1955 (for short "the Act") there are several grounds for granting divorce e.g. cruelty, adultery, desertion etc. but no such ground of irretrievable breakdown of the marriage has been mentioned for granting divorce. Section 13 of the Act reads as under:

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22 *G.V.N. Kameswara Rao v G. Jabilli*, 2002 (2) SCC 296.
23 *Parveen Mehta v Inderjit Mehta*, 2002 (5) SCC 706.
24 *Vishnu Dutt Sharma v Manju Sharma*, AIR 2009 SC 2254.
25 At paras 9-11.

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13. Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

(iv) has been suffering from a virulent and incurable form of leprosy; or

(v) has been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

10. On a bare reading of section 13 of the Act, reproduced above, it is crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to section 13 of the Act as that would be amending the Act, which is a function of the legislature.

11. Learned counsel for the appellant has stated that this Court in some cases has dissolved a marriage on the ground of irretrievable breakdown. In our opinion, those cases have not taken into consideration the legal position which we have mentioned above, and hence they are not precedents. A mere direction of the Court without considering the legal position is not a precedent. If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts. Hence, we do not find force in the submission of the learned counsel for the appellant.'

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(xii) In a more recent case *Smt Seema Kumari v Suniul Kumar Jha*,[26] the Family Court allowed a divorce filed by the respondent in the present case on the ground of irretrievable breakdown of marriage coupled with desertion. The appellant appealed against the order on the grounds that the Family Court had abruptly arrived at the conclusion of desertion by the appellant, without any evidence in its support, and also that irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act. On the basis of these, the Patna High Court in the appeal set aside the impugned order. It held that the power to grant divorce on the ground of irretrievable breakdown of marriage lies with the Supreme Court under Art 142 of the Constitution and the same power is not available to the High Court or the Family Court.

(xiii) In *Hitesh Bhatnagar v Deepa Bhatnagar*,[27] when the Apex Court was examining a matrimonial dispute for divorce by mutual consent where the second motion was not made by both the parties, it was held that no Court can pass a decree in violation of s 13B of the HMA, 1955. The Apex Court also declined to use its power under Art 142 of the Constitution to hold that the marriage had broken down irretrievably and held that the Apex Court grants a decree of divorce only in those situations in which the Court is convinced beyond any doubt that there is absolutely no chance of the marriage surviving and it is beyond repair. The Court held that 'even if the chances are infinitesimal for the marriage to survive, it is not for this Court to use its power under Article 142 to dissolve the marriage as having broken down irretrievably'.[28] Clearly, the Apex Court has propounded a view to rule out use of its powers when not called for.

(xiv) In *Darshan Gupta v Radhika Gupta*,[29] the Apex Court was pleased to hold that the claim for divorce cannot be maintained under the HMA, 1955 and the Court declined to exercise its jurisdiction under Art 142 of the Constitution as entertaining the plea of irretrievable breakdown of marriage would not constitute and serve the ends of justice. The Apex Court dismissed the appeal of the husband and upheld the decisions declining divorce to him.

(xv) In *U Sree v U Srinivas*,[30] the Apex Court affirmed the finding of the Family Court and the High Court relating to mental cruelty as the foundation for grant of divorce. Fixing the permanent alimony at Rs 50 lacs, the Apex Court affirmed the decree for dissolution of marriage on the ground of mental cruelty.

(xvi) In *Kollam Chandra Sekhar v Kollam Padma Latha*,[31] the Apex Court came to be conclusion that even if the wife did suffer from schizophrenia, the Court cannot grant the dissolution of marriage on the basis of one

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[26] *Smt. Seema Kumari v Suniul Kumar Jha,* AIR 2014 Pat 44.
[27] *Hitesh Bhatnagar v Deepa Bhatnagar* 2011(3) SCC 234.
[28] At para 25.
[29] *Darshan Gupta v Radhika Gupta*, 2013 (9) SCC 1.
[30] *U Sree v U Srinivas*, 2013(2) SCC 114.
[31] *Kollam Chandra Sekhar v Kollam Padma Latha*, 2014(1) SCC 225.

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spouse's illness since mental disorder as alleged had not been proved. Accordingly, the judgment of the High Court in not granting a decree of divorce was upheld and the petition of the wife for grant of a decree for restitution of conjugal rights under s 9 of the HMA, 1955 was allowed.

(xvii) However, in *Malathi Ravi v BV Ravi*,[32] the Apex Court, noticing extreme incompatibility between the parties perpetuated by mental cruelty, was led to conclude that the marriage had become illusory and that the decree of divorce granted by the High Court deserved to be affirmed. The matter was sent to the mediation centre where parties entered into a memorandum of settlement by payment of Rs 3 lacs in name of the minor child of the parties.

(xviii) Likewise, in *Vimi v Chopra v Vinod G Chopra*,[33] the husband and wife, who had been litigating for a long time and had arrived at a settlement, were permitted by the Supreme Court to be granted a decree of divorce under s 13B of HMA, 1955 by waiving the statutory period in order to do complete justice under Art 142 of the Constitution.

(xix) From the above cases of G*VN Kameswara Rao, Parveen Mehta*, *U Sree v U Srinivas*, *Malathi Ravi v BV Ravi* and *Vimi V Chopra v Vinod G Chopra* it will be noticed that a high degree of proved inflicted mental cruelty among other attendant circumstances prompted the Apex Court to apply the irretrievable breakdown principle. These five judgments, in addition to other cited cases, canvass the fact that the breakdown principle is not applied simpliciter in a mechanical fashion. There is an extreme degree of reluctance on the part of the courts to apply the same. Chetan Dass, Hitesh Bhatnagar, Darshan Gupta, and Kollam Chandra, as discussed above, are glaring examples in this regard. Two different High Court decisions, i e *Yudhister Singh v Sarita*[34] and *Kakali Dass v Dr Asish Kumar*,[35] and a Supreme Court decision in *Sham Sunder v Sushma*[36] give a clear indication that the ground of irretrievable breakdown of marriage should be rarely used. What then is required to be done? The breakdown theory, which finds judicial recognition under s 13(1A) of HMA, 1955 as an additional ground for divorce on non-resumption of cohabitation after one year of the passing of the decree of judicial separation or restitution of conjugal rights, does not seem to serve the purpose any more in the current situation. A possible solution has to be found to resolve the predicament.

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32 *Malathi Ravi v BV Ravi*, (2014) 7 SCC 640.
33 *Vimi V Chopra v Vinod G Chopra*, 2014 (3) RCR (Civil) 959 (SC).
34 *Yudhister Singh v Sarita*, HLR 2004 (1) 228.
35 *Kakali Dass v Dr Asish Kumar*, HLR 2004 (1) 448.
36 *Sham Sunder v Sushma*, AIR 2004 SC 5111.

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(d) Validity of a foreign marriage divorce decree on grounds of irretrievable breakdown of marriage in a matrimonial proceeding in India

Another case relating to the applicability of the irretrievable breakdown theory while granting a decree for divorce is the case of *Rupak Rathi v Anita*.[37] Justice Rajiv Narain Raina of The Punjab and Haryana High Court, in an illuminating judgment in this case, extensively dealt with the jurisdiction of the foreign courts regarding the dissolution of a Hindu marriage. The facts of the case are that Rupak Rathi, appellant, instituted divorce proceedings against his wife, Anita Chaudhary, in UK on 17 March 2011. During the pendency of these proceedings, Anita Chaudhary instituted the proceedings for divorce in Panchkula on 17 May 2011 and the UK proceedings were acknowledged before the court in Panchkula. Both the proceedings ran parallel. Proceedings in the English Court were concluded absolutely on 31 January 2012 and the divorce was granted in favour of the husband on the ground of irretrievable breakdown of marriage. In response to the divorce petition by the wife at Panchkula, on 18 July 2012, the husband argued before the Matrimonial Court in Panchkula for the rejection of the divorce proceedings against him on the ground that the divorce decree of the English Court is binding on both the parties and hence, the divorce petition by the wife was barred on the principles of res judicata and estoppel. However, the wife contended that the English Courts had no jurisdiction to pass a decree on an unavailable ground of irretrievable breakdown of marriage under the Hindu Marriage Act and, since both the parties were domiciled in India, they were to be governed by the Hindu Law. The High Court finally held that the English court cannot grant such a divorce decree as irretrievable breakdown of marriage was not a ground of divorce in the Hindu Marriage Act itself, which governs the parties in the present case. The High Court accordingly held:[38]

> '17. A close analysis of para. 20 leaves no manner of doubt that the major premise or what we may call the rule which is clearly statutory in nature with reference to both section 13, CPC and section 13, HMA, that if a foreign Court enters upon a matrimonial action brought by a Hindu husband against a Hindu wife married under the Hindu Law, then both the jurisdiction and grounds have deservedly to be in accordance with HMA. Here, the word jurisdiction refers to the right, power, as well as authority to interpret and implement the law, or simply put in a nut shell, the authority and power to decide a lis. Court jurisdictions are limited by physical boundaries as well as by subject matter. The original jurisdictional court in the present case by all means is the court of the District Judge exercising territorial jurisdiction in India and the grounds on which the action can be brought, must be one which are mentioned in section 13 of HMA. But that is not the end of the matter. There can be cases where parties confer jurisdiction on the foreign Court and the said Court will assume jurisdiction available to the Matrimonial Court in India but would remain confined to adjudicate the action in accordance with the matrimonial law of the parties i.e. HMA and the grounds available therein. The

[37] *Rupak Rathi v Anita Chaudhary*, 2014 (2) RCR (Civil) 697.
[38] *Rupak Rathi v Anita Chaudhary*, 2014 (2) RCR (Civil) 697 (emphasis added).

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> legal principle being that when a Hindu couple tied by the nuptial knot according to Hindu rites travel abroad with intention to settle down and reside there to set up matrimonial home, they carry their personal laws on their back, off loading it in a foreign court for adjudication in the event parties intend to litigate for dissolving the marriage, mutually or by contest on one or more of HMA recognized principles. A foreign Court can then grant a valid decree of dissolution of marriage but the adjudication must be upon one of the available grounds in the Indian law. Since *irretrievable breakdown* of marriage is not available in HMA, the twin test of forum jurisdiction and relief based grounds would remain unsatisfied and the foreign Court decree would not be binding in India nor recognized …'

Thus, the court in *Rupak Rathi's* case upheld the order passed by the District Judge, Panchkula by which the Court at Panchkula had declined the application of the husband under Order VII, rule 11, CPC for accepting the decree of the English Court and praying for dismissing the divorce petition of the wife as not maintainable. This landmark view has brought explicit clarity and has given a clear precedent to be followed wherever foreign matrimonial decrees fall for interpretation before a Family Court before whom a matrimonial cause is pending and a foreign verdict is cited as a fait accompli. In this erudite judgment, Justice Rajiv Narain Raina has given explicit clarity to the proposition that a decree of divorce on the grounds of 'irretrievable breakdown of marriage' passed by a foreign jurisdiction would not find favour before a Court of competent jurisdiction under the HMA, 1955 before whom the parties are litigating in a matrimonial cause in the Indian jurisdiction.

(e) Recommendations of the Law Commission of India

The Law Commission of India in Report No 217, March 2009, on 'Irretrievable Breakdown of Marriage – Another Ground for Divorce' took notice of the 71st report of the Law Commission of India dated 7 April 1978 and upon taking due notice of the earlier recommendation, took suo motu notice on the subject to suggest that immediate action be taken to introduce an amendment in the HMA, 1955 and the SMA, 1954 for inclusion of 'irretrievable breakdown of marriage' as another ground for grant of divorce. The 217th report of the Law Commission relied upon the earlier 71st report and in para 1.5 stated as under:

> '1.5 It is pertinent to notice that the Law Commission of India has already submitted a very comprehensive 71st Report on irretrievable breakdown of marriage as a ground of divorce. The matter had been taken up by the Commission as a result of a reference made by the Government of India. The Law Commission under the Chairmanship of Shri Justice H. R. Khanna presented its Report on April 7, 1978. The Report considered the suggestion and analyzed the same in extenso. Before embarking upon further action on the suggestion that irretrievable breakdown of marriage should be made as a ground for divorce, the Law Commission considered it appropriate to invite views on the matter by issuing a brief questionnaire. The Commission in its 71st Report have accepted in principle irretrievable breakdown of marriage as a ground of divorce and also examined the question as to how exactly to incorporate it into the Act and also further examined the question whether the introduction of such a ground should be coupled with

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> any safeguards. The Commission also in Chapter II of the said Report considered present law under the Hindu Marriage Act, merits and demerits of the theory of irretrievable breakdown of marriage in Chapter IV and retention of other grounds of divorce in Chapter V. In Chapter VI the Commission also considered the requirement of living apart and also suggested many safeguards like welfare of children, hardship and recommended amendments to Sections 21A, 23(1)(a) and also recommended insertion of new sections 13C, 13D and 13E.'

Accordingly, Dr Justice AR Lakshmanan, as Chairman heading the 18th Law Commission of India gave the following recommendations in the 217th report dated 30 March 2009 as follows:

> '3.1 It is, therefore, suggested that immediate action be taken to introduce an amendment in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 for inclusion of "irretrievable breakdown of marriage" as another ground for grant of divorce.
>
> 3.2 The amendment may also provide that the court before granting a decree for divorce on the ground that the marriage has irretrievably broken down should also examine whether adequate financial arrangements have been made for the parties and children.'

As a consequence of the above proposal of the Law Commission of India, 'irretrievable breakdown of marriage' was suggested to be added as a ground for divorce in HMA, 1955 and SMA, 1954. The Rajya Sabha on 26 August 2013 approved the Marriage Laws (Amendment) Bill, 2013, which allows both spouses to file for divorce on the ground of 'irretrievable breakdown' of marriage. Both parties have to live apart for at least 3 years before filing for such a petition. The Marriage Laws (Amendment) Bill seeks to empower the courts to decide the compensation amount from the husband's inherited and inheritable property for the wife and children once the marriage legally ends. Also, the wife has the right to oppose the grant of a divorce on the ground that the dissolution could result in grave financial hardship. Provisions have been made to restrict grant of a decree of divorce on ground of 'irretrievable breakdown' of marriage if the court is satisfied that adequate provision for maintenance of children has not been made consistently with financial capacity of the parties to the marriage. The Bill proposes amendments to both the HMA, 1955 and SMA, 1954. These amendments include a property clause whereby 50 per cent of the husband's property, both inherited and inheritable in the future, including any he has acquired after the marriage, may be ceded to his wife. The Irretrievable Breakdown of Marriage clause allows for speedier separation if the husband and wife have stayed apart for a period of 3 years or more on the grounds of unfulfillment or unhappiness. It also states that women can oppose divorce if she can prove grave financial hardships as a result of the divorce, while men cannot. It was mooted in the Rajya Sabha that the proposal was to make divorce friendly for women as it provides for the wife getting a share in the husband's immovable property after 'irretrievable breakdown' of marriage. However, the Bill has not since been tabled in the Lok Sabha and the matter remains inconclusive.

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(f) Article 142 – an alternative serving well

The trend of some recent judgments of the Apex Court clearly demonstrates that irretrievable breakdown of marriage itself directly needs to be brought on to the statute book as an additional independent ground for obtaining divorce. The proposed Marriage Laws (Amendment) Bill, 2013 also seeks to include 'irretrievable breakdown of marriage' as an additional ground for divorce. The authors differ with this proposal and have an alternative suggestion which is set down hereunder.

It is proposed that for a civilised parting of spouses before Indian Courts, only when both or either of the spouses are non-resident Hindus domiciled in a foreign jurisdiction and whose marriage has broken down does irretrievable breakdown need to be incorporated into the statute book as an additional ground for divorce, which should be hedged with protections and safeguards for the spouse at a disadvantage in a broken relationship. This will have an immediate three-fold benefit.

First, where parties, one or both, who reside abroad, have irreconcilable differences and want to part amicably, an option will be available to such Hindu spouses to legally and logically part in observance of the sanctity of their personal law, without resorting to a protracted time-consuming legal battle on trumped-up charges either in India or abroad at prohibitive legal costs. The minimum 6-month waiting after filing of a petition for divorce by mutual consent and one year prior period of living apart can thus be obviated.

Secondly, resort to divorces in foreign jurisdictions may reduce once a proper legal option of irretrievable breakdown is available on Indian soil to spouses of a dead marriage. Irretrievable breakdown can thus serve as an additional ground for divorce in the HMA, 1955 and SMA, 1954 only for non-resident spouses of Hindu religion to prevent hasty divorces abroad on unfriendly terms. However, to prevent misuse, sufficient statutory safeguards can be incorporated to arm the Indian judiciary to stall any abuse of the process of law.

Thirdly, inter-parental child custody conflicts across international borders can be avoided if suitable forums for redress are available in India and children will be saved the agony of living apart, deprived of the love and affection of joint rearing of both their parents.

This however should be limited only to cases where one or both parties of Hindu religion are non-resident Indians. Undoubtedly, it will have to be hedged about with all necessary safeguards and precautionary conditions to prevent hasty divorces and other abrupt attempts at misuse. But, all the same, the time has now come to make it available separately as a ground for divorce in Indian matrimonial law to discourage overseas litigation. This will greatly facilitate parties to settle amicably their matrimonial disputes on Indian soil and prevent them from entering into protracted litigation where allegations and insinuations are hurled freely for achieving a matrimonial victory. Such a legislative change

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will thus bring relief not only to litigating spouses but also to members of extended families who are invariably involved in the litigation process as a common Indian practice.

Beyond the above, proposed limited change is recommended in NRI marriages only, ie where one or both parties is a non-resident Indian. Domestically, no change is advocated by the authors for in-country residents in India as the existing three-tier divorce structure meets the requirements sufficiently for local purposes. Accordingly, the authors have a different perspective. Keeping the Hindu ceremonial and sacramental concept of marriage intact must be adhered to at least domestically. Erosion of values in matrimonial life must be checked. Marriage in its traditional form must be protected. Hindu divorce law does not need an overhaul. It only needs some amendments. The Hindu institution of a family, a home and children of the marriage as they exist today under Hindu law needs protection. For domestic marriages within the country, the constitutional power of the Apex Court invoked under Art 142 (1) of the Constitution to do complete justice to litigating spouses to dissolve marriages, which have irretrievably broken down, under the banner and umbrella of mutual consent grounds, is serving the purpose well. The Apex Court within its discretion uses its jurisdiction to settle matters when necessary for total justice but refuses to do so when a spouse seeks an unfair advantage by seeking the court to invoke Art 142 of the Constitution.

II DIVORCE BY MUTUAL CONSENT – A GROUND FOR IRRETRIEVABLE BREAKDOWN UNDER ARTICLE 142

(a) Statutory requirements of mutual consent divorce

Section 13B of the HMA, 1955 came up for interpretation by the Bombay High Court in *Leela Mahadeo Joshi v Mahadeo Sitaram Joshi*.[39] The Court held that the three ingredients with regard to which the Court must satisfy itself before granting divorce by mutual consent are, first that the petition must be a joint petition presented by both the parties praying for a divorce by mutual consent. Secondly, they have been living separately for a period of one year or more prior to the presentation of the petition. Lastly, they have not been able to live together and have mutually agreed that the marriage should be dissolved. The safeguards as enumerated in s 23 of the HMA, 1955 must undoubtedly be borne in mind, namely that the consent of the parties has not been obtained by force, fraud or undue influence and this aspect must necessarily be ascertained by the trial Court.

Furthermore, the court held:[40]

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39 *Leela Mahadeo Joshi v Mahadeo Sitaram Joshi*, AIR 1991 Bom 105.
40 Paragraph 13, p 108.

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> 'It is material to note that section 13B, sub-section (2) makes it mandatory on the part of the Court to pass a decree once the above ingredients are satisfied and it is, therefore, not open to the Court to refuse to pass a decree in such circumstances. Such refusal would be contrary not only to the provisions of law but the very purpose of the amendment and would frustrate the basic objective of providing an honourable and effective dissolution of marriage in cases of matrimonial break-down without having to go through the exercise of an adversary litigation involving allegations against each other …'

(b) Mere compromise not sufficient

Section 13B stipulates specific conditions and circumstances for the grant of divorce by mutual consent, only upon satisfaction of the court. In *Munesh v Anasuyamma*,[41] the husband's petition for divorce on the grounds of desertion was dismissed. This was on account of the failure of the husband to prove the desertion against the wife. The husband appealed against the decision. Pending the institution of the appeal, the husband recorded a compromise under Order XXIII, rule 3 of the Code of Civil Procedure, 1908, which was placed on record in the pending family appeal in the High Court. The compromise petition did not contain any averment or admission to show that the wife had deserted her husband without any justifiable cause. The court doubted the compromise petition. The petition only recited that the litigation had been continuing for more than 15 years, the marriage itself was dead, and both the parties were agreeable to judicial separation. The court frowned upon such an agreement. The court held that such an agreement is not a lawful agreement. It was further held that no decree for divorce can be granted on the basis of such a compromise. The court observed that such a compromise is against the scheme of the provisions of s 13 and s 13B of the HMA, 1955 and renders nugatory these provisions of the Act. According to the court, such a divorce petition should have been presented before the original competent court, i e the District Court or the Family Court.

(c) Supreme Court's purported exercise of inherent powers under Article 142 of the Constitution to grant divorce by mutual consent

In *Shashi Garg v Arun Garg*,[42] the Supreme Court in an application under s 25 of the Code of Civil Procedure (Power of the Supreme Court to transfer suits, etc from one jurisdiction to another) substantially altered the relief available to the parties. In this case, initially a petition for dissolution of the marriage had been filed by the respondent husband on the grounds of cruelty. The wife moved the Apex Court seeking to transfer the proceedings from the Court of the District Judge, Delhi to the Court of competent jurisdiction at Rewari, Haryana. Notice of the transfer petition was issued to the respondent husband. When the transfer petition came up for hearing, the parties settled outside the

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[41] *Munesh v Anasuyamma*, AIR 2001 Kant 355.
[42] *Shashi Garg v Arun Garg*, 1997 (7) SCC 565.

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court and filed a memorandum of agreement in the Supreme Court. In the light of the agreement, the Supreme Court took the matter on board. The apex Court scrutinised the agreement. The parties to the marriage prayed to the Court that their marriage be dissolved by mutual consent which was otherwise emotionally dead and for all other practical reasons. The Court concluded as follows in para 8 of the judgment at p 566:[43]

> 'The requirements of section 13B of the Act have been satisfied and there is no impediment in granting the decree for divorce by mutual consent by altering the relief in HMA Case No. 221 of 1996, as one available under section 13B of the Act with a view to do complete justice between the parties and avoid unnecessary further litigation. We are also satisfied that the interest of the minor daughter has been safe guarded …'

In the ruling above, the Apex Court seems to have exercised its powers under Art 142 of the Constitution of India, without expressly referring to it. The Court was more than particular in protecting the pecuniary interest of the minor daughter. The use of the phrase 'to do complete justice between the parties and avoid unnecessary further litigation' is indicative of this fact. Under Art 142 of the Constitution, the Supreme Court in the exercise of its jurisdiction may pass any decree or order as is necessary for doing 'complete justice' in any matter pending before it. Section 25, CPC only empowered the Supreme Court to transfer the case from one Civil Court to another. Perhaps, in its wisdom, the Apex Court, to prevent any further ordeal to the parties of relegating them for further relief to another Court, took upon itself the task of doing substantial justice by there and then terminating a dead marriage, hence rendering substantial justice to all the parties to the litigation.

In *Madhuri Mehta v Meet Verma*,[44] during the course of the hearing of the transfer petition, the parties to the marriage made an application for dissolution of their marriage under s 13B of the HMA, 1955. The Court also conferred visitation rights on the husband to meet their only child from the marriage. The court noticed that the parties had been estranged and had been living apart since January 1996. The court entertained the joint plea of the parties to the marriage. The ruling concluded in no uncertain terms that divorce by mutual consent was being granted in exercise of powers under Art 142 of the Constitution of India, for which there is ample authority reflective from the past decisions of the Apex Court itself.

In a third transfer petition case, reported at the same time as Maduri Mehta's case, the Apex Court gave a yet more liberal interpretation to the mutual consent provisions. This is the case of *Anita Sabharwal v Anil Sabharwal*.[45] In this case the respondent husband's divorce petition was pending in the court of the Additional District Judge, Delhi. The wife moved the transfer petition seeking transfer of the said case to Mumbai. During the pendency of the

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43 Paragraph 8, p 566.
44 *Madhuri Mehta v Meet Verma*, 1997 (11) SCC 81.
45 *Anita Sabharwal v Anil Sabharwal*, 1997 (11) SCC 490.

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transfer petition, the parties as well as the counsel put on the record of the court a compromise deed wherein they had agreed to get divorced by mutual consent. The Judges observed that the petition had not been filed under s 13B of the HMA, 1955 and that the statutory period of 6 months had not even commenced. The Apex Court summoned the trial court record and noticed that the parties had been married for 14 years. The court noticed that sadly enough, they had spent the prime of their life in acrimony and litigation. The court held that it was time that their mutuality bore some fruit in putting them apart. The court concluded in this short but liberal judgment as follows:[46]

> 'We, therefore, in the spirit of section 13B of the Act, and in view of the fact that all hopes to unite them together have gone, hereby grant to the parties divorce by a decree of dissolution by mutual consent to end their prolonged unhappiness. Ordered accordingly. The transfer petition stands disposed of.'

The remarkable feature of this judgment is that the court was not bogged down by the technicalities of law while interpreting s 13B of the HMA, 1955. Also, the Court adequately satisfied itself as to the financial arrangements for the education of the children. The estranged father tendered in Court a sum of seven lacs by way of bank drafts. He was also given visitation rights to visit his children. The decision of the Court to do substantial justice to the parties was unfettered. The spouses parted amicably. Due provision was made for the future and welfare of the children's rights. Hence, the Court rendered complete justice to the parties.

(d) Merely living separately is no ground for section 13B petition

Mere agreement of the parties to live separately, and the fact of living separately, is not a ground for granting divorce under s 13B of the HMA, 1955. A decree for divorce can be granted only when all of the statutory conditions mentioned in the HMA, 1955 for the grant of relief are found to exist and not merely on the ground that the parties had agreed to the grant of such a decree. This was the mandate of law laid down in *Surinder Kaur v Amarjit Singh* and *Apurba Mohan Ghosh v Manashi Ghosh*.[47]

The Delhi High Court, in the case of *Gaurav Kapoor v Komal Babbar*,[48] reiterated the explanation of the term 'living separately' under s 13B, given by the Apex Court in the case of *Smt Sureshta Devi v Om Prakash*, and held as follows:

> '6 … The similar question came up before the Apex Court in the case of Smt. *Sureshta Devi v. Om Prakash*, (1991) 2 SCC 25. In paragraph 9 of the said judgment, it was observed:

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46 At p 491.

47 *Surinder Kaur v Amarjit Singh*, 1986 (2) HLR 120, and *Apurba Mohan Ghosh v Manashi Ghosh*, 1989 (1) HLR 247.

48 *Gaurav Kapoor v Komal Babbar*, 2014 (206) DLT 637 at para 6.

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> "9. The 'living separately' for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression 'living separately' connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they 'have not been able to live together' seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually agreed that the marriage should be dissolved."'

Hence, besides living separately, the Court clarified the requirements of not having been able to live together and mutual agreement to dissolve the marriage, as the three necessary and mandatory ingredients of a mutual consent divorce petition under s 13B of the HMA, 1955 which cannot be relaxed or waived.

(e) Mutual consent should continue until the divorce decree is sought

There has been conflict of law situation as to whether consent of both the parties to the marriage should continue up to the date of the final decree. This issue was resolved by the Supreme Court of India in 1992 but the correctness of this decision has been doubted by the Apex Court itself in the year 1997. The law at this moment in time appears to be that mutual consent of both the parties should continue until the decree is passed by the court. The law on this issue is analysed briefly hereunder.

The Punjab and Haryana High Court in *Harcharan Kaur v Nachhatar Singh*,[49] held that either party to the marriage is at liberty to revoke his or her consent any time before the petition is finally disposed of:

> 'In our view, unless the parties to the petition under section 13B of the Act, who have mutually consented to have the marriage dissolved, continued to signify their mutual consent for the dissolution of the marriage right up to the date of the decree, the marriage cannot be dissolved under sub-section (2) of section 13B of the Act merely on the basis that six months earlier the parties had together presented the petition for dissolution of marriage by mutual consent. Either of the parties to the petition under section 13B, that is, husband or wife, is at liberty to revoke its consent any time before the petition is finally disposed of; and if the other party is still keen to have the marriage dissolved, the other provisions of the Hindu Marriage Act are still available for the grant of necessary relief if a case is made out for the same. The object of section 13B is to provide an additional speedy remedy to the husband and wife to have the marriage dissolved if even after

[49] *Harcharan Kaur v Nachhatar Singh*, AIR 1988 P&H 27 at para 11, p 30.

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> sufficient efflux of time both of them find, that it is not possible for them to continue as husband and wife any further. Obviously, if both the parties agree, the decree of divorce can be granted by mutual consent under section 13B and if one of them fails to agree and does not want to oblige the other party by extending the requisite consent to the divorce, decree of divorce cannot be passed under section 13B of the Act. For that, other provisions of the Act would have to be resorted to.'

The Delhi High Court, in a contradictory view to the decision of the Punjab and Haryana High Court, in *Chander Kanta v Hans Kumar*[50] held that a petition presented under s 13B of HMA, 1955 cannot be withdrawn by one party unilaterally. Of course, if the court is satisfied that the consent was not a free consent and it was the result of force, fraud or undue influence, then it is a different situation because the court in such a case is empowered to refuse to grant the decree of divorce. The Kerala High Court, like the Punjab and Haryana High Court, in *KI Mohanan v Jeejabai*[51] held that it is open to one of the spouses to withdraw the consent given to the petition at any time before the Court passes a final decree for divorce.

In *Sureshta Devi v Om Prakash*,[52] the Apex Court had the occasion to deal in detail with the conflicting views of different High Courts on the question of withdrawal of consent by either party to the marriage before the passing of the divorce decree. The law laid down in this ruling was that a party to a s 13B petition for divorce by mutual consent can unilaterally withdraw the consent. It is not irrevocable. Mutual consent must continue until the time a final divorce decree is passed. Therefore, if in the interregnum period of 6 to 18 months' waiting the mutual consent is withdrawn, no divorce by mutual consent can be granted. The Apex Court upheld the interpretation given by the High Courts of Kerala, Punjab and Haryana and Rajasthan and overruled the views of the High Courts of Bombay, Delhi and Madhya Pradesh as not laying down good law. The court, while supporting the above views, held:[53]

> '13. From the analysis of the section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under sub-section (2). There is nothing in the section which prevents such course. The section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable. At the time of the petition by mutual consent,

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[50] *Chander Kanta v Hans Kumar*, AIR 1989 Del 73.
[51] *K.I. Mohanan v Jeejabai*, AIR 1988 Ker 28.
[52] *Sureshta Devi v Om Prakash*, AIR 1992 SC 1904.
[53] At para 13, pp 1907–1908.

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> the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section (2) of section 13B is clear on this point. It provides that 'on the motion of both the parties … if the petition is not withdrawn in the meantime, the Court shall … pass a decree of divorce …' What is significant in this provision is that there should also be mutual consent when they move the Court with a request to pass a decree of divorce. Secondly, the Court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the Court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the Court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent.'

The court also relied on Halsbury's Laws by stating: 'The consent must continue to decree nisi and must be valid subsisting consent when the case is heard.'[54] The Supreme Court in Ashok Hurra's case[55] has doubted the correctness of the above decision. It has been held that for mutual consent to continue until the divorce decree is passed after a passage of 6 to 18 months appears to be too wide and does not logically accord with s 13B(2) of the HMA, 1955. The Supreme Court in this later decision has held that the observations made in Sureshta Devi's case, to the effect that mutual consent should continue until the divorce decree is passed, even if the petition is not withdrawn by either of the parties within the period of 18 months, appears to be too wide and is not in consonance with s 13B(2) of the HMA, 1955. The court felt that this issue would require reconsideration in an appropriate case. The Judges did not deliberate further on this issue. Since in this case the wife had withdrawn her consent for divorce before the passing of the final decree and the Supreme Court felt that the marriage was dead and that it warranted the exercise of jurisdiction under Art 142 of the Constitution to grant a decree of divorce by mutual consent under s 13B of the Act, the Supreme Court dissolved the marriage between the parties in order to meet the ends of justice. The Court held that realities on the ground cannot deter it from taking a total and broad view of the situation when dealing with adjustment of human relationships. Subject to the financial settlement between the parties, the Court dissolved the marriage by mutual consent under s 13B, HMA. This judgment seems to be an eye-opener where the Court brushed aside the technical interpretation of continuing consent until the passing of the final decree, and in rendering complete substantial justice between parties clearly differed from the earlier view of the Supreme Court. The judgment is thus indeed salutary in nature.

Furthermore, once any party has withdrawn consent for a petition under s 13B, it is not the duty of the court to look into the bona fides or reasonableness of withdrawal of consent. Once consent is withdrawn, the only option available to the Court is to close the matter at that stage and dismiss the petition without

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[54] At para 14, p 1908. See *Halsbury's Laws of England*, (4th Edn, Vol. 13, Butterworths, London, 1973), para 645; *Rayden on Divorce* (12th Edn., Vol. 1, Butterworths, London, 1974) p. 291; and *Beales v Beales* [1972] 2 All ER 667.

[55] *Ashok Hurra* (AIR 1997 SC 1266).

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going into the merits or demerits of the matter. This has been held in a judgment in *Rajesh R Nair v Meera Babu*.[56] A similar view has been settled by the Apex Court in *Hitesh Bhatnagar v Deepa Bhatnagar*,[57] clearly holding that if a second motion is not made in a petition for divorce by mutual consent, no Court can pass a decree of divorce by mutual consent. Article 142 is thus a panacea for all ills for dissolving a bad marriage to do complete justice to the spouses, children and extended families who are enveloped in the relationship.

(f) Six months statutory waiver period – Article 142 to the rescue

The tenor of several High Court decisions lays down that the statutory requirement of the waiting period of 6 to 18 months after filing the mutual consent divorce petition can be waived in instances where the parties have been litigating for a long time or where the marriage has lasted for a sufficient period of time and the spouses have been living apart. The period of 6 to 18 months is given in divorce by mutual consent so as to give time and opportunities to the parties to reflect on their move and seek advice from relations and friends if there is any hope of reconciliation between the parties.

The Punjab and Haryana High Court in *Mohinder Pal Kaur v Gurmit Singh*,[58] held that the 6-month waiting period under s 13B of the HMA, 1955 can be reduced in cases where the divorce petition is already pending on some other fault ground for more than 6 months and the reconciliation efforts have been unsuccessful. The court also added a rider that this period cannot be curtailed altogether in freshly instituted petitions.

The same court in *Vinod Kumar v Kamlesh*[59] has held that the statutory period of 6 months as provided under s 13B(2) of the HMA, 1955 can be waived if the marriage has broken down completely and the parties are living separately. This Punjab and Haryana High Court ruling places reliance on an earlier Andhra Pradesh High Court decision in *Re Grandhi Venkata Chitti Abbai*.[60] In that case, criminal proceedings and maintenance proceedings were already pending. On the intervention of village elders and friends the parties agreed to obtain a divorce by consent. Under the terms of the compromise the maintenance settled was payable to the wife only after the divorce. She, therefore, filed an application before the senior sub-judge for preponement of the divorce. The same was rejected, hence the appeal was instituted in the High Court. The court held that there was no possibility of revival of marriage in this case. The court held as follows:[61]

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[56] *Rajesh R. Nair v Meera Babu*, 2014 (1) HLR 263.
[57] *Hitesh Bhatnagar v Deepa Bhatnagar* 2011 (5) SCC 234 .
[58] *Mohinder Pal Kaur v Gurmit Singh*, 2002 (1) HLR 537.
[59] *Vinod Kumar v Kamlesh*, 2002 (1) HLR 270.
[60] *Re Grandhi Venkata Chitti Abbai*, AIR 1999 AP 91.
[61] At para 5, p 92.

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> 'When once such a situation is ruled out having liberalised the process of divorce by mutual consent which was not there prior to the amendment it will not serve any purpose in directing the parties to continue the agony for six more months. Hence, in a case of this nature, I feel that the statutory period of six months prescribed under the statute for taking divorce by mutual consent can be waived and the parties can be given liberty to part their company without waiting for the statutory period.'

Likewise in *Paresh Shah v Vyjayanthimala*,[62] in a case pertaining to a well-educated couple, where the marriage had lasted for several years, the court granted a divorce decree by consent. The judgment takes cognisance of the agony of the parties in such a situation:[63]

> 'From the above compromise memos, filed by both the parties, it is clear that both are educated and in a position to understand the concept of marriage and their responsibility towards each of them as husband and wife. But their feelings, mal-adjustment and temperament, made their lives miserable and to pull on as husband and wife an impossibility. For them, divorce is a blessing than to continue as husband and wife in miserable circumstances …'

In *Bijal Chandreshbhai Bhatt v Chandreshbhai Sahdevbhai Bhatt*,[64] the parties to the marriage had irreconcilable differences which also culminated in criminal litigation between them. The parties were not at all willing to reunite. The court, while dispensing with the requirement of a 6-month waiting period, highlighted the need to shorten litigation in such matters.

In one of the recent case of *Devinder Singh Narula v Meenakshi Nangia*,[65] the Apex Court granted divorce, after 4 months of cooling period, to the parties who had been living separately for more than one year by invoking the powers of the Supreme Court under Art 142 of the Constitution of India. In this case, the Apex Court held:

> '13. In the above circumstances, in our view, this is one of those cases where we may invoke and exercise the powers vested in the Supreme Court under article 142 of the Constitution. The marriage is subsisting by a tenuous thread on account of the statutory cooling off period, out of which four months have already expired. When it has not been possible for the parties to live together and to discharge their marital obligations towards each other for more than one year, we see no reason to continue the agony of the parties for another two months.'

In conclusion it can be inferred that only the Supreme Court can exercise its discretion to waive the statutory 6 to 18 months' waiting period in suitable cases as an exception wherever the need is felt to do so in exercise of its powers under Art142 of the Constitution of India for doing complete justice to parties in any cause or matter pending before it. This power is not vested with the High

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[62] *Paresh Shah v Vyjayanthimala*, AIR 1999 AP 186.
[63] *Paresh Shah v Vyjayanthimala*, AIR 1999 AP 186 at para 4, p 188.
[64] *Bijal Chandreshbhai Bhatt v Chandreshbhai Sahdevbhai Bhatt*, AIR 1999 Guj 203.
[65] *Devinder Singh Narula v Meenakshi Nangia*, 2013 (3) DMC (SC).

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Courts or any other court. Therefore, as a normal rule, the statutory 6 to 18 months' waiting period has to be adhered to necessarily. This time gap is a safeguard which prevents hasty divorces and helps parties to think over and decide on their intentions to divorce by mutual consent.

III GUIDELINES LAID DOWN BY THE SUPREME COURT OF INDIA ON RECOGNITION OF FOREIGN MATRIMONIAL JUDGMENTS – PRECEDENTS AND PERSPECTIVES

(a) Landmark Supreme Court judgment

Section 13 of the Code of Civil Procedure 1908 (hereinafter CPC) is the general provision of law relating to conclusiveness of judgments by foreign courts. There is no separate provision of law prescribed in the HMA, 1955 or SMA, 1954 relating to recognition of foreign matrimonial judgments. Hence, the general provisions of law laid down in s 13 of the CPC are also applicable to matrimonial matters decided by foreign courts.

The Supreme Court of India in 1991 laid down comprehensive fresh guidelines to recognise foreign matrimonial judgments by the Courts in India. The Apex Court in *Y Narasimha Rao v Y Venkata Lakshmi*[66] made it clear that Indian courts would not recognise a foreign judgment if it has been obtained by fraud which need not be only in relation to the merits of the matter but may also be in relation to jurisdictional facts. The ruling declared a divorce decree passed by a US court as 'unenforceable'.

In this case a decree for dissolution of marriage had been passed by the Circuit Court of St Louis County Missouri, USA. Three important factors were noteworthy in the case. In the first instance, the Court assumed jurisdiction over the matter on the ground that the first appellant had been a resident of the State of Missouri for 90 days preceding the commencement of the action and hence the petition could be filed in that Court. Secondly, the decree had been passed on the only ground of irretrievable breakdown of marriage. Thirdly, the respondent wife had not submitted to the jurisdiction of the Court. The Supreme Court of India observed from the record, that the wife had filed two replies of the same date. Both were identical in nature except that one of the replies began with an additional averment as follows:[67]

> 'without prejudice to the contention that this respondent is not submitting to the jurisdiction of this Hon'ble court, this respondent submits as follows ...'

The wife raised several objections in her defence along with other issues. She stated that they both were Hindus, were governed by Hindu law and got

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[66] *Y. Narasimha Rao v Y. Venkata Lakshmi*, JT 1991 (3) SC 33.

[67] At para 5, p 37.

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married at Tirupati in India under Hindu law. She further contended that she was an Indian citizen and was not governed by the laws in force in the State of Missouri. Hence, the foreign court had no jurisdiction to entertain the petition.

The Supreme Court held that, in terms of s 19 of the HMA, 1955 (s 19 lays down the Court to which the divorce petition shall be presented), the Circuit Court of St Louis County, Missouri had no jurisdiction to entertain the petition, in terms of which admittedly the parties were not married. Secondly, irretrievable breakdown of marriage is not one of the grounds recognised by the HMA, 1955 for dissolution of the marriage. Hence, the decree of divorce passed by the foreign court was on a ground which was not available under the HMA, 1955.

The Court interpreted s 13 of the CPC with special reference to the validity of foreign divorce decrees. Section 13 of the CPC states that a foreign judgment is not conclusive as to any matter directly adjudicated upon between the parties if:

> '(a) it has not been pronounced by a Court of competent jurisdiction;
> (b) it has not been given on the merits of the case;
> (c) it is founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
> (d) the proceedings are opposed to natural justice;
> (e) it is obtained by fraud;
> (f) it sustains a claim founded on a breach of any law in force in India.'

Justice PB Sawant analysed and consolidated the reasons for framing the guidelines in terms of s 13 of the CPC:[68]

> '11. The rules of Private International Law in this country are not codified and are scattered in different enactments such as the Civil Procedure Code, the Contract Act, the Indian Succession Act, the Indian Divorce Act, the Special Marriage Act etc. In addition, some rules have also been evolved by judicial decisions …
>
> 13. We cannot also lose sight of the fact that today more than ever in the past, the need for definitive rules for recognition of foreign judgments in personal and family matters, and particularly in matrimonial disputes has surged to the surface. Many a man and woman of this land with different personal laws have migrated and are migrating to different countries either to make their permanent abode there or for temporary residence. Likewise there is also immigration of the nationals of other countries. The advancement in communication and transportation has also made it easier for individuals to hop from one country to another. It is also not unusual to come across cases where citizens of this country have been contracting marriages either in this country or abroad with nationals of the other countries or among themselves, or having married here, either both or one of them migrate to other countries. There are also cases where parties having married here have been either domiciled or residing separately in different foreign countries. This migration, temporary or permanent, has also been giving rise to various kinds of matrimonial disputes destroying in its turn the family and its

[68] At paras 11 and 13, pp 39 and 40.

peace. A large number of foreign decrees in matrimonial matters is becoming the order of the day. A time has, therefore, come to ensure certainty in the recognition of the foreign judgments in these matters …'

The Apex Court laid down the following broad principles in the interpretation of s 13 of the CPC, with special emphasis on foreign matrimonial judgments.

(i) Clause (a) of s 13 states that a foreign judgment shall not be recognised if it has not been pronounced by a court of competent jurisdiction. The court was of the view that this clause should be interpreted to mean that only such a court will be a court of competent jurisdiction, which the HMA, 1955 or the law under which the parties are married, recognises as a court of competent jurisdiction to entertain the matrimonial dispute.

(ii) Clause (b) of s 13 states that if a foreign judgment has not been given on the merits of the case, the courts in this country will not recognise such a judgment. This clause should be interpreted to mean (a) that the decision of the foreign court should be on a ground available under the law under which the parties are married, and (b) that the decision should be a result of the contest between the parties. The latter requirement is fulfilled only when the respondent is duly served and voluntarily and unconditionally submits himself or herself to the jurisdiction of the court and contests the claim, or agrees to the passing of the decree with or without appearance. A mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the court, or an appearance in the Court either in person or through a representative for objecting to the jurisdiction of the Court, should not be considered as a decision on the merits of the case.

(iii) The marriages which take place in India can only be under either the customary or the statutory law in force in India. Hence, the only law that can be applicable to the matrimonial disputes is the one under which the parties are married, and not any other law. When a foreign judgment is founded on a jurisdiction or on a ground not recognised by such law, it is a judgment which is in defiance of the law in India. Hence, it is not conclusive of the matters adjudicated therein and, therefore, unenforceable in India.

(iv) Section 13(d) of the CPC makes a foreign judgment unenforceable on the ground that the proceedings in which it is obtained are opposed to natural justice. The court held that, in the realm of family law such as matrimonial disputes, this principle has to be extended to mean something more than mere compliance with the technical rules of procedure. Therefore, it is necessary for the court to ascertain whether the respondent was in a position to represent himself or herself and effectively contest the said proceedings.

(v) Section 13(e) of the CPC stipulates that the courts in India will not recognise a foreign judgment, which is prima facie obtained by fraudulent means. The court here placed reliance on its earlier decision in *Satya v Teja*

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Singh.[69] In this case it was held that the fraud need not be only in relation to the merits of the matter but may also be in relation to jurisdictional facts.

The Apex Court ruled that the jurisdiction assumed by the foreign court as well as the grounds on which the relief was granted must be in accordance with the matrimonial law under which the parties were married.[70] The court also elaborated upon the exceptions to this rule, which are as follows:

(a) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married;
(b) where the respondent voluntarily and effectively submits to the jurisdiction of the forum and contests the claim which is based on a ground available under the matrimonial law under which the parties are married;
(c) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

Therefore, the Indian Apex Court has given clear guidelines in accordance with the general law of the land for enforcement of foreign matrimonial judgments in India to prevent erring spouses from taking advantage of liberal matrimonial laws of foreign jurisdiction which permit quick divorce on easier grounds not available in the Indian Jurisdiction. The necessity to do so arose on account of a large number of foreign divorce decrees, mostly obtained in default, being sought to be enforced on Indian soil and which gave no choice to a helpless spouse invariably deserted and pitted on Indian land much against his or her wishes.

(b) Authoritative High Court verdict

In the case of *Rupak Rathi v Anita Chaudhary*,[71] in a vibrant interpretation given by Justice Rajiv Naraian Raina, the judgment gives a verdict with respect to applicability and interpretation of the exception in para 20 of *Y Narasimha Rao* (above)[72] and interpretation of Order VII, rule 11 of the CPC in the following terms:

> 'In exceptions (i) and (ii) the words "grounds" or "ground" have been used in the rule and also in exceptions (i) and (ii) but not in exception (iii). The word, "relief" has been used in the rule and in exceptions (i) and (iii) but not in exception (ii). The first exception talks of "forum" where the respondent is domiciled or

69 *Satya v Teja Singh*, 1975 (2) SCR 197.
70 *Y Narasimha Rao v Y Venkata Lakshmi*, JT 1991 (3) SC 3, at para 20, p 43.
71 *Rupak Rathi v Anita Chaudhary*, 2014 (2) RCR (Civil) 697 at para 18.
72 *Y Narasimha Rao v Y Venkata Lakshmi*, 1991 (3) SCC 451.

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habitually and permanently resides and this is clarified by the conjunction "and" to mean that the "relief" is granted on a ground available under HMA. Exception (iii) applies in cases which are not contested and are based on consent. It follows that when "contest" and "consent/s" are referable to grounds available under HMA, only then can relief flow. This is for the reason that there is no estoppel against the statute. What is meant by consent to the grant of relief even though the English Court's jurisdiction is contrary to HMA is the moot point presenting some difficulty. The rule in para. 20 confers and recognizes jurisdiction by assumption conferred on a foreign Court to act in accordance with the mandate of Indian matrimonial law. The Supreme Court chose not to use the word "grounds" in exception (iii) and this is how some ambiguity is felt after the heated debate on the interpretation of exception (iii) vehemently argued by the respective counsel and the learned amicus from many angles and prisms or points of view. It is, however, well settled that the words used in a judgment cannot be read as one would read words used by the legislature in enactments which latter have to be given their ordinary and plain meaning. In cases of ambiguity in the statutory rule and of the words used by the Parliament, then the court can step in to harmonize the provisions in a way which is in consonance with the objects and reasons for which the Act was passed and to further the intention of the law. There is a difference between the words "relief" and "jurisdiction" of the "forum" in exception (iii). Even in the rule, the forum has no jurisdiction but is assumed to have one when it acts on a principle permitted by section 13, HMA to be the grounds for dissolution of marriage by a decree of divorce. It is for this reason the Supreme Court used the word "may" when it observed while carving out the three exceptions that the "exceptions to this rule may be as follows". To my mind, if any other interpretation is placed on the word "relief" in exception (iii), it may result in grant of an illegal decree of dissolution of marriage made available to a party on the ground of irretrievable breakdown of marriage which is an impermissible ground of divorce not so far heralded into the Hindu law of marriage.

Exception (iii) is consent based for relief to the respondent but not to the petitioner in forum conveniens; "although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties". When the Supreme Court carved out this last exception it avoided introducing the word "grounds". If it were employed, the meaning then would have admitted no further debate and full effect would have to be given to the declaration under article 141 of the Constitution of India and for this Court to act in aid. However, since an exception cannot be seen to obliterate the rule itself or to rewrite it, then what the Supreme Court, in my humble view, in fact meant was a consent based decree obtained on foreign soil on HMA grounds and not otherwise. Therefore, HMA law would have to be read into exception (iii) to align it with the rule and not create a new rule since then it would not qualify as an exception to a rule. Reading the exception in isolation, will, in my considered view, be in violation of the rule itself. Thus, in cases of contested and consented decrees both would suffer HMA standards, failing which, the foreign court will be overstepping Parliamentary mandates in India and the decrees so obtained cannot be recognized in India unless falling in exceptions (i) and (ii). This is more so, as I see, when exception (i) talks neither of contest nor consent. Otherwise, there would hardly be any visible distinction between exception (i) and exception (iii) because even in exception (i) the assumed jurisdiction of the foreign court was not in accordance with the provisions of the matrimonial law of the parties or the relief granted was not in accordance with the matrimonial law under which the parties are married. This would be the "just and

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equitable" rule to follow for the protection of women who are the most vulnerable sections of society as observed in para 21 of Y. Narasimha Rao itself. Besides, consent to a foreign decree not questioned or litigated in court by parties makes no lis and remains good till it lasts. However, this is not a matter of law but of personal choice where the arms of law may not reach. But consent itself is a question of evidence if the mode and manner in which it was given is taken to a court of law for determination.'

Further, the High Court laid down seven guidelines for the Matrimonial Courts functioning under its jurisdiction for dealing with applications under Order VII, rule 11 of the CPC in the context of HMA, 1955 and s 13 of the CPC. These are as follows:[73]

'(i) If the spouse aggrieved by the foreign matrimonial decree has not submitted to the jurisdiction of the foreign court or consented to the passing of the foreign Court judgment, it ought not to be recognised being unenforceable under section 13, CPC. This position of law ought to be applied to the facts of the individual case.

(ii) There may be occasions that a spouse relying upon the judgment of a foreign matrimonial court, upon receipt of a summon or notice from a court of competent jurisdiction under the HMA, may not choose to file a written statement in response to a petition seeking a matrimonial cause under HMA in Punjab, Haryana or Chandigarh. Instead, the contesting spouse may prefer to move an application under Order VII, rule 11, CPC seeking to rely upon or invoke the provisions of section 13, CPC. Thus, it may be contended before the court of competent jurisdiction under the HMA that since the matrimonial action between the parties has already been decided and concluded by a Court in the foreign jurisdiction, the adjudication in the matter in issue between the same spouses based on the same matrimonial cause of action is barred by the principle of res judicata and spouses are estopped in law from agitating the same again.

(iii) It is respectfully contended that wherever both or any spouse arrayed in a matrimonial cause in a matrimonial action under HMA contest, dispute, question or oppose any above such application under Order VII, rule 11, CPC involving interpretation of the principles laid down under section 13, CPC thereby necessitating requirement of detailed pleadings and evidence of spouses, no summary decision may seem possible to decide the matter in the preliminary stage.

(iv) In the above situation, there may also be circumstances involving application of issues of domicile as also applicability of sections 1 and 2 of the HMA regarding extra territorial application of the provisions of HMA. Determination of these issues may also require parties to put their pleadings and testimony as well on the record of the Court of competent jurisdiction under the HMA.

(v) The application of the provisions of the CPC finding mention under section 21, HMA, the Court of Competent jurisdiction under the HMA in Punjab, Haryana or Chandigarh may then be guided by the procedural law of pleadings contained in the Orders and Rules of the CPC and Punjab & Haryana High Court amendments, if any, for further proceedings in the matter. Accordingly, filing of a written statement, counter claim, rejoinder

[73] *Rupak Rathi v Anita Chaudhary,* 2014 (2) RCR (Civil) 697 at para 24.

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and/or other pleadings may be necessitated for having the factual matrix on record leading to the settlement of issues under Order XIV, CPC which can only be framed upon allegations made by parties to be read along with the contents of documents produced by spouses. Hence, this procedure may be necessary to be adopted to decide upon the warring claims of spouses relying on averments in support or against the judgment of the foreign matrimonial court between the parties.

(vi) Based on the above procedural requirements, the Court of competent jurisdiction under the HMA may then examine the process, pleadings, grounds and other details in the passing of the judgment/decree of the matrimonial court of foreign jurisdiction to test it on the anvil of section 13, CPC and based on the principles laid down by the Apex Court in Y. Narasimha Rao v. Y. Venkata Lakshmi, 1991 (3) SCC 451 and exception (iii) as understood in the present opinion. Hence, in the event of a contest, dispute, opposition to the applicability of the foreign matrimonial judgment in the Indian jurisdiction, a summary disposal may not be possible. To do complete justice to both the spouses and to ensure that prejudice has not been caused to either of them as also that issues of maintenance, settlement of matrimonial property, child custody etc. arising in India have been completely settled between spouses based on provisions of HMA, the Court of competent jurisdiction under the HMA may examine the matter on the lines suggested above.

(vii) Thereafter, if the issue relating to the jurisdiction of Competent Court under the HMA as also any bar to the matrimonial cause created by any existing law appears to be established, the matrimonial court in Punjab, Haryana or Chandigarh may upon the facts and circumstances of the case take an appropriate decision under Order XIV, rule 2, CPC whether it needs to pronounce judgment on all issues or decide the issue of jurisdiction or maintainability as a preliminary issue. In such circumstances, the Competent Court under the HMA may after forming an opinion take an appropriate decision on the facts of the case as to whether the issue of jurisdiction or maintainability is to be decided as a preliminary issue or pronounce judgment together on all the issues. Accordingly, based on the individual facts and circumstances, the Court ought to take a decision whether to decide the preliminary issue of jurisdiction or maintainability or postpone the settlement of other issues after such preliminary issues has been determined.'

(c) Recommendatory Supreme Court view

Smt Neeraja Saraph v Jayant V Saraph[74] is another case of wife dumping by a foreign husband. The Apex Court rightly came down heavily on the erring husband by upholding an interim order for compensation payable to the helpless wife. The facts of this case are as follows. The appellant was a post-graduate daughter of a senior Air Force Officer. She was serving as a teacher and drawing a salary of Rs 3,000. She was married to respondent number 1, a doctor in computer sciences who was employed in the USA. The marriage took place at the behest of her father-in-law who approached through a common family friend. The marriage was performed on 6 August 1989 and the appellant was taken on a honeymoon to Goa for a few days. Respondent

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74 *Smt Neeraja Saraph v Jayant V Saraph*, JT 1994 (6) SC 488.

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number 1 returned to the USA on 24 August 1989, wrote letters to the appellant on 15 September, 20 October and 14 November 1989 persuading her to give up her job and suggesting the various avenues for her career in the US. The appellant was lured, she tried to obtain a visa and ultimately resigned from her job in November 1989. But from December things started getting cold. Ultimately, in June 1990 the respondent's brother came to Delhi and handed over a petition for annulment of marriage presented in an American Court and the father-in-law had sent a sentimental letter owning moral responsibility only. The wife filed a suit in India for damages against the husband and the father-in-law for ruining her life in forma pauperis. The suit was decreed ex parte for Rs 22 lacs. The court held:[75]

> 'Various submissions have been advanced on behalf of the father-in-law to support the order of the High Court including his helplessness financially. Is it a case of any sympathy for the father-in-law at this stage? In our opinion not. True the decree is ex-parte. Yet it is a money decree. However, no opinion is expressed on this aspect as the appeal is pending in the High Court. But the order of the High Court is modified by directing that the execution of the decree shall remain stayed if the respondents deposit a sum of Rs. 3,00,000 [sic] including Rs. 1,00,000 [sic] directed by the High Court within a period of two months from today, with the Registrar of the High court ...
>
> 5. Why the facts of this case have been narrated in brief with little background is to impress upon readers the need and necessity for appropriate steps to be taken in this direction to safeguard the interest of women. Although it is a problem of private International Law and is not easy to be resolved, with change in social structure and rise of marriages with NRI, the Union of India may consider enacting a law like the Foreign Judgments (Reciprocal Enforcement) Act, 1933 enacted by the British Parliament under section (1) in pursuance of which the Government of the United Kingdom issued the Reciprocal Enforcement of Judgments (India) Order, 1958. Apart from it there are other enactments such as the Indian and Colonial Divorce Jurisdiction Act, 1940 which safeguard the interest so far as the United Kingdom is concerned. But the rule of domicile replacing the nationality rule in most of the countries, for assumption of jurisdiction and granting relief in matrimonial matters, has resulted in conflict of laws. This domicile rule is not necessary to be discussed. But feasibility of legislation safeguarding the interests of women may be examined by incorporating such provisions as the following—
>
> (1) no marriage between a NRI and an Indian woman which has taken place in India may be annulled by a foreign court;
> (2) provision may be made for adequate alimony to the wife in the property of the husband both in India and abroad.
> (3) the decree granted by Indian courts may be made executable in foreign courts both on the principle of comity and by entering into reciprocal agreements like section 44A of the Civil Procedure Code which makes a foreign decree executable as it would have been a decree passed by that court.'

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[75] At paras 4 and 5, pp 490 and 491.

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(d) Necessity for a codified law

It will be noticed that the proposed guidelines in the above Supreme Court and High Court rulings are meaningful and, if implemented, can mitigate the plight of wives dumped in India by foreign husbands. Although the Apex Court has clearly stated that there is need for suitable legislation on the subject, until now no comprehensive Indian law has been enacted to protect the rights of deserted and abandoned spouses in India. In essence, therefore, judicial verdicts of the Courts of Law are the only available law in India to come to the rescue of helpless Indian spouses who protest against the uncontested foreign divorce decrees invariably obtained in default by spouses from overseas jurisdictions. Some codified laws on the subject are undoubtedly now an absolute necessity in India to cope with the need for interpretation and enforcement of foreign matrimonial judgments of overseas courts. Until then, Art 142 does the rescue for complete justice.

IV SUPREME COURT OF INDIA'S RECENT INTERPRETATION OF THE RIGHT TO MARRY

In a first judgment of its kind on the right of a patient suffering from contagious venereal disease to marry, the Supreme Court of India ruled that, so long as the person is not cured of the disease or impotency, his right to marry cannot be enforced through a court of law. The judgment is reported as *Mr 'X' v Hospital 'Z'*.[76] The Supreme Court firmly held that, if the man's marriage has been cancelled due to his being an AIDS patient, his right to marry will remain a 'suspended right'. Furthermore, he is not entitled to claim any compensation from the hospital which has disclosed his medical condition to the would-be bride's family.

The judgment came in the wake of a doctor's petition seeking compensation from Apollo Hospital in Chennai. The hospital had detected that he was an HIV-positive patient. This fact was also disclosed to his would-be bride's family. The marriage was called off immediately. The doctor contended that the hospital had violated medical ethics by disclosing his medical condition to the bride's family. This led to his social ostracisation.

The issue in the above-mentioned case went a step further. A subsequent petition was filed in the Supreme Court of India, seeking clarification of the above-mentioned judgment to facilitate marriage of an HIV-positive person after 'full, free and informed consent is taken for the marriage'.[77]

The same Supreme Court Bench comprising Justice BN Kirpal and Justice S Saghir Ahmad, which had handed down the earlier judgment, issued notices in

[76] *Mr 'X' v Hospital 'Z'*, 1998 (8) SCC 296.
[77] 'SC seeks opinion on AIDS patients' right to marry', *The Times of India*, New Delhi, 8 February 2000.

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the subsequent petition to the Union of India and the Medical Council of India to ascertain their views. The second petition on this subject was filed by Sahara, a centre for residential care and rehabilitation of HIV-positive persons under the AIDS care project and is discussed below.

The original judgment in *X v Hospital Z* again came up for reinterpretation and reconsideration before a different bench of the Supreme Court of India. The subsequent rollover judgment is reported as *Mr 'X' v Hospital 'Z'*.[78] The author of the subsequent judgment, Justice Rajendra Babu, is clearly in disagreement with the findings given in the earlier judgment in 1998. The court explained the reasons for reopening of the case as follows:[79]

> '3. A special leave petition was filed before this court. This court made an order on 21 September, 1998 (1998 (8) SCC 296 dismissing the said petition. However, in the course of the order several findings have been given, particularly those relating to "suspend right to marry". In that proceeding, this court heard only the appellant and there was no issue of notice to any other person nor had this court occasion to hear any of the persons representing the HIV or AIDS infected persons or their rights, much less any of the non-government organisations which are doing work in the field were heard. In those circumstances, a writ petition was filed under article 32 of the Constitution before this court for setting aside the said judgment. However, in the proceedings dated 7 February, 2000 it was noted that prayer was deleted and the other prayer which indirectly concerned the correctness of the judgment already passed was also deleted. However, the petition was ordered to be treated as an application for clarification or directions in the case already decided by this court ...'

Accordingly, the court directed that the fresh writ petition filed under Art 32 of the Constitution of India be registered separately as an interlocutory application for clarification/directions in the earlier original judgment. Notices were also issued to the National Aids Control Organisation, Union of India, Indian Medical Association and the Medical Council of India. The Supreme Court clarified the law as follows:[80]

> '4. By an order dated 2 September, 2001, it has been further directed that the IAs should be listed before a three-Judge Bench.
>
> 5. In IA No. 2 of 1999 filed by the impleaded petitioner, the petitioner has raised the question whether a person suffering from HIV(+) contracting marriage with a willing partner after disclosing the factum of disease to that partner will be committing an offence within the meaning of sections 269 and 270, IPC. In substance, the petitioner wants the court to clarify that there is no bar for the marriage, if the healthy spouse consents to marry in spite of being made aware of the fact that the other spouse is suffering from the said disease.
>
> 6. The various organisations to which the notice was issued have also entered their appearance before this court and filed a plethora of material giving their respective

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78 *Mr 'X' v Hospital 'Z'*, 2003 (1) SCC 500.
79 At para 3, p 502.
80 *Mr 'X' v Hospital 'Z'*, 2003 (1) SCC 500 at paras 4–7, p 503.

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> stands. The practical difficulties in ensuring disclosure to the person proposed to be married or in monitoring such cases are pointed out. It is not necessary to examine these matters in any detail inasmuch as in our view this court has rested its decision on the facts of the case that it was open to the hospital or the doctor concerned to reveal such information to persons related to the girl whom he intended to marry and she had a right to know about the HIV-positive status of the appellant. If that was so, there was no need for this court to go further and declare in general as to what rights and obligations arise in such context as to right to privacy or confidentiality or whether such persons are entitled to be married or not or in the event such persons marry they would commit an offence under law or whether such right is suspended during the period of illness. Therefore, all those observations made by this court in the aforesaid matter were unnecessary, particularly when there was no consideration of the matter after notice to all the parties concerned.
>
> 7. In that view of the matter, we hold that the observations made by this court, except to the extent of holding as stated earlier that the appellant's right was not affected in any manner in revealing his HIV-positive status to the relatives of his fiancée, are uncalled for. We dispose of these applications with these observations.'

Analysing the above two judgments, it seems that the subsequent judgment in 2003 takes away what the earlier judgment in 1998 gave. In the 1998 decision, the Supreme Court, while laying down that the infringement of the suspended right to marry cannot be legally compensated by damages either in torts or common law, expounded the rights of persons suffering from a communicable disease like AIDS. The latter judgment by the Supreme Court in 2003, instead of further delving into the concepts, cut short the matter by stating that even the earlier observations of the court were unnecessary, particularly when there was no consideration of the matter. Thus, the rights of persons suffering from diseases like AIDS or who are HIV-positive, which could have been further gone into, were abruptly cut short. There is no specific legislation in India which takes care of rights of such persons. Therefore, in some appropriate case, the judiciary itself will be faced with the task of interpreting the rights of such persons by expounding the benefit of existing legislation. Whether the rights will be extended or curtailed remains to be seen. But certainly, the Supreme Court which lays down the law of the land under Art 141 of the Constitution, and which can under Art 142 of the Constitution pass such orders as are necessary for doing complete justice in any cause or matter pending before it, may have to address the above issue sooner or later given the gravity of the matter. Avoiding answering the questions may not serve the purpose. Thus, it may be argued that the earlier judgment in 1998 was better law. It would have been immensely helpful had the subsequent judgment in 2003 laid down some sort of criteria regarding obligations, duties and liabilities of HIV or AIDS-affected persons embarking upon matrimony, both in the event of wilful and non-wilful disclosure, which may have shed some more light on the subject.

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V SETTLEMENT SANS DIVORCE-POST NUPTIAL AGREEMENTS

(a) Unique position

In an inimitable decision rendered on 15 July 2013, in *Pamela Sharda v Rama Sharda in Special Leave to Appeal (Civil)*,[81] the Supreme Court, accepting a tripartite settlement deed executed between the wife, husband and his mother through mediation, permitted parties to part ways upon a one-time payment of Rs 45 lacs to the wife with the condition that both would not seek divorce on any ground. The couple, married for 30 years, agreed to withdraw all their pending litigation and the wife agreed not to cause any disturbance or invade the privacy of her husband and his 83-year-old mother living in their household property. The sum of Rs 45 lacs paid in full and final settlement to the wife was towards all her financial claims. Both parties, living separately since 2009, agreed that they would have nothing to do with each other's lives and would not undergo any divorce proceedings. The wife would also not claim restitution of conjugal rights or rights of residence in the household. However, in the event of remarriage of the husband, the agreement would stand terminated and the wife would be entitled to revive her claim maintenance or alimony for the present and future, since the sum of Rs 45 lacs would not be considered as an amount towards dissolution of marriage and payment of permanent alimony. The Apex Court accepting the settlement deed and the undertakings of the parties, disposed of the matter and permitted parties to file the same before all Courts where litigation was pending with liberty to invoke the provisions of the Contempt of Courts Act, 1971 upon breach, if any.

(b) Position of the law

Under Hindu family laws where marriage is considered a sacrament and not a contract, pre-nuptial agreements do not find any recognition under existing matrimonial legislation or under other civil codified laws. Hence, pre-marital settlements between Hindus are alien to the present legal system. Regardless, if there be any pre-nuptial settlement, it would be tested like any other contract for its validity. Essentially, it should not be opposed to public policy, must not violate principles of natural justice, must not be fraudulent, and must recognise rights of both the parties as also should be executed freely, voluntarily, without coercion and upon full disclosure of all relevant facts. As, traditionally, break-ups are not discussed before marriages, there seems to be no reported decision testing the validity of a pre-nuptial termination agreement.

(c) Changing social millieu

In a fast-evolving society of urban set-ups and escalating cross-border matrimonial unions, divorces settled through mutual consent petitions to avoid

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[81] *Pamela Sharda v Rama Sharda* No 11714/2012.

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ugly, protracted and harmful litigation are being increasingly resorted to through the process of alternative dispute resolution and mediation centres now available in all Courts in India. Furthermore, invoking of punitive criminal proceedings against immediate family members and parents of spouses upon death of a matrimonial relationship often results in the entire family being implicated on trumped up charges as retribution to settle scores. Easy outlets to do so under the Indian Penal Code and the Domestic Violence Act often result in harassment to parties, even though they may have no role attributed to them. Likewise, adequate protection and financial support to an abandoned spouse needs to be secured in advance to avoid flights of fancy, leaving a hapless partner with nothing to survive on, if a marriage goes sour. Securing protection for children from inter-parental child removal is another dimension of breaking marriages when abduction of children is resorted to by parents to settle egos. Such facets of life of new generations makes the mind ponder to evolve solutions which as of now do not exist in the statute book but are now necessitated with the advent of time.

(d) Existing law

As of now, mutual consent is the most resorted to method for divorce if parties are principally in agreement on the terms and conditions of termination of marriage which in itself reflects acceptable breakdown of marriage. However, Parliament is looking at defining and bringing in irretrievable breakdown of marriage as an additional ground for divorce, though the process of legislation may be time consuming. Although irretrievable breakdown of marriage is not recognised as a ground of divorce under existing matrimonial laws, the Apex Court, in exercise of its vast powers under Art 142 of the Constitution of India, may pass such decree or make such order as it is necessary for doing complete justice in any cause or matter pending before it. Hence, in a prolonged messy litigation, the Apex Court may bury the hatchet in the facts and circumstances of a case under its inherent jurisdiction. The Apex Court of India in two decisions, ie *BS Joshi v State of Haryana* and *GV Rao v LHV Prasad*,[82] has very eloquently emphasised the need to encourage court settlements in matrimonial disputes. The Court concluded 'that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their "cases" in different courts'.[83] Therefore, there is far greater emphasis in the Indian context to settle post-marriage matrimonial disputes in the event of divorce oriented litigation, rather than focusing on pre-nuptial agreements. Law thus looks at the cure and not the remedy to prevent the problems.

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[82] *BS Joshi v State of Haryana*, (2003) 4 SCC 675 and *GV Rao v LHV Prasad*, (2000) 3 SCC 693.

[83] *GV Rao v LHV Prasad*, (2000) 3 SCC 693.

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(e) New perspective

The Apex Court Judgment of 15 July 2013 in *Pamela Sharda v Rama Sharda* (above) opens a new window. It is in this breath that the need for pre-nuptial agreements needs a fresh thought with a new outlook. It comes at a time when surrogacy agreements are entered upon freely and have become acceptable in society. Thus, if the concept of a pre-marital settlement finds judicial acceptance and ultimate legislative sanction, matrimonial terms can be settled in advance optionally and alternatively to those who wish to do so. By no means would this be mandatory and offend those who do not wish to think of marital breakups before marriage by considering it as inauspicious or uneventful. Without disturbing sentiments, emotions and feelings of traditional mindsets, drawing up of pre-marriage agreements can be thought of where double income independent spouses are comfortable in such mutual understandings. Protection of spouses and avoidance of inter-parental child removal are immediate benefits of it. Beneficiaries would include a large segment of the NRI population who either marry foreign spouses or relocate to overseas jurisdictions and need written understandings for mutual protection and easy implementation by courts in alien jurisdictions. Clash of parallel matrimonial disputes in Indian and foreign courts can easily be avoided by it.

(f) Conclusions

Equally, the law does not forbid spouses from agreeing as to how they should live and conduct themselves as husband and wife, when they would consummate their marriage and how they would conduct themselves towards each other. It is equally important that due respect should be given for adult autonomy, subject to proper safeguards, which could be tested by judicial discretion, when the need arises. The fact remains that any matrimonial agreement made between husband and wife should not be illegal, immoral or opposed to public policy. The overhanging safeguard of the pre-marital settlement being adopted as a fair, free and just settlement will always be omnipotent. By no means should it be used as an instrument of oppression to take away rights of spouses which are guaranteed under existing laws, meant to secure relief. The need for evolving a jurisprudence to develop a positive thought process for creating such friendly methods would require an educative process to familiarise the advantages of such a concept while also clearly identifying its negative traits. The chaff has to be separated from the grain to enjoy the dough which has to be kneaded and blended over a period of time to be consumed to become acceptable as a welcome change. The traditional and sacramental notion of marriage must be gently flavoured with a commercially sounding phrase of pre-nuptial agreements, which is not to be viewed as an announcement of a break-up of a marriage, even before it is solemnised. The path has to be trodden carefully and slowly while administering the change. Changing times require that amicable settlements be arrived at by dispute resolution which can be aided and assisted if the parameters are penned down in advance. Exercising its jurisdiction, the Supreme Court by using the long arm

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of Art 142 can do complete justice in any matrimonial cause or litigation before it, as may be necessary on the facts and in the interests of justice. Law is an instrument of justice. At all times it may not be possible to do complete justice according to law. It is then that Art 142 can be invoked by the final Court to do total, wholesome and absolute justice which will serve the practical ends, more so in matrimonial matters where human relationships, families and children are involved. Intricacies and technicalities of law may require resolution by relaxing the existing statutory mandates. Relief culled out under Art 142 may at times be beyond the four corners of law. This is the beauty of the power, prerogative and authority vested in the Apex Court in whom wisdom, expertise and finality is attributed by the Constitution. Justice weaved with the yarn of Art 142 clothes the resolution of matrimonial disputes. The framers of the Constitution did well in vesting this exemplary power serving the ends of justice. A vibrant Indian Apex judiciary does extremely well in utilising this extra ordinary jurisdiction when called for. It has no substitute, cannot be eroded or limited by statute and is an ultimate jurisdiction.

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INDIA

MAINTENANCE, NON-RESIDENT INDIANS AND THE LAW

Anil Malhotra and Ranjit Malhotra[*]

Résumé

La législation relative aux obligations alimentaires est complexe en Inde. On la trouve dans différentes lois et elle peut dépendre de la religion des personnes. De ce fait, une législation différente s'applique aux hindous, aux musulmans et aux chrétiens, et il existe également des les lois laïques. L'obligation alimentaire peut inclure des dispositions relatives au logement des femmes et des enfants, selon un standard qui correspond au logement familial des parties lorsqu'elles vivaient ensemble. Le montant de l'obligation est déterminé en tenant compte des besoins du demandeur et des moyens des parties. Le paiement peut prendre la forme d'une rente ou d'un capital. Pour les parties vivant hors de l'Inde, qui sont nombreuses, le paiement peu être ordonné dans la monnaie étrangère. En plus de la législation pertinente, le présent article examine la jurisprudence récente sur le sujet.

I EXISTING FAMILY LAW LEGISLATION IN INDIA

It may be relevant to give a background on the existing Indian family law, keeping in mind that there is no uniform civil matrimonial legislation in India governing all religions, caste, communities, denominations and groups in India. There being no uniform civil or matrimonial code, all Indian citizens are governed by their respective codified personal statutory laws enacted or approved by Parliament.

(a) The Indian background

The Constitution of India enacted on 26 November 1949 resolved to constitute India as a Union of States and a Sovereign, Socialist, Secular, Democratic Republic. Today, a population of over one billion Indians live in 29 States and seven Union Territories within India besides about 25 million Indians who reside in foreign jurisdictions and are called Non-Resident Indians. Within the territory of India spread over an area of 3.28 million square kilometres, the large Indian population comprised of multicultural societies professing and

* Malhotra & Malhotra Associates, India (email: anilmalhotra1960@gmail.com).

practising different religions and speaking different local languages coexist in harmony in one of the largest democracies in the world.

The Indian Parliament at the helm of affairs legislates on central subjects in the Union and Concurrent lists and State legislatures enact laws pertaining to State subjects as under the State and Concurrent lists with regard to the subjects enumerated in the Constitution of India. Likewise, pertaining to the Judiciary, under art 214 of the Indian Constitution there shall be a High Court for each State and under art 124 there shall be a Supreme Court of India. Under art 141 of the Constitution, the law declared by the Supreme Court shall be binding on all courts within the territory of India. However, the Supreme Court may not be bound by its own earlier views and can render new decisions.

Part III of the Constitution of India secures to its citizens 'Fundamental Rights' which can be enforced directly in the respective High Courts of the States or directly in the Supreme Court of India by issue of prerogative writs under arts 226 and 32 respectively of the Constitution of India. Under the Constitutional scheme, amongst others, freedom of religion and the right to freely profess, practise and propagate religion are sacrosanct and are thus enforceable by a prerogative writ issued by any of the High Courts or the Supreme Court.

Simultaneously Part IV of the Indian Constitution lays down 'Directive Principles of State Policy' which are not enforceable by any court but are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles while making laws. Under art 44 of the Constitution in this Part, the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. However, realistically speaking, to date a uniform civil code remains an aspiration which India has yet to achieve and enact. Hence, there is no uniform matrimonial or civil law statutorily enacted by Parliament in India and Indian Citizens are governed by separate codified personal laws. All matrimonial matters are adjudicated at the first level in Family Courts or a District Court (if there is no Family Court) exercising territorial and subject matter jurisdiction as per relevant statutes, being the principal courts of original jurisdiction in all matrimonial matters. Against the decisions rendered by these courts, appeals are preferred to the High Court concerned with exercising territorial jurisdiction within the specific States in which these Family Courts or District Courts are situated. Against the decisions rendered by the respective High Courts, final appeals can be instituted in the Supreme Court of India whose judgments are final and applicable in all courts throughout the territory of India. However, the Supreme Court of India is not bound by its own decisions and can differ, vary, confirm or change its view in later decisions.

(b) Prevailing statutory family laws of different communities

India is a land of diversities with several religions with Hindus dominating with the largest number. The oldest part of Indian legal system is the personal laws

governing the Hindus and the Muslims. The Hindu personal law has undergone changes by a continuous process of codification. The process of change in society has brought changes in law reflecting the changed social conditions and attempts the solution of social problems by new methods in the light of experience of legislations in other countries of the world. The Muslim personal law has been comparatively left untouched by legislations over a period of time.

The Indian legal system is basically a common law system. The Indian Parliament has enacted the following family laws which are applicable to the religious communities defined in the respective enactments themselves. A brief description of each of these separate enactments is given as hereunder.

(a) The main marriage law legislation in India applicable to the majority population constituted of Hindus is known as the Hindu Marriage Act 1955 (HMA), which is an Act to amend and codify the law relating to marriage among Hindus. It applies to parties who are Hindus by religion. Ceremonial marriage is essential under this Act and registration is optional. It applies to any person who is a Hindu, Buddhist, Jaina or Sikh by religion and to any other person who is not a Muslim, Christian, Parsi or Jew by religion. The Act also applies to Hindus resident outside the territory of India. Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment. Likewise, in other personal law matters, Hindus are governed by the Hindu Succession Act, 1956, which is an Act to amend and codify the law relating to intestate succession among Hindus. The Hindu Minority and Guardianship Act 1956 is an Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus and the Hindu Adoptions and Maintenance Act 1956 is an Act to amend and codify the law relating to adoptions and maintenance among Hindus.

    It may be pertinent to point out that the Indian Succession Act 1925 is an Act to consolidate the law applicable to intestate and testamentary succession in India unless parties opt and choose to be governed by their respective codified law otherwise applicable to them. In respect of issues relating to guardianship, the Guardian and Wards Act 1890 would apply to non-Hindus. Interestingly, s 125 of the Code of Criminal Procedure 1973 provides that, irrespective of religion, any person belonging to any religion can approach a Magistrate seeking to be provided maintenance. Therefore, apart from personal family law legislation, both Hindus and non-Hindus have an independent right of maintenance under the general law of the land, if he or she is otherwise entitled to maintenance under this Code.

(b) The Indian Parliament also enacted the Special Marriage Act 1954 (SMA), as an Act to provide a special form of marriage in certain cases, and for the registration of such and certain other marriages and for divorces under this Act. This enactment of solemnising marriage by registration is resorted to by Hindus, non-Hindus and foreigners marrying in India who opt out of the ceremonial marriage under their respective personal laws. Registration is compulsory under this enactment. Divorce can also be

obtained by non-Hindus under this Act. This legislation governs people of all religions and communities in India, irrespective of their personal faith. Likewise, under the Foreign Marriage Act 1969, a person has only to be a citizen of India to have a marriage solemnised under this Act outside the territorial limits of India.

(c) The Parsi Marriage and Divorce Act 1936, as amended in 1988, is an Act to amend the law relating to marriage and divorce among the Parsis in India.

(d) The Christian Marriage Act 1872 was enacted as an Act to consolidate and amend the law relating to the solemnisation of the marriages of Christians in India and the Divorce Act 1869 as amended in 2001 is an Act to amend the law relating to divorce and matrimonial causes relating to Christians in India.

(e) The Muslim Personal Law (Shariat) Application Act 1937, the Dissolution of Muslim Marriages Act 1939, the Muslim Women (Protection of Rights on Divorce) Act 1986 and the Muslim Women (Protection of Rights on Divorce) Rules 1986 apply to Muslims living in India.

For enforcement and adjudication of all matrimonial and other related disputes of any person in any of the different religious or non-religious communities under the respective legislation mentioned above, the designated judicial forum or court where such petition is to be lodged is prescribed in the respective enactments themselves. There is an organised system of uniform designated civil and criminal judicial courts within every State in India, which work under the overall jurisdiction of the respective High Court in the State. It is in the hierarchy of these courts that all family and matrimonial causes are lodged and decided by the aggrieved party. In addition, the Indian Parliament has enacted the Family Courts Act 1984 to provide for the establishment of Family Courts with a view to promote conciliation and to secure speedy settlement of disputes relating to marriage and family affairs. Despite the existence of an organised, well-regulated and established hierarchy of judicial courts in India, there are still unrecognised parallel community and religious courts under the Muslim religion in existence whose interference has been deprecated by the judicial courts since such unauthorised and unwarranted bodies work without the authority of law and are not part of the Indian judicial system applicable to all.

Accordingly, maintenance *pendente lite* (maintenance during the pendency of the matrimonial litigation) and litigation expenses, permanent alimony and maintenance, maintenance of children as also settlement/division of matrimonial property/home as also rights of residence in the matrimonial home will be examined in this chapter in the light of all personal laws currently prevailing in India, besides looking at the parallel provisions for these heads under the Special Marriage Act 1954 (SMA) and other laws referred to above. It may be reiterated that the SMA is applicable between any two persons who fulfil the conditions of solemnisation of special marriages under the SMA, irrespective of religion, nationality, caste, creed or faith. It may be repeated that there is no universal matrimonial civil law in India enacted by Parliament or

uniform civil code applicable to all persons or citizens in India, and hence there is no reference or discussion with regards to any uniform matrimonial civil law in India, as there is no such Code.

II MAINTENANCE UNDER FAMILY LAWS IN INDIA

The wife is entitled to maintenance from the husband, as is invariably the case made out under s 24 or 25 of the Hindu Marriage Act, or s 37 of the Special Marriage Act. Section 125, CrPC gives the wife an additional claim for maintenance, irrespective of any matrimonial proceedings under the personal laws of the parties or the Special Marriage Act, as the case may be. The statutory provisions under various laws in India may be summarised as hereunder.

(a) Position of Maintenance under Personal Laws and Special Marriage Act

(i) Position of maintenance under Hindu Laws

In Hindu Law, there are two statutes, which provide for maintenance, viz, the Hindu Marriage Act 1955 (HMA) and the Hindu Adoptions & Maintenance Acts 1956 (HAMA).

Position of maintenance under the Hindu Marriage Act (HMA)

Section 24 of the HMA provides for interim maintenance and states:

> 'Maintenance *pendente lite* and expenses of proceedings. Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.
>
> Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of the notice on the wife or the husband, as the case may be.'

Section 25 of the HMA dealing with permanent alimony and maintenance, to be decided at the time of passing a decree or subsequently, reads as follows:

> 'Permanent alimony and maintenance. (1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his

> maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and the property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.
>
> (2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.
>
> (3) If the court is satisfied that the party in whose favour an order has been made under this Section has remarried, or if such party is the wife, that she has not remained chaste, or if such party is the husband, that he has had sexual intercourse with any women outside the wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the court may deem just.'

Position of maintenance under Hindu Adoptions and Maintenance Act

A Hindu wife has the advantage of an additional statute, the Hindu Adoptions and Maintenance Act 1956 (HAMA). Under s 18 of the HAMA, a Hindu wife is entitled to live separately from her husband without forfeiting her claim to maintenance, provided her separate living is justified which means that the husband:

(i) is guilty of desertion;
(ii) has treated her with cruelty;
(iii) is suffering from a virulent form of leprosy;
(iv) has any other wife living;
(v) keeps a concubine in the same house, or is living or habitually resides with a concubine elsewhere;
(vi) has ceased to be a Hindu by conversion to another religion; or
(vii) if there is any other cause justifying living separately.

The section provides two specific bars which would disentitle a wife from claiming maintenance under this Act: (i) if she is unchaste; or (ii) if she ceases to be a Hindu by conversion to another religion.

(ii) Position of maintenance under the Special Marriage Act (SMA)

This is a secular law applicable to all those persons who are married in India under this Act, irrespective of their caste, community, nationality or religion. Section 36 and 37 of the SMA also provides for maintenance *pendente lite* other than permanent alimony and maintenance for the wife, respectively. Unlike the Hindu Marriage Act 1955, there is no provision in the SMA for maintenance for the husband. The sections read as follows:

'Section 36. Alimony *pendente lite*.Where in any proceeding under Chapter V or Chapter VI it appears to the district court that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as, having regard to the husband's income, it may seem to the court to be reasonable.

Provided that the application for the payment of the expenses of the proceeding and such weekly or monthly sum during the proceeding under Chapter V or Chapter VI, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the husband.

Section 37. Permanent alimony and maintenance. (1) Any court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support if necessary, by a charge on the husband's property such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as, having regard to her own property, if any, her husband's property and ability, the conduct of the parties and other circumstances of the case, as it may seem to the court to be just.

(2) If the district court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the court to be just.

(3) If the district court is satisfied that the wife in whose favour an order has been made under this Section has remarried or is not leading a chaste life, it may, at the instance of the husband, vary, modify or rescind any such order and in such manner as the court may deem just.'

(iii) Position of maintenance under Parsi Law

The Parsi Marriage and Divorce Act 1936 provides for maintenance *pendente lite* and for permanent alimony and maintenance. It is significant to note that, prior to Amendment Act 5 of 1988, only a wife was entitled to maintenance under the provisions of the Act. After the Amendment the provision has been brought at par with the Hindu Marriage Act 1955 and now even a husband can seek maintenance. The relevant sections of this enactment provide for maintenance as follows:

'Section 39. Alimony *pendente lite*. Where in any suit under this Act, it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the suit, it may, on the application of the wife or the husband, order the defendant to pay to the plaintiff, the expenses of the suit, and such weekly or monthly sum, during suit, as having regard to the plaintiff's own income and the income of the defendant, it may seem to the court to be reasonable.

Provided that the application for the payment of the expenses of the suit and such weekly or monthly sum during the suit, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.

Section 40. Permanent alimony and maintenance. (1) Any Court exercising jurisdiction under this Act may, at the time of passing decree or at any time subsequent thereto, on an application made to it for the purpose by either the wife or the husband, order that the defendant shall pay to the plaintiff for her or his maintenance and support, such gross sum or such monthly or periodical sum, for a term not exceeding the life of the plaintiff as having regard to the defendant's own income and other property, if any, the income and other property of the plaintiff, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the movable or immovable property of the defendant.

(2) The Court, if it is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-Section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) The Court if is satisfied that the party in whose favour an order has been made under this Section has remarried or, if such party is the wife, that she has not remained chaste, or if such party is the husband, that he had sexual intercourse with any woman outside the wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the court may deem just.

Section 41. Payment of alimony to wife or to her trustee. In all cases in which the Court shall make any decree or order for alimony it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court or to a guardian appointed by the Court and may impose any terms of restrictions which to the Court may seem expedient, and may from time to time, appoint a new trustee or guardian, if for any reason it shall appear to the Court expedient so to do.'

(iv) Position of maintenance under Christian Law

Provisions for maintenance under the Christian Law are contained in the Indian Divorce Act 1869 as amended in 2001. The relevant sections in this regard are:

'Section 36. Alimony *pendente lite*. In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection, the wife may present a petition for expenses of the proceedings and alimony pending the suit.

Such petition shall be served on the husband, and the court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of expenses of the proceedings and alimony pending the suit as it may deem just.

Provided that the petition for the expenses of the proceedings and alimony pending the suit shall, as far as possible, be disposed of within sixty days of service of such petition on the husband.

Section 37. Power to order permanent alimony. Where a decree of dissolution of the marriage or a decree of judicial separation is obtained by the wife, the District Court may order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable, and for that purpose may cause a proper instrument to be executed by all necessary parties.

Power to order monthly or weekly payments. In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the court may think reasonable.

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the court seems fit.

Section 38. Court may direct payment of alimony to wife or to her trustees. In all cases in which the court makes any decree or order for alimony it may direct the same to be paid either to the wife herself or to any trustee on her behalf to be approved by the court and may impose any terms or restrictions, which to the court seem expedient and may from time to time appoint a new trustee if it appears to the court expedient so to do.'

(v) Position of maintenance under Muslim Law

The personal law statutes governing a Muslim woman's right to maintenance are the Dissolution of Muslim Marriages Act 1939 and the Muslim Women (Protection of Rights on Divorce) Act 1986. The former Act provides for grounds under which a women married under the Muslim law can seek dissolution of the marriage. One of the grounds provided is that 'the husband has neglected or has failed to provide for her maintenance for a period of 2 years', as under s 2(ii) of the Dissolution of Muslim Marriages Act 1939. The latter Act, as its very title indicates, makes provision for protection of rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands, which includes right of maintenance as well. Section 2(ii) of the Dissolution of Muslim Marriages Act 1939 is quoted as hereunder for purposes of ready reference:

'2. Grounds for decree for dissolution of marriage.

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

i. …

ii. that the husband has neglected or has failed to provide for her maintenance for a period of two years.'

The Muslim Women (Protection of Rights on Divorce) Act 1986, which is an Act to protect the rights of Muslim women who have been divorced by or have obtained a divorce from their husbands, provides for making of an order for payment of maintenance under s 3 and 4 of this Act by making an application to a Magistrate in the area where the divorced woman unable to maintain herself resides. This is apart from the right of the Muslim Woman to claim *Mahr* under s 3 of this Act which provides for *Mahr* or other properties of Muslim woman to be given to her at the time of divorce by her former husband and which can also be enforced by making an application to a Magistrate. In this regard s 3 and 4 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 is as follows:

'3. *Mahr* or other properties of Muslim woman to be given to her at the time of divorce.—

(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to—
  (a) a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband;
  (b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;
  (c) an amount equal to the sum of *mahr* or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and
  (d) all the properties given to her before or at the time of marriage or after the marriage by her relatives or friends or the husband or any relatives of the husband or his friends.
(2) Where a reasonable and fair provision and maintenance or the amount of *mahr* or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, *mahr* or dower or the delivery of properties, as the case may be.
(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that—
  (a) her husband having sufficient means, has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and the children; or
  (b) the amount equal to the sum of *mahr* or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her,

  make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced

woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such *mahr* or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or *mahr* or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974) and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

4. Order for payment of maintenance.—

(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the *iddat* period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:

Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her:

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relative as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order direct the State Wakf Board established under section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may

be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.'

III DIVORCED WIFE'S RIGHT TO RESIDENTIAL ACCOMMODATION

The Bombay High Court in two rulings *Ajit Bhagwandas Udeshi v Kumud Ajit Udeshi*[1] and *Sunita Shankar Salvi v Shankar Laxman Salvi* held that the divorced wife cannot be left without a roof over her head. In *Udeshi*, the tenancy of the flat was for the benefit of the family and the wife occupied it as member of the family. *Salvi* is important from the point of view that, irrespective of the financial contribution or joint ownership on record, the courts in India are concerned about providing residential accommodation to a divorced wife who has no resources of her own.

In *Komalam Amma v Kumara Pillai Raghavan Pillai*,[2] the Supreme Court of India endorsed the right of a woman to a residence as included in the general term 'maintenance'. The Apex Court elaborated on the concept of maintenance as follows:[3]

> '9. Maintenance, as we see it, necessarily must encompass a provision for residence. Maintenance is given so that the lady can live in the manner, more or less, to which she was accustomed. The concept of maintenance must, therefore, include provision for food and clothing and the like and take into account the basic need of a roof over the head. Provision for residence may be made either by giving a lump sum in money, or property in lieu thereof. It may also be made by providing, for the course of the lady's life, a residence and money for other necessary expenditure. Where provision is made in this manner, by giving a life interest in property for the purposes of residence, that provision is made in lieu of a pre-existing right to maintenance and the Hindu lady acquires far more than the vestige of title which is deemed sufficient to attract Section 14(1).'

Basically, the law in the Indian jurisdiction relating to the concept of maintenance for the wife under the provisions of the HMA 1955 and the HAMA 1956 includes the amount of maintenance given to her to generally sustain the same lifestyle to which she was accustomed. As will be noticed, this view is also reiterated in the ruling of the Supreme Court of India. Furthermore, the judgment reiterated the position of law as enunciated by the Supreme Court of India in one of its earlier judgments of the year 2005. This particular judgment of 2005 very succinctly elaborates on the concept of maintenance as statutorily provided under the provisions of the HAMA 1956:[4]

> '12. In *B.P. Achala Anand Vs. S. Appi Reddy and Anr* (2005 (2) SCALE 105), it was observed as follows:

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1 *Ajit Bhagwandas Udeshi v Kumud Ajit Udeshi* AIR 2003 Bombay 120.
2 *Komalam Amma v Kumara Pillai Raghavan Pillai* AIR 2009 SC 636.
3 At para 9 at p 637.
4 At para 12 at page 638.

> "Having said so generally, we may now deal with the right of a wife to reside in the matrimonial home under personal laws. In the factual context of the present case, we are confining ourselves to dealing with the personal law as applicable to Hindus as the parties are so. A Hindu wife is entitled to be maintained by her husband. She is entitled to remain under his roof and protection. She is also entitled to separate residence if by reason of the husband's conduct or by his refusal to maintain her in his own place of residence or for other just cause she is compelled to live apart from him. Right to residence is a part and parcel of wife's right to maintenance. The right to maintenance cannot be defeated by the husband executing a will to defeat such a right (See: MULLA, *Principles of Hindu Law*, Vol. I, 18th Ed. 2001, paras 554 and 555). The right has come to be statutorily recognized with the enactment of the Hindu Adoption and Maintenance Act, 1956. Section 18 of the Act provides for maintenance of wife. Maintenance has been so defined in clause (b) of Section 3 of the Hindu Adoption and Maintenance Act, 1956 as to include therein provision for residence amongst other things. For the purpose of maintenance the term 'wife' includes a divorced wife."'

Hence, it is clear from the case-law analysis that the right of a wife to get maintenance from her husband also encompasses a right of residence either in the matrimonial home or a separate residence. Furthermore, the estranged wife along with her maintenance claim can also stake a claim for her right to separate residence from her husband in light of the settled position of law. Out of abundant caution, it is equally important to refer to the provisions of the Protection of Women from Domestic Violence Act 2005 (Domestic Violence Act 2005 or DVA 2005), which is legislation very favourable to women rights in actual implementation, and is certainly not advantageous where the alleged erring spouse is a husband.

IV DISPOSAL OF PROPERTY UNDER THE PROVISIONS OF THE HINDU MARRIAGE ACT 1955 AND PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT 2005

There is no talk of division of assets in Indian divorce laws. Financial settlements are limited to paying maintenance. On this aspect of the matter, both the HMA 1955 and the Special Marriage Act 1954 (SMA) are gender-neutral, allowing the spouse with the smaller income to seek maintenance. However, there are some provisions under the Indian laws which talk about the division of properties between the parties on divorce. Section 27 of HMA 1955 empowers the court to adjudicate upon the division and distribution of the property of the divorced couple at the time of the passing of the divorce decree, and is reproduced below for ease of reference:

'27. Disposal of property

> In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.'

The Delhi High Court held in *Subhash Lata v VN Khanna*[5] that s 27 of the Act concerns only property presented at or about the time of marriage, which is alleged to belong jointly to both the spouses. It is a pre-condition for getting relief that such property must belong jointly to both the spouses.

However, many High Courts have differently interpreted s 27 of the HMA 1955 and have elaborated the scope of the application of the section. Some of the judgments interpreting s 27 of the HMA are referred as hereunder.

The Punjab and Haryana High Court held in *Inderjit Singh v Manjit Kaur*[6] that no order under s 27 can be passed with the respect to the property which exclusively belongs to the wife. A Division Bench of the Allahabad High Court in *Hemant Kumar Agrahari v Lakshmi Devi*[7] held that s 27 of the HMA 1955 does not confine or restrict the jurisdiction of matrimonial courts to deal only with the joint property of the parties, which is presented at or about the time of marriage but also permits disposal of exclusive property of the parties provided they were presented at or about the time of marriage. Hence, the court has the right to deal with the property of the parties acquired jointly at or about the time of the marriage and also with the exclusive property of the parties presented at or about the time of the marriage with a clear exception to the '*istridhan*' (woman's property given to her at time of marriage). A court has no right to pass orders regarding the '*istridhan'* of the woman as stated above.

Furthermore, ss 17 and 19 of the DVA provide for the right of a woman to reside in her matrimonial home when in a domestic relationship and empowers the courts to provide for residential accommodation for the aggrieved spouse in cases where the domestic violence is proved. Sections 17 and 19 of the DVA 2005 read as follows:

'SECTION 17 OF DOMESTIC VIOLENCE ACT, 2005:

SECTION 17: Right to reside in a shared household:

(1) Notwithstanding anything contained household: in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

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5 *Subhash Lata v. VN Khanna* AIR 1992 Delhi 14.
6 *Inderjit Singh v Manjit Kaur* 1987 (2) *Hindu Law Reporter* 496.
7 *Hemant Kumar Agrahari v Lakshmi Devi* AIR 2004 All 126 (DB).

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.'

and

'SECTION 19 OF DOMESTIC VIOLENCE ACT, 2005:

SECTION 19: Residence orders–

(1) While disposing of an application under sub-section (1) of Section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order–
   (a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;
   (b) directing the respondent to remove himself from the shared household;
   (c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;
   (d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;
   (e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or
   (f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause (b) shall be passed against any person who is a woman.'

The Supreme Court of India in *Vimlaben Ajitbhai Patel v Vatslaben Ashokbhai Patel with Ajitbhai Revandas Patel v State of Gujarat*[8] held that the statutory right of a woman to reside in her matrimonial home arises only in cases where the matrimonial home is the property of the husband. This judgment carves out the obligations of a husband towards his wife in the following categorical terms:[9]

'21. Maintenance of a married wife, during subsistence of marriage, is on the husband. It is a personal obligation. The obligation to maintain a daughter-in-law arises only when the husband has died. Such an obligation can also be met from the properties of which the husband is a co-sharer and not otherwise. For invoking the said provision, the husband must have a share in the property. The property in the name of the mother-in-law can neither be a subject matter of attachment nor during the life time of the husband, his personal liability to maintain his wife can be directed to be enforced against such property.'

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8 *Vimlaben Ajitbhai Patel v Vatslaben Ashokbhai Patel with Ajitbhai Revandas Patel v State of Gujarat* 2008 (4) SCC 649.

9 At para 21, page 660.

Clearly, the import of this judgment rendered lays down that the issue of maintenance of a wife is the personal obligation of the husband and the liability is solely fastened on him while he is alive. Further, the Supreme Court has interpreted the provisions of the DVA 2005 dealing with the wife's right to reside in her matrimonial home:[10]

> '27. The Domestic Violence Act provides for a higher right in favour of a wife. She not only acquires a right to be maintained but also thereunder acquires a right of residence. The right of residence is a higher right. The said right as per the legislation extends to joint properties in which the husband has a share.
>
> 28. Interpreting the provisions of the Domestic Violence Act this Court in *S.R. Batra vs. Taruna Batra* (2007) 3 SCC 169 held that even a wife could not claim a right of residence in the property belonging to her mother-in-law, stating:
>
>> "17. There is no such law in India like the British Matrimonial Homes Act, 1967, and in any case, the rights which may be available under any law can only be as against the husband and not against the father-in-law or mother-in-law…
>>
>> Hence, the DVA, 2005 gives a right to the aggrieved spouse to reside in the matrimonial home. Where the aggrieved wife qualifies for maintenance from her husband, she also has a right to only reside in the properties belonging to her husband and not the mother-in-law."'

In another Bombay High Court judgment, *Abhijit Bhikaseth Auti v State of Maharashtra & another*,[11] the provisions under s 17 and 19 of the DVA 2005 have been elaborated. The case was filed by the wife against the husband on the ground of domestic violence committed by him. The judgment explains the extent of the applicability of s 17 and 19 in the following terms:[12]

> '12. Section 17 reads thus:
>
> 17. Right to reside in a shared household: (1) Notwithstanding anything contained household: in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.
>
> (2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.
>
> 13. Sub Section (1) of Section 17 starts with a non-obstante clause which has over-riding effect over other statutes. The sub-section provides that every women in a domestic relationship shall have right to reside in a shared household whether or not she has any right, title or beneficial interest in the same. This is indeed a provision which enlarges the scope of the concept of matrimonial home under the

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[10] At paras 27 and 28 at page 662.

[11] *Abhijit Bhikaseth Auti v. State of Maharashtra & another* AIR 2009 (NOC) 808 (Bom).

[12] At paras 12 and 13.

> existing laws dealing with matrimonial relationship. This is in the context of the definition of domestic relationship under clause (f) of Section 2 which means relationship between two persons who live or have, at any point of time lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of a marriage. The definition of shared household under Section 2(s) of the said Act is very wide. It even includes a household which may belong to the joint family of which the respondent is a member. Section 19 which give power to the Magistrate to pass residence orders providing for grant of various orders in relation to a shared household for protecting the rights of the aggrieved person to occupy a shared household. The learned Magistrate in a given case can even direct the respondent to remove himself from a shared household.'

Hence, under the Indian laws the division of property in cases where marriage ends up in a divorce has been specifically dealt only under the above mentioned legislation, ie the provisions of the DVA 2005. Whether or not a foreign national can be charged under the DVA 2005 is a debatable point. In the Indian context, it is a very powerful tool to nail down the husband, especially in matters of alimony, maintenance and right of residence.

Thus, on the basis of the above discussion, the position regarding the property of the parties to the marriage is very clear and unambiguous. The court may or may not deal with the property of the parties acquired after the marriage. In the facts and circumstances of a case, if the wife feels that some specific property was bought by the parties after the marriage, she can claim the share in the property under s 27 of the HMA 1955 as well.

In terms of the provisions of the DVA 2005, it is important to note, that another efficacious alternative remedy is available for Hindu wives in cases where they are ill-treated and not kept properly by the husband. The DVA 2005 not only provides for a right to maintenance that might be granted to a wife but also a right to residence that has to be provided to the wife by the husband, depending on the facts and circumstances of each case. Hence, claiming a right to maintenance along with the right to residence is yet another remedy available to the wife.

V WHETHER THE INDIAN COURTS ARE IN A POSITION TO DETERMINE AN APPLICATION FOR MAINTENANCE WHILE THE HUSBAND IS NOT RESIDENT WITHIN THE INDIAN JURISDICTION

The concept of 'maintenance' in India is statutorily defined under s 125 of the Code of Criminal Procedure 1973 (s 125), s 24 and 25 of the HMA 1955 and s 18 of the HAMA 1956. Under Indian law, the term 'maintenance' is a measure of social justice and an outcome of the natural duty of a man to maintain his wife, children and parents, when they are unable to maintain themselves. The object of maintenance is to ameliorate the economic condition

of women and children, as it lowers them down in society after divorce proceedings are started as a result of which the husband refuses to maintain the wife and the child. The remedy available to the Hindu wife under s 24 and 25 of the HMA 1955 and s 18 of the HAMA 1956 are civil in nature.

However, it is important to mention that proceedings initiated under s 125 of the Indian CrPC 1973 are criminal proceedings and, unlike the personal laws, are of a summary nature and apply to everyone regardless of caste, creed or religion. The object of such proceedings however is not to punish a person for his past neglect. The provision has been enacted to compel those who can do so to give support to those who are unable to support themselves. Maintenance can be claimed either at the interim stage, ie during the pendency of proceedings, or the final stages of proceedings under the relevant provisions both of the HMA 1955 and/or the CrPC 1973. But, at the same time it is important to mention that contested divorce proceedings under the HMA 1955, as also claims for maintenance, can be protracted, time-consuming and cumbersome proceedings, sometimes leading to inordinate delay.

With regard to the determination of an application for maintenance by the courts in India when the husband is not residing with the Indian jurisdiction it is stated that, even though the husband in such cases is not ordinarily resident in India, maintenance will still be granted to the wife and the children, by the courts in India adjudicating upon maintenance applications under the above mentioned provisions of law. The reasons for this are that in divorce proceedings the spouse who is not able to earn a livelihood is bound to get maintenance from the other spouse during and after the divorce proceedings subject to fulfillment of all other requirements of law.

There is a specific ruling addressing this issue. The legal position was dealt by the Delhi High Court in 2004. In a lucid and an erudite judgment in *Anubha v Vikas Aggarwal*,[13] the court handed down an authoritative pronouncement taking into account a humanitarian approach especially on the rights of deserted/abandoned non-resident Indian spouses (commonly referred to as NRIs). This particular judgment is also posted on the Delhi High Court website and the portions most relevant to the facts and circumstances of the case read as follows:

> 'This is one of those classic cases where Indian citizens who go abroad and marry Indian women and thereafter maltreat such women and inflict cruelty and dump them in alien and hostile environment without even bothering to give adequate maintenance. Such persons take advantage of the fact that they are outside the jurisdiction of the Courts of India and most of the time battered married women do not have resources to fight back and bring the culprits to face the consequences of their wrong doings. To deal with such kind of cases and to counter the mischief of such people who exploit the women of this country, and who feel that the strong arms of law cannot reach them, stern action should be taken at every level against them and they should be made to pay such amount of maintenance as would be

[13] *Anubha v Vikas Aggarwal*, Regular First Appeal 38/2002, decided on 17 November 2004.

> necessary to restore some dignity and comforts to such women to lead a normal life again. Therefore, in this regard, the duty is cast on the State that such persons who marry Indian women and then dump them in foreign countries by resorting to the laws of those countries for taking divorce, which may not be valid in India, and without giving any maintenance and without discharging their liabilities, to be served with the notices and the orders passed by the court through the embassies and High Commissions of India in those countries so as to bring them under the jurisdiction of the Courts to enforce the liabilities fastened on them under India law and to make them comply with the orders passed by the Courts in India. Indian citizens residing outside as NRIs either on account of having a residency permit or on account of having work permit should not be allowed to violate the rule of law of this country. So long they are citizens of India, they are not immune from the laws of this country and must be made to comply with the orders passed by the Courts in India.'

Similarly, in a Delhi High Court decision in *Radhika v Vineet Rungta*,[14] an application for maintenance was filed, before the Indian Courts, by a wife who was residing in India against her husband who was working and residing in the United States of America. In this case as well, maintenance was granted to the wife by the court even though the husband was not ordinarily resident in India at the time of the judgment.

VI THE LIKELY VIEW OF THE INDIAN COURTS OF THE HUSBAND'S INCOME BEING PAID TO HIM IN A FOREIGN OR OVERSEAS JURISDICTION

This particular issue specifically deals with the consequential impact of the salary income or other income of the husband in the foreign or overseas jurisdiction on the amount of maintenance that might be or other income potentially awarded to the wife presently residing in India. In India, the quantum of maintenance provided to one of the parties in a divorce proceeding is at the discretion of the court depending on the facts and circumstances of each case. The test employed by the courts in the Indian jurisdiction is the means test, as to what amount of money the estranged wife would need to sustain herself and her children.

However, in relation to the quantum of maintenance, s 23 of the HAMA 1956, categorically lays down the conditions that will be taken into account by the court in awarding maintenance to the aggrieved spouse. It provides that it shall be at the discretion of the court to determine the amount of maintenance, if any, payable; and in doing so the court shall be guided by the considerations set out in s 23(2) or (3) of the HAMA 1956:

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[14] *Radhika v. Vineet Rungta* AIR 2004 Delhi 323.

'23. Amount of maintenance

(1) It shall be in the discretion of the Court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so, the Court shall have due regard to the considerations set out in sub-section (2), or sub-section (3), as the case may be, so far as they are applicable.

(2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, the following factors shall be taken into account—

(a) the position and status of the parties;
(b) the reasonable wants of the claimant;
(c) if the claimant is living separately, whether the claimant is justified in doing so;
(d) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source;
(e) the number of persons entitled to maintenance under this Act.

(3) In determining the amount of maintenance, if any, to be awarded to a dependant under this Act, regard shall be had to—

(a) the net value of the estate of the deceased after providing for the payment of his debts;
(b) the provision, if any, made under a will of the deceased in respect of the dependant;
(c) the degree of relationship between the two;
(d) the reasonable wants of the dependant;
(e) the past relations between the dependant and the deceased;
(f) the value of the property of the dependant and any income derived from such property, or from his or her earnings or from any other source;
(g) the number of dependants entitled to maintenance under this Act.' Section 25 of the HAMA 1956 also provides that the amount of maintenance may be altered on change of circumstances.'

The Delhi High Court in *Radhika v Vineet Rungta* lamented at the practice of the parties to the litigation not disclosing their actual income. In a terse ruling, Justice Vikramjit Sen held as follows:[15]

'3. Cases where the parties disclose their actual income are extremely rare. Experience, therefore, dictates that where a decision has to be taken pertaining to the claim for maintenance, and the quantum to be granted, the safer and surer method to be employed for coming to a realistic conclusion is to look at the status of the parties, since whilst incomes can be concealed, the status is palpably evident to all concerned. If any opulent lifestyle is enjoyed by warring spouses he should not be heard to complaint or plead that he has only a meagre income. If this approach had been followed, it would have been evident that the warring spouses enjoy an affluent lifestyle. It has already been noted that the learned trial Court has not discussed the Husband's income. While granting maintenance it is incumbent

[15] *Radhika v Vineet Rungta* AIR 2004 Delhi 323 at para 3 at pp 323 and 324.

> on the Court to make such monetary arrangements as would be conducive to the spouses continuing a lifestyle to which they were accustomed before the matrimonial discord. In the application under Section 24 of the Hindu Marriage Act, it has been categorically pleaded that the Husband is getting a salary of US$ 72,000 per annum which is equivalent to Rs.30,24,000/ per annum along with the perquisites. A mention is made of the receipt of interest of approximately US$ 1,000 per month as also accounts in various banks. It is pleaded that the Husband is a joint owner of properties valued at over Rs.2,00,00,000/. The wife has pleaded that since 5-10-1998 she has been living at the mercy of her parents; that she has no movable or immovable properties or other assets in her name except a nominal amount of interest from deposits. It has been categorically stated that the Wife has no income to support herself and to meet her necessary expenses.'

The court, after making an assessment of the overseas income of the husband resident abroad, awarded the maintenance to the wife resident in India:[16]

> '8. Discounting all other incomes, I find that the Husband should be held to have an income of at least US $ 50,000 annually. Considering the lifestyle to which the spouses would be accustomed, and the above minimum assessment of the disposable income of the Petitioner, I am of the considered view that the learned Trial Court should have granted Rs.15,000/ per month towards maintenance *pendente lite*. It is ordered accordingly. By adopting this approach an effort has been made to balance the income and the earnings of the Husband against the income of the Wife, and ensuring that the normal lifestyle and status can be preserved in some measure.'

Here, it will be noticed that the Court assessed the annual income of the husband to be at least 50,000 USD, but awarded the wife a sum of Rs 15,000/ per month towards maintenance *pendente lite*, which after conversion at present exchange rates works out to 300 USD per month only.

Furthermore, the Supreme Court in *Vinny Parmar v Paramvir Parmar*[17] dealt with the question of the reasonable amount of maintenance that the appellant wife was entitled to be paid by the husband in a case of divorce on the grounds of cruelty. The trial court and the High Court did not take note of the actual income of the husband and the amount of maintenance granted to the appellant wife was considered to be low as per the lifestyle of the husband. The Supreme Court in this recent judgment elaborated upon the broad principles to be kept in mind by the courts when dealing with the question of award of maintenance and permanent alimony.

The court elaborated on the legal position in the following terms:[18]

> '10. In *Shri Bhagwan Dutt vs. Smt. Kamla Devi and Anr* (1975) 2 SCC 386, though this Court has considered the amount of maintenance payable to wife under Section 488 of the Code of Criminal Procedure, 1898, the principle laid down is applicable to the case on hand. In para 19, this Court held 'The object of

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16 At para 8 at p 324.
17 *Vinny Parmar v Paramvir Parmar* AIR 2011 SC 2748.
18 At paras 10 to 12 at p 2750.

these provisions being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and requirements of the wife for such moderate living can be fairly determined, only if her separate income, also, is taken into account together with the earnings of the husband and his commitments.

11. In *Chaturbhuj vs. Sita Bai* (2008) 2 SCC 316, which also relates to maintenance claim by deserted wife under Section 125 of the Code of Criminal Procedure, 1973. The following statement in para 8 is relevant which reads as under:

> "Where the personal income of the wife is insufficient she can claim maintenance under Section 125 CrPC. The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. In *Bhagwan Dutt v. Kamla Devi* it was observed that the wife should be in a position to maintain a standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression unable to maintain herself does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 CrPC."

12. As per Section 25, while considering the claim for permanent alimony and maintenance of either spouse, the respondent's own income and other property, and the income and other property of the applicant are all relevant material in addition to the conduct of the parties and other circumstances of the case. It is further seen that the court considering such claim has to consider all the above relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and mode of life she was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept in mind while determining maintenance or permanent alimony.'

The Apex Court in categorical terms laid down the factors and circumstances to be borne in mind by the courts while adjudicating upon the issue of grant of maintenance to the aggrieved spouse in divorce cases. Further, the Apex Court, while allowing the appeal of the appellant wife, enhanced the maintenance earlier granted to the wife by the trial court and the High Court. This was on the basis of detailed reasons advanced as follows:[19]

'15. In the light of the details furnished by both the parties, we are of the view that the amount of Rs.1,40,000/ determined as net monthly income of the

[19] At para 15 at p 2751.

respondent-husband is not acceptable. Equally, direction for payment of maintenance at the rate of Rs. 20,000/ per month to the appellant wife is also inadequate. It is relevant to point out that the status of the appellant before her marriage is also one of the relevant factors for determining the amount of maintenance. It is not in dispute that before her marriage with the respondent, she was working as an Air Hostess in Cathay Pacific Airlines and after marriage she resigned from the said post. Considering the conditions prescribed in Section 25 of the Act relating to claim of permanent alimony/maintenance and the fact that the appellant is not permanently employed as on date and residing with her sister at Mumbai, taking note of the respondent's income from salary as Sr. Commander in Air India, other properties standing in his name, age being 42 years, future employment prospects and also considering the fact that the respondent re-married, having a child and also to look after his parents, we feel that the ends of justice would be met by fixing maintenance at the rate of Rs.40,000/ per month instead of Rs.20,000/ per month as fixed by the Family Court and affirmed by the High Court. The same shall be payable from the date of her application and continue to pay in terms of Section 25 of the Act. The respondent is granted one year time from 01.08.2011 to pay all the arrears payable in six equal instalments. It is made clear that if there is any change in the circumstance of either party, they are free to approach the Court concerned to modify or rescind. As suggested and fixed by the High Court, in the alternative, we fix the amount of permanent alimony/maintenance at Rs. 40 lakhs in lump sum to be paid by the respondent within a period of six months from 01.08.2011 which will forfeit all her claims. The respondent is free to opt any one mode to comply with the same. If the respondent opts the first method, the same is subject to the conditions prescribed in sub-section (3) of Section 25 of the Act. The appeals are allowed to the extent mentioned hereinabove. No order as to costs.'

It will be noticed that the court, first, doubled the monthly maintenance to be provided to the aggrieved wife. In the alternative, the court also provided the one time option to the husband to pay a consolidated lump sum towards permanent alimony/maintenance. It is important to mention that the amount of permanent alimony/maintenance in the case was doubled from 20 lakhs to 40 lakhs. This, after conversion at that time, worked out at 24,494.6 British pounds to 48,989.3 British pounds.[20] The Supreme Court reiterated the earlier law of the means test as also taking into account the factors to be taken into consideration while deciding the quantum of maintenance and permanent alimony by the courts.

In *Mr Rajat Taneja v Ms Harmeeta Singh*,[21] the Delhi High Court specifically dealt with the question of quantum of maintenance to be paid to an aggrieved wife in divorce proceedings who is staying in India while the husband is residing outside India. The observations of the court in this regard have been elaborated as follows:[22]

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[20] Approximately, as per the current exchange rate at that time on a prominent currency converter website www.oanda.com – current rates of exchange now may vary.

[21] *Mr Rajat Taneja v Ms Harmeeta Singh* (2008) 149 PLR 18.

[22] At paras 38 and 39 at pp 21 and 22.

> '38. As held by the Supreme Court in the decision reported as *United India Insurance v. Patricia Jean Mahajan*, AIR 2002 SC 2607: 2002 (6) SCC 281, when compensation has to be paid in India to the claimants of a deceased working abroad, standard of living in India, cost of living in India and other related factors have to be considered and in light of the said facts considering income of the husband in a foreign country further taking note of the fact as to what is the cost of living in the said foreign country, loss of dependence has to be worked out.
>
> 39. Similar principles would apply to grant of monthly maintenance to a wife stationed in India but husband being abroad and earning in foreign currency.'

Hence, in cases where the wife is resident in India and has to be paid maintenance by the husband working outside India, the cost of living and the expenditure in both the countries where the parties are residing has to be kept in mind while calculating the quantum of maintenance to be paid to the wife.

Therefore, from the position of law as elaborated above, the relevant considerations laid down in the HAMA 1956, HMA 1955 and/or the CrPC 1973, depending on the recourse sought by the aggrieved wife, will have to be taken into consideration by the court when arriving at a decision on the quantum of maintenance to be provided to the wife. Hence, along with the salary of the husband, the court will also take into consideration other relevant factors before granting the maintenance, i e the status of the parties, the number of claimants, other properties of the husband and any income from such properties, cost of living in both the countries, etc.t can hence be asserted that the quantum of maintenance to be paid to the aggrieved wife cannot be decided on the basis of the salary of the husband alone.

To sum up, therefore, it can be stated that, if the aggrieved wife has no means of livelihood to maintain herself, she can claim any of the financial remedies as analysed above. The relevant provisions in this regard that could potentially be invoked free of personal laws are under s 125 of the CrPC 1973, as it is a religion-neutral provision.

VII MAINTENANCE UNDER S 125 OF THE CRIMINAL PROCEDURE CODE 1973

Apart from the personal laws, the Code of Criminal Procedure 1973 (CrPC) also provides for maintenance of wives, under Chapter IX containing s 125 to 128. Unlike the personal laws which are applicable only to persons belonging to particular religions, the provisions of the Code of Criminal Procedure 1973 are applicable to all persons irrespective of religion. Relief under this Code is speedy and is available irrespective of whether or not any matrimonial proceedings are pending. Maintenance under CrPC is also available separately even if matrimonial proceedings are separately pending under other provisions of the law, though the quantum may get reduced if separate maintenance under

any other statutory provision of a matrimonial law has already been awarded and is being paid. The relevant extract of s 125 CrPC is quoted as follows:

> 'Section 125. Order for maintenance of wives, children and parents. (1) if any person having sufficient means neglects or refuses to maintain–
>
> (a) his wife, unable to maintain herself, or
> (b) …
> (c) …
> (d) …
>
> a magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife… at such monthly rate, as such magistrate thinks fit, and to pay the same to such person as the magistrate may from time to time direct
>
> …
>
> Provided … that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife …, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct
>
> Explanation: For the purpose of this chapter …
>
> (a) …
> (b) "Wife" includes a woman who has been divorced or has obtained a divorce, from her husband and has not remarried.
>
> (2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.
>
> (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:
>
> Provided that no warrant shall be issued for the recovery of any amount due under this Section unless application be made to the court to levy such amount within a period of one year from the date on which it became due:
>
> Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider

any grounds of refusal stated by her, and may make an order under this Section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation: If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this Section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favor an order has been made under this Section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.'

The salient features of s 125 CrPC may be summarised as hereunder:

'(i) A wife includes a divorced wife.
(ii) Only lawful wife is entitled to maintenance under this Section.
(iii) A wife may seek maintenance even without any matrimonial litigation.
(iv) She may stay separate if there are sufficient grounds justifying that and yet get maintenance.
(v) There must be neglect or refusal on part of husband to maintain her.
(vi) Wife must be unable to maintain herself.
(vii) The court can grant interim maintenance also.
(viii) The amount maybe varied or cancelled if there is change in circumstances.
(ix) In certain situations a wife may be debarred from claiming maintenance.
(x) Her right terminates on remarriage.
(xi) The proceedings are summary and expeditious.'

VIII SOME RECENT DECISIONS OF INDIAN COURTS ON ALIMONY

A compilation of some recent decisions are given here in cases where parties have either settled or have been directed to pay lump sum alimony or an agreed negotiated amount towards parting by a decree of divorce or consensual termination.

(a) In *Sarla Singh v Kr Ajay Partap Singh*,[23] the High Court of Punjab and Haryana held as follows:

'It is settled law, that in estimating the amount of permanent alimony or permanent maintenance, the Court, while dealing with the fact of income, is not to focus its attention only on the disposable income of a spouse in the

[23] *Sarla Singh v Kr Ajay Partap Singh* 2011 (2) Marriage Law Journal 372.

> year of proceedings the making of the order, but would also normally have regard to the earnings in the previous years and probable earnings in the future. The Court is also to look into the position and the status of parties and in absence of any reliable data on the point of income, the Court is to take into consideration overall financial position of the spouses and their necessities having regards not merely to their income but their properties, debts and liabilities.
>
> It is well settled that the wife besides maintenance is now also entitled to right of residence with the equal status as that of husband. Even a flat of two rooms is worth more than Rs.80 lacs (Rupees eighty lac only). However, the right of residence along with right to maintenance is assessed at Rs.1,00,000,00/ (Rupees one crore only), if paid in lump sum.
>
> For the reasons stated, this appeal is allowed, the permanent alimony payable is enhanced to Rs.40,000/ (Rupees forty thousand only) per month with right of residence or in the alternative a sum of Rs.1,00,000,00/ (Rupees one crore only) as one time alimony which would not represent even 1/10th of the property owned by the respondent.

Hence, in this decision, the High Court held that the wife besides maintenance is also entitled to a right of residence with status equal to that of the husband which on the facts was quantified to Indian rupees 100,000, if paid in lump sum as one time alimony.

(b) In *Vinny Parmvir Parmar v Parmvir Parmar*,[24] the Supreme Court held as follows in a case to determine what would be the reasonable amount the wife was entitled to by way of maintenance from the husband under s 25 of the HMA:

> '12. As per Section 25, while considering the claim for permanent alimony and maintenance of either spouse, the respondent's own income and other property, and the income and other property of the applicant are all relevant material in addition to the conduct of the parties and other circumstances of the case. It is further seen that the court considering such claim has to consider all the above relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and mode of life she was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept in mind while determining maintenance or permanent alimony.
>
> …

24 *Vinny Parmvir Parmar v Parmvir Parmar* (2011) 13 Supreme Court Cases.

> 15. … It is not in dispute that before her marriage with the respondent, she was working as an Air Hostess in Cathay Pacific Airlines and after marriage she resigned from the said post. Considering the conditions prescribed in Section 25 of the Act relating to claim of permanent alimony/maintenance and the fact that the appellant is not permanently employed as on date and residing with her sister at Mumbai, taking note of the respondent's income from salary as Sr. Commander in Air India, other properties standing in his name, age being 42 years, future employment prospects and also considering the fact that the respondent re-married, having a child and also to look after his parents, we feel that the ends of justice would be met by fixing maintenance at the rate of Rs.40,000/- per month instead of Rs.20,000/ per month as fixed by the Family Court and affirmed by the High Court. The same shall be payable from the date of her application and continue to pay in terms of Section 25 of the Act. The respondent is granted one year time from 01.08.2011 to pay all the arrears payable in six equal instalments. It is made clear that if there is any change in the circumstance of either party, they are free to approach the Court concerned to modify or rescind. As suggested and fixed by the High Court, in the alternative, we fix the amount of permanent alimony/maintenance at Rs. 40 lakhs in lump sum to be paid by the respondent within a period of six months from 01.08.2011 which will forfeit all her claims. The respondent is free to opt any one mode to comply with the same. If the respondent opts the first method, the same is subject to the conditions prescribed in sub-section (3) of Section 25 of the Act. The appeals are allowed to the extent mentioned hereinabove. No order as to costs.'

In this case, the Supreme Court, while holding that no fixed formula can be laid down for the amount of permanent alimony, fixed the amount of permanent maintenance quantified at Indian rupees 400,000 (Rs 40 lacs) to be paid in lump sum, which would forfeit all the claims of the respondent wife as a one-time payment or be paid Indian rupees 40,000/ per month during her life time.

(c) In *Vishwanath v Sau Sarla Vishwanath Agrawal*,[25] while deciding permanent alimony, it was held:

> '41. Presently, we shall deal with the aspect pertaining to the grant of permanent alimony. The court of first instance has rejected the application filed by the respondent-wife as no decree for divorce was granted and there was no severance of marital status. We refrain from commenting on the said view as we have opined that the husband is entitled to a decree for divorce. Permanent alimony is to be granted taking into consideration the social status, the conduct of the parties, the way of living of the spouse and such other ancillary aspects. During the course of hearing of the matter, we have heard the learned counsel for the parties on this aspect. After taking instructions from the respective parties, they have addressed us. The learned senior counsel for the appellant has submitted that till 21.2.2012, an amount of Rs. 17,60,000/ has been paid towards maintenance to the wife as directed by the courts below and hence, that should be deducted from the amount to be fixed. He has further submitted that the permanent alimony should be fixed at Rs. 25 lacs. The learned counsel for the respondent, while insisting

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[25] *Vishwanath v Sau Sarla Vishwanath Agrawal* 2012 (7) Supreme Court Cases 288.

for affirmance of the decisions of the High Court as well as by the courts below, has submitted that the amount that has already been paid should not be taken into consideration as the same has been paid within a span of number of years and the deduction would affect the future sustenance. He has emphasised on the income of the husband, the progress in the business, the inflation in the cost of living and the way of life the respondent is expected to lead. He has also canvassed that the age factor and the medical aid and assistance that are likely to be needed should be considered and the permanent alimony should be fixed at Rs. 75 lacs.

42. In our considered opinion, the amount that has already been paid to the respondent wife towards alimony is to be ignored as the same had been paid by virtue of the interim orders passed by the courts. It is not expected that the respondent wife has sustained herself without spending the said money. Keeping in view the totality of the circumstances and the social strata from which the parties come from and regard being had to the business prospects of the appellant, permanent alimony of Rs. 50 lacs (rupees fifty lacs only) should be fixed and, accordingly, we so do. The said amount of Rs. 50 lacs (rupees fifty lacs only) shall be deposited by way of bank draft before the trial court within a period of four months and the same shall be handed over to the respondent-wife on proper identification.'

In this decision, the court, keeping in mind inflation and the cost of living besides the life the respondent wife was expected to lead but also ignoring earlier amounts paid, held that keeping in view the social strata of the parties, a permanent alimony of Indian rupees 500,000 (Rs 50 lacs) be paid as a lump sum settlement to the wife.

(d) In *U Sree v U Srinivas*,[26] the Apex Court, holding that no arithmetical formula was possible to be devised in calculating permanent maintenance, held as follows:

'33. We have reproduced the aforesaid orders to highlight that the husband had agreed to buy a flat at Hyderabad. However, when the matter was listed thereafter, there was disagreement with regard to the locality of the flat arranged by the husband and, therefore, the matter was heard on merits. We have already opined that the husband has made out a case for divorce by proving mental cruelty. As a decree is passed, the wife is entitled to permanent alimony for her sustenance. Be it stated, while granting permanent alimony, no arithmetic formula can be adopted as there cannot be mathematical exactitude. It shall depend upon the status of the parties, their respective social needs, the financial capacity of the husband and other obligations. In *Vinny Parmvir Parmar v. Parmvir Parmar*, 2011(3) R.C.R.(Civil) 900 : 2011(4) Recent Apex Judgments (R.A.J.) 357 : (2011)13 SCC 112, while dealing with the concept of permanent alimony , this Court has observed that while granting permanent alimony , the Court is required to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status

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26 *U Sree v U Srinivas* All India Reporter 2013 Supreme Court 41.

> and the mode of life she was used to when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party.
>
> 34. Keeping in mind the aforesaid broad principles, we may proceed to address the issue. The respondent himself has asserted that he has earned name and fame in the world of music and has been performing concerts in various parts of India and abroad. He had agreed to buy a flat in Hyderabad though it did not materialise because of the demand of the wife to have a flat in a different locality where the price of the flat is extremely high. Be that as it may, it is the duty of the Court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but simultaneously she should not be left to live in discomfort. The Court has to act with pragmatic sensibility to such an issue so that the wife does not meet any kind of man-made misfortune. Regard being had to the status of the husband, the social strata to which the parties belong and further taking note of the orders of this Court on earlier occasions, we think it appropriate to fix the permanent alimony at Rs 50 lacs which shall be deposited before the learned Family Judge within a period of four months out of which Rs 20 lacs shall be kept in a fixed deposit in the name of the son in a nationalized bank which would be utilised for his benefit. The deposit shall be made in such a manner so that the respondent wife would be in a position to draw maximum quarterly interest. We may want to clarify that any amount deposited earlier shall stand excluded.'

In this decision, it was held that the wife was entitled to a status depending on the financial capability of the husband. Further, it was held that no arithmetical formula can be adopted as there cannot be a mathematical exactitude. The court awarded a sum of Indian Rupees 500,000 (Rs 50 lacs) as permanent alimony, out of which Indian Rupees 200,000 (Rs 20 lacs) were to be kept in the name of the son in a fixed deposit to be utilised for his benefit.

(e) In *Biswajit Dash v Milan Dash*,[27] interpreting s 25 of the Hindu Marriage Act dealing with permanent alimony, it was held by the Orissa High Court as follows:

> 'A perusal of the above provision makes it clear that any Court exercising jurisdiction under the Hindu Marriage Act, before granting permanent alimony under Section 25 of the Act, is required to consider the following:
>
> (a) that the order granting permanent alimony is made at the time of passing any decree under the Act, 1955 or at any time subsequent thereto,
> (b) the income and other property of the applicant,
> (c) the respondent's own income and other property,
> (d) the conduct of the parties, and
> (e) other circumstances of the case.

[27] *Biswajit Dash v. Milan Dash* 2014 (134) All India Cases (AIC) 333.

12. The Apex Court in *Vinny Parmvir Parmar v. Parmvir Parmar*, AIR 2011 SC 2748 held as follows:

"It is further seen that the court considering such claim has to consider all the above relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept in mind while determining maintenance or permanent alimony."

13. In *Vishwanath Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal*, reported in 2012 (117) AIC 111 (SC) : AIR 2012 SC 2586 the Apex Court while granting permanent alimony has observed that the amount that has already been paid to the respondent wife towards alimony is to be ignored as the same had been paid by virtue of the interim orders passed by the courts. It is not expected that the respondent wife has sustained herself without spending the said money.

14. In *U. Sree v. U. Srinivas*, AIR 2013 SC 415, the Apex Court while dealing with Section 25 of the Act has observed as follows:

"... while granting permanent alimony , no arithmetic formula can be adopted as *there* can not be mathematical exactitude. It shall depend upon the status of the parties their respective social needs, the financial capacity of the husband and other obligations."'

In the said judgment the Apex Court has also observed that 'it is the duty of the court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but simultaneously she should not be left to live in discomfort. The court has to act with pragmatic sensibility to such an issue so that the wife does not meet any kind of man made misfortune.'

Hence, summarising the position of law as elucidated by the Supreme Court, the High Court laid down general principles for grant of permanent alimony to the wife.

(f) In another unique financial settlement between parties for agreeing to a divorce by mutual consent, which was decided by the 8th Court of the Additional District Judge, Alipore, Calcutta (India) in *Matrimonial Suit no 104 of 2013*, in *Aritra Sarkar v Alison Gansell Sarkar*, *decided on 18*

> *December 2013*,[28] the parties negotiated and settled terms for grant of a divorce by mutual consent under s 13(B) of the Hindu Marriage Act 1955. The parties mutually settled that the husband would pay to the wife a sum of 2 million USD as a one-time payment of permanent alimony as stated in sch B, Part I, besides giving to the wife all the 50 items of jewellery and ornaments mentioned in sch B, Part II, besides also giving the Ganesh Pyne Painting mentioned in sch B, Part III of the Deed of Settlement. This agreement between the parties was arrived at by mutual negotiation and settlement after parties had amicably decided to divorce by mutual consent. The transfer of the permanent alimony was done in US dollars to enable the wife to have the alimony given to her in the USA along with all other jewellery items and the painting.

IX MAINTENANCE OF CHILDREN UNDER FAMILY LAWS IN INDIA

(a) Maintenance under Personal Laws and Special Marriage Act

The obligation of parents to maintain minor children arises both out of blood relationships as well as moral duty, which is reinforced by statutory provisions. Almost every society recognises the duty of a parent to maintain his minor child so long as he is a minor or unable to maintain himself. The degree and extent of such obligation varies from society to society and from time to time.

Minor children in India are entitled to be maintained under two sets of laws, viz, (i) their personal law and (ii) the secular law, which is the Code of Criminal Procedure 1973. It may be added that under s 38 of the Special Marriage Act 1954, in any proceeding under the Act the Court can pass both interim and final orders for the custody, maintenance and education of minor children consistently with their wishes wherever possible and may make further orders if so required.

(b) Hindu Law for maintenance of children

There are two personal law statutes amongst the Hindus where under children are entitled to claim maintenance. These are the Hindu Marriage Act 1955 and the Hindu Adoptions and Maintenance Act 1956. The Hindu Marriage Act 1955 is primarily a statute governing matrimonial relations and providing relief to parties but children being an integral component of matrimony, the Act makes provisions to safeguard the interests of the minor children of marriage. Section 26 of the Act says:

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[28] *Matrimonial Suit no.104 of 2013*, in *Aritra Sarkar v. Alison Gansell Sarkar*, 18 December 2013.

> 'Section 26. Custody of Children. In any proceeding /under this Act, the court may, from time to time pass such interim orders and make such provisions… as it may deem just and proper with respect to the custody, maintenance and education of minor children …'

Apart from s 26, the court may grant maintenance for minor children also on an application by the wife under s 24 and 25 of the Act.

A relevant extract of s 20 Hindu Adoptions and Maintenance Act 1956 providing for maintenance of children is as reproduced here:

> 'Section 20. Maintenance of Children and aged parents. (1) … a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children …
>
> (2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is minor.
>
> (3) The obligation of a person to maintain his or her daughter who is unmarried extends in so far as … the unmarried daughter … is unable to maintain … herself out of … her own earnings or other property.'

'Maintenance', under s 3(b) of the Act includes:

> '(i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;
>
> (ii) in the case of unmarried daughter, also the reasonable expenses of an incident to her marriage.'

A reading of the above enactments leads to the following conclusions:

(a) the children are to be maintained by both the mother and the father;
(b) children, legitimate or illegitimate, have a right to maintenance;
(c) children have a right of maintenance until they attain the age of 18 years;
(d) however, an unmarried daughter is entitled to maintenance beyond the age of 18 years, if she is not in a position to maintain herself;
(e) the responsibility of maintaining minor children does not depend on the parents possessing any property or assets and it is an absolute personal right of the minor children;
(f) the scope for maintenance is much larger under the Hindu Adoptions and Maintenance Act as it does not require any pending or existing litigation between the parents;
(g) under the Hindu Marriage Act, the right of maintenance is an ancillary relief in a pending proceeding between parents for some matrimonial relief; and

(h) there is no scope for maintenance of an unmarried adult daughter under the Hindu Marriage Act since it provides maintenance only for minor children.

(c) Other Personal Laws for maintenance of children

Section 49 of the Parsi Marriage and Divorce Act 1936 provides maintenance for children, as also ss 41–44 of the Indian Divorce Act 1869 deal with provisions for custody, maintenance and education of minor Christian children. Similarly, under s 38 of the Special Marriage Act 1954, issues of maintenance, custody and education of children regardless of their religion are dealt with. Like the Hindu Marriage Act 1955, these provisions provide for maintenance when there is a pending matrimonial litigation between their parents. However, the Hindu Adoptions and Maintenance Act 1956 does not require any pending litigation between parents as a requirement for a claim for maintenance by the children against the parents.

(d) Muslim Law for maintenance of children

Muslim law has different provisions for maintenance of sons and daughters. Sons are entitled to maintenance until the age of 15 and daughters are entitled to maintenance until they are married. The children have a right of maintenance irrespective of the fact that they are in the custody of their mother. However, the children who are in a position of being maintained out of property with them, would not be entitled to maintenance from their father.

(e) Provision for maintenance of children under the Code of Criminal Procedure 1973

Under ss 125–128 of the Criminal Procedure Code, other than wives and parents, children have a right of maintenance regardless of their religion. The relevant extract of s 125 of the Criminal Procedure Code reads in the following terms:

> 'Section 125. Order for maintenance of wives, children, and parents. (1) If any person having sufficient means neglects or refuses to maintain–
>
> (a) ...
>
> (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
>
> (c) his legitimate or illegitimate child (not being a married daughter)who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
>
> (d) ...

> A Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance … of such child … at such monthly rate as such Magistrate thinks fit …'

It may be added here that the provisions of s 125 of the Criminal Procedure Code can be invoked irrespective of any existing proceedings between the parents and the children. Further, a claim for maintenance under this provision is not dependent on the award of any maintenance under the provisions of any proceedings or amount awarded under the Hindu Marriage Act or the Hindu Adoption and Maintenance Act or any other personal law applicable to the parties.

(f) Conclusions on the issue of maintenance of children

(i) The rights of maintenance for children in pending proceedings are available by way of ancillary relief under all personal laws of parties as also under the Special Marriage Act 1954.
(ii) Under the Hindu Adoptions and Maintenance Act 1956, maintenance of minor children does not depend on any previous proceedings or any existing or pending litigation between the parents.
(iii) Maintenance for children under s 125 of the Criminal Procedure Code does not depend on any maintenance awarded under any personal laws and is an independent provision regardless of the pendency of any pending proceedings between the parents under their personal laws.
(iv) The responsibility to maintain children is absolute irrespective of the financial status of the parents and is confined to minor children only, under personal laws of the parties.

X DISPOSAL OF MATRIMONIAL PROPERTY AND CLAIM FOR RIGHTS OF RESIDENCE

Section 27 of the Hindu Marriage Act provides that, in any proceedings under the Act, the Court may make such provisions as it deems fit with respect to any property presented at or about the time of marriage, which may belong jointly to both the husband and the wife. The Supreme Court in *BR Kadam v SB Kadam*[29] interpreted the expression 'at or about the time of marriage' to mean and include even the property given before or after marriage so long as it is related to the marriage. The right of residence of an estranged wife is part of a maintenance rights as there is no separate provision in the Hindu Marriage Act for rights of residence. As held by the Supreme Court in *Komalam Amma v Kumara Pillai*,[30] maintenance includes rights to matrimonial assets. Under the HMA, the estranged wife cannot be denied the right of residence in the matrimonial home.

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[29] *BR Kadam v SB Kadam* AIR 1997 SC 3562.
[30] *Komalam Amma v Kumara Pillai* AIR 2009 SC 636.

It may also be added that under s 3(b) of the Hindu Adoptions and Maintenance Act 1956, read with s 18, a Hindu wife is entitled to live separately from her husband, without forfeiting her claim to maintenance, if her husband is guilty of any matrimonial wrong. Section 3(b) defines maintenance by including provisions for residence. Thus, the right of maintenance and separate residence under s 18 is a substantive right, and not dependent on any existing proceedings, unlike the Hindu Marriage Act.

Under Section 37 of the Special Marriage Act 1954, permanent alimony and maintenance is available to the wife at the time of passing any decree or subsequent thereto. This would include a charge on the husband's property for such gross sum or monthly or periodical payment, as the court may deem fit to award. Therefore, under the SMA, the right of residence in the matrimonial home would be a part of her right to maintenance to be adjudicated under s 37 of the Act.

Under s 17 and 19 of the Protection of Women from Domestic Violence Act 2005, every woman in a domestic violence has the right to reside in a shared household, whether or not she has any right, title or beneficial interest in the same. Residence orders can be obtained by the wife against the husband under s 19 of the Act. In *SR Batra v Tarun Batra*,[31] it was held that the estranged wife cannot claim any rights under this Act against the father-in-law, mother-in-law and other relatives. It was further held that shared household accommodation, owned by the mother-in-law, does not become a shared household of the husband and wife for the purposes of the Act. Hence, it was held that a claim for a right to alternative accommodation can be made against the husband only in respect of a house owned or taken on rent by the husband or a house that belongs to the joint family of which the husband is a member.

In a unique unreported case, *Pamela Sharda v Rama Sharda*,[32] the Supreme Court upheld a settlement arrived at between the parties at the Supreme Court Mediation Centre. It may be mentioned that this Centre assists parties for resolution of disputes through the process of mediation. Clauses 2, 5, 7 and 9 of the Settlement between parties read as follows:

> '2. That the First Party shall pay a sum of Rs.45,00,000/ (Rupees Forty Five Lakhs only) to the Third Party in full and final settlement of her claims towards *Istridhan*, maintenance *pendente lite*, alimony temporary and permanent and pursuant to the receipt of Rs.45,00,000/ (Rupees Forty Five Lakhs only) the Third Party shall have no claim whatsoever against the First Party. The Third Party shall also make no claim in future qua the rights of residence as envisaged under Section 19 of the Domestic Violence Act, Hindu Adoption and Maintenance Act,1956 and Hindu Marriage Act, 1956 or under any other statutory enactment and all her statutory rights, claims qua the First Party shall stand extinguished upon the payment of Rs.45,00,000/ (Rupees Forty Five Lakhs only).

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31 *SR Batra v Tarun Batra* AIR 2007 SC 118.

32 *Pamela Sharda v Rama Sharda*, a petition for *Special Leave to Appeal (Civil) No 11714 of 2012*, judgment 15 July 2013 (against a judgment of the High Court of Delhi).

> 5. That it has been agreed between the First Party and the Third Party that the amount received by the Third Party from the First Party shall not be considered as an amount towards dissolution of marriage as permanent alimony. Further the First Party had assured the Third Party that he shall not file any proceedings for obtaining divorce on any ground and in lieu of that assurance the Third Party has undertaken that she will not claim any maintenance past, present or future or permanent alimony or expenses of the proceedings, costs, etc., from the First Party in any form whatsoever or under any statutory enactment.
>
> 7. That pursuant to the receipt of Rs.45,00,000/ (Rupees Forty Five Lakhs only) from the First Party the Third Party shall cease to have any right to reside with the First Party nor shall claim any right of residence from the First Party nor claim any restitution of conjugal rights or any form of matrimonial relationship with the First Party before any Court, Tribunal or Forum. The Third Party shall have no right to stay with the First and the Second Parties and shall not cause any disturbance in the normal day to day life of the First and the Second Parties and in the event the Third Party tries to invade the privacy of the First and the Second Party, then in that event, the First and the Second Party shall be entitled to seek injunction against the third party. However, it is agreed that for the three months i.e August, September and October, 2013 the first party shall pay maintenance of Rs. 15,000/ per month to the third party and thereafter all the rights of the third party to claim any maintenance, permanent alimony, *istridhan* shall stand extinguished in law, against the first party.
>
> 9. That pursuant to the receipt of the amount of Rs.45,00,000/ (Rupees Forty Five Lakhs only) the Third Party shall have no right, title or interest in the said property or any other property belonging to the First and the Second Parties and further undertakes that she shall not file any claim, case or action against the First and the Second Parties nor shall stake any claim qua the movable and immovable properties of the First and the Second Parties and even upon the demise of the first and second party, the third party shall not claim any right, title or interest over the said property or over any movable or immovable properties of the first and the second party, including the said property.'

The Supreme Court, accepting the tripartite settlement deed executed between the wife, husband and his mother through mediation, permitted the parties to part ways upon a one-time payment of Indian Rupees 450,000 (Rs 45 lacs) to the wife with the condition that both would not seek divorce on any ground. The couple married for 30 years agreed to withdraw all their pending litigation and the wife agreed not to cause any disturbance or invade the privacy of her husband and his 83-year-old mother living in their household property. The sum of Indian Rupees 450,000 (Rs 45 lacs) paid in full and final settlement to the wife was towards all her financial claims. Both parties, living separately since 2009, agreed that they should have nothing to do with each other's lives and would not undergo any divorce proceedings. The wife would also not claim restitution of conjugal rights or rights of residence in the household. However, in the event of remarriage of the husband, the agreement would stand terminated and the wife would be entitled to revive her claim maintenance or alimony for the present and future, since the sum of Indian Rupees 450,000 (Rs 45 lacs) would not be considered as an amount towards dissolution of marriage and payment of permanent alimony. The Apex Court, accepting the Settlement

Deed and the Undertakings of the parties, disposed of the matter and permitted the parties to file the same before all courts where litigations was pending, with liberty to invoke the provisions of the Contempt of Courts Act 1971 upon breach. Hence, prior to divorce or at the time of settlement of permanent alimony upon divorce, the wife could claim her right of residence in a property owned by the husband or demand an equivalent share to compensate her for her right to residence so that the wife and her children could have suitable living accommodation as per the standard they were living in when the parties were married and were enjoying residential facilities jointly.

XI CONCLUSION: NEED-BASED ASSESSMENT, NO ARITHMETICAL FORMULA

Hence, all personal laws provide for maintenance of women and children. The Special Marriage Act, as a secular law, also provides for maintenance, alimony and support for both women and children. The provisions of the Criminal Procedure Code can be invoked irrespective of religion by both women and children regardless of the pendency of any matrimonial litigation between the parties. The Protection of Women from Domestic Violence Act provides rights to reside in a shared household. The quantum of maintenance under all laws is a need based means requirement depending upon the status of parties, and maintenance can be claimed simultaneously under personal laws and the CrPC, though the quantum may be reduced in such parallel claims.

A Hindu wife has an added advantage of invoking a right to claim maintenance under the Hindu Adoptions and Maintenance Act 1956 for which there is no requirement of any matrimonial litigation and can be availed of irrespective of maintenance under other laws. However, the quantum of maintenance may be reduced if parallel claims are made under different laws.

Permanent alimony, right of residence and maintenance are determined by Indian courts depending upon the income and properties of both parties, status of parties, their respective needs, standards or amenities the wife is entitled to as per facilities enjoyed by the husband when she lived with the husband, and their respective lifestyles as also the conduct of both parties. The courts will consider not only consider present income of the earning spouse, but will also look at previous and probable future earnings. Overall financial position, properties owned, debts, liabilities, future earnings, pensions, rents, and other accruals will also fall in the zone of consideration. Thus, no fixed or arithmetical formula in general can be laid down for calculating maintenance which would vary in the individual facts and circumstances of each case. Right of residence is a component of the wife's right to maintenance. Besides, the wife would also have right of residence in the matrimonial home under the Protection of Women from Domestic Violence Act 2005.

Based on the precedent of various courts, the factors and remedies which merit consideration in an application for maintenance and alimony and also a right of

residence sought by the wife as also her children can now be broadly identified. A court is likely to ascertain a monthly or lump sum amount on a need based formula with a means test, to be evaluated after assessing the following factors:

(a) On termination of marriage, a spouse can claim permanent maintenance and alimony including a right of residence as part of maintenance. This claim can be made by a spouse under s 25 of the Hindu Marriage Act 1955 (for Hindus), s 37 of the Special Marriage Act 1954 (for all persons), Section 40 of the Parsi Marriage and Divorce Act 1936 (for Parsis), or s 37 of the Indian Divorce Act 1869 as amended in 2001 (for Christians) and s 3 and 4 of the Muslim Women (Protection of Rights on Divorce) Act 1986 (for Muslims), depending on the applicability of the relevant law to the parties based on their religion, or application of Special Marriage Act 1954 if parties do not invoke their personal laws. Besides, independent of these provisions, there are also remedies available under s 125 of the Criminal Procedure Code and also under s 17 and 18 of the Protection of Women from Domestic Violence Act 2005.

(b) Under all statutory provisions of different religious communities (except Muslims) as also under the provisions of the Special Marriage Act 1954, the factors and considerations weighing with a court in making an order for financial relief in the nature of permanent alimony and maintenance are by and large uniform and consistent as they follow a need-based requirement. In Indian jurisprudence and interpretation of matrimonial laws in giving financial relief, the practice of making individual or distinct capital orders by way of property adjustment or sharing of pensions has not been noticed in precedents. Instead, the courts estimate the value of all the assets of spouses to proportionately determine on a need-based means test, the lump sum amount of maintenance to be awarded to the non-earning spouse. In most matters, when the claim for permanent maintenance and alimony is made by the wife, courts consolidate the value of all the assets of the husband by including his income, properties, other assets, future earnings etc to assess the net worth. The practice of making pension sharing orders separately is not adopted in the Indian jurisdiction. Insofar as property adjustment is concerned, it is made a part of lump sum maintenance, unless the parties chose to separately make a property arrangement. However, there is no such statutory requirement and any such arrangement is purely on the volition of the parties. Accordingly, maintenance and alimony include all assets to form one composite figure from which the court decides lump sum maintenance on a need-based requirement which may be paid in one or separate instalments. Once a consolidated figure of the total income and assets of the earning spouse is arrived at, the court awards a proportionate amount as lump sum alimony after determining the need based requirement on the means test basis for granting this lump sum amount without any separate or segregated arrangements.

(c) It may be stated that once courts arrive at a consolidated figure for lump sum maintenance or alimony, they lay down a lump sum package or a monthly ongoing payment plan after fixing the lump sum amount. It may

be the option of the wife, ie the receiving spouse invariably to make her choice upon a request to the court, depending on the need-based requirements varying from the facts and circumstances in an individual case. There is no statutory rule or mandate in any enactment for any lump sum or monthly payment process and it is the discretion of the court adjudicating any such matter to make an appropriate decision upon the request of parties, keeping in mind the need-based requirement in a specific case. There is no hard and fast rule to make an ongoing monthly payment or lump sum payment once the consolidated figure of permanent alimony is settled. The payment will subsist only to the extent of the amount payable as agreed and settled and the husband's estate cannot be burdened beyond the settled amount after his death. A decree for maintenance does not get extinguished with the death of the husband and the decree of maintenance would have to be satisfied first and thereafter the legal heirs would succeed to his property from the amount remaining after such satisfaction of a matrimonial decree. Hence, any ongoing monthly payment would subsist after the death of the husband until the lump sum decretal amount is settled but would not go beyond it. In so far as remarriage is concerned, most courts invariably hold upon awarding a lump sum or monthly amount that no maintenance shall be payable on remarriage of a spouse. The logic clearly is that maintenance is a need-based requirement and upon remarriage the need-based requirement ceases. Furthermore, even on the death of the wife, the maintenance for the wife would be not payable in the case of a monthly payment plan to the extent to which it remains unpaid until death of the wife. However, if paid in a lump sum, no refunds are possible on the death or the remarriage of the wife as lump sum payments cannot be refunded.

(d) It may be stated that there are no statutory criteria or principles laid down in any of the enactments to guide the award of maintenance, which is purely discretionary depending on the facts of each case. The underlining basic principle for all these factors is a need-based means test or requirement of the spouse claiming maintenance and alimony. A number of factors and considerations can be possibly termed as guiding sub-principles to understand and appreciate the import of the basic need-based test principle as everything revolves around this basic primary test. The general principles and grounds on which the claims for maintenance and permanent alimony are awarded by courts generally have been identified on the basis of the large number of precedents cited and relied upon over a period of time.

(e) There is no statutory law in matrimonial jurisprudence for any separate maintenance or other benefits to be paid to adult children. Hence, any award of ongoing financial support to adult children for higher education on a need basis would require special facts and circumstances to be pleaded before a court to merit any attention. Thereafter, it is in the total discretion of the court, in the special situation of a given case, to award maintenance and financial support to adult children for higher education or other specified purposes. This would require special pleadings, specific evidence and documentary proof to enable the court to be satisfied of any

such special need. However, there is no specific bar to disentitle adult children from receiving any such benefits and it is purely the discretion of the court to make an award. This may require the court to give reasons and justification for doing so. However, nothing prevents the parties from giving benefits to adult children for higher education or for other situations like medical treatment or special facilities, or in cases of adult children having special needs due to disabilities or medical conditions.

(f) Gross income of the husband for a period of 3–5 years before filing of the divorce petition as well as the application for permanent alimony and maintenance is considered. Earnings of previous years may also be examined by the court, for a better assessment. The income of the husband will be examined in a foreign currency if he is earning abroad and if the wife is also abroad.

(g) Future earnings prospects of the husband from salary and other benefits, rents, accruals, profits, annuities, pension or any other income from any other capital movable and immovable assets will fall in the zone of consideration to assess the net value of the wealth of the husband. Income, assets, properties and all financial gains of the wife may be kept in mind by the court to make a need based assessment of maintenance for her.

(h) If the husband has property abroad and a pension in a foreign country, which are substantial assets, a court in India in every likelihood would take into consideration these assets in deciding the permanent alimony of the wife as the wife would certainly make a claim on these foreign-based assets considering that she is resident overseas and would need funds in the foreign currency. The foreign-based pension or other assets of the husband would certainly be relied upon by the wife and therefore be considered by an Indian court as an asset of the husband to determine permanent alimony to be paid to the wife.

(i) It may be the claim of the wife that the property of the husband located abroad was their former 'matrimonial home'; this however may be disputed by the husband who claims that the 'matrimonial home' of the parties is in India where parties may have lived together as husband and wife. Be that as it may, the wife has a right of residence after divorce, irrespective of where the parties last resided or had their 'matrimonial home'. Therefore, the wife would have to be either given a right of residence in a foreign country in a property owned by the husband commensurate to the status the parties had when they were living as a family, and if that is not possible, the wife would have to be compensated monetarily to live in the foreign country with the children (if they are still living with the mother in the foreign country) in accordance with the standards the wife and children enjoyed when they lived as a family.

(j) Previous employment of the wife, her current position of non-employment and any other possible source of income of the wife may also be looked into by the court in making an assessment of her dependency on the husband.

(k) Since the wife has a right of residence in a property owned by the husband, the wife would be entitled to a proportionate share in case she is

not provided with suitable accommodation in the foreign country. If no residence is made available by the husband, he will have to compensate the wife with a monetary compensation so that the wife would have as comfortable accommodation as the husband enjoys.

(l) The permanent alimony will be determined in accordance with expenses commensurate to the standards of living the wife would have been entitled to had she been living with the husband keeping in mind the status of the parties, their respective social and family needs as also other obligations.

(m) The permanent alimony would be assessed in accordance with standards by which the wife can live in reasonable comfort and the mode of life she was used to when she lived with her husband.

(n) The conduct of both parties, ie husband and wife, will be relevant for determining permanent alimony, although for interim maintenance, the conduct of parties is not to be kept in mind by the court at these initial stages of proceedings.

(o) If the parties have any children, their maintenance and education expenses as also any other upbringing costs may have to be borne in mind in calculating the monthly or lump sum payment of alimony for the wife and children. The court may segregate the amounts or determine a lump sum. However, since statutory provisions only provide for maintenance and education of minor children, the grant of any financial benefit or support to adult children may be totally discretionary.

(p) If the wife resides in a foreign jurisdiction and all her expenses, living costs, funds (if any) for adult children and other maintenance claims would be in a foreign currency, as also keeping in mind that the husband has assets, income, property and other wealth in that foreign jurisdiction, the court in India is likely to award a lump sum monthly or total amount in the currency of that foreign jurisdiction and not in Indian Rupees.

(q) Rising costs due to inflation, escalating living costs, future expenses of adult children towards higher education and medical expenses of the wife will also be kept in mind by an Indian court for assessing permanent alimony.

(r) Under Indian law there is no mathematical or set formula for determining the amount payable towards permanent alimony, maintenance and right of residence from the collective earnings of the husband. The court makes its own need-based assessment by a means test and then arrives at a figure by which lump sum permanent alimony can be paid either on a monthly basis or a one-time single payment.

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INDIA

TO RETURN OR NOT TO RETURN: HAGUE CONVENTION V NON-CONVENTION COUNTRIES

Anil Malhotra and Ranjit Malhotra[*]

Résumé

Parmi les 1,2 milliards d'Indiens, environ 30 millions d'entre eux vivent dans 180 pays étrangers. Ce nombre inclut les familles transfrontalières, c'est-à-dire les familles dont les enfants sont partis vivre à l'étranger avec l'un de leurs parents tout en gardant un pied-à-terre en Inde par l'intermédiaire de l'autre parent qui y vit toujours. Ces mariages mixtes, lorsqu'ils sont rompus, entraînent souvent l'enlèvement par un parent des enfants de l'Inde vers l'étranger ou inversement et ce, en violation des ordonnances de droit de garde rendues par les juridictions ainsi qu'en violation des droits parentaux de l'autre parent. Malheureusement, bien qu'il s'agisse d'un phénomène fréquent dans le quotidien des Indiens migrants, l'Inde ne définit pas les enlèvements d'enfants par un parent et ne les reconnaît pas non plus comme étant une infraction à la loi. Pour cette raison, les solutions juridiques permettant de régler efficacement ce problème sont difficiles à mettre en place.

L'adhésion de l'Inde à la Convention de La Haye résoudrait la question de ces enlèvements entre les pays puisqu'elle repose sur deux principes: d'abord, revenir au statu quo ante et renvoyer rapidement l'enfant enlevé dans son pays de résidence habituelle afin de permettre à une juridiction de ce pays d'examiner le bien-fondé du litige entre les parents relatif à la garde de l'enfant et ensuite, pouvoir davantage se concentrer sur l'intérêt supérieur de l'enfant et le protéger. Selon la Convention, les tribunaux de la résidence habituelle de l'enfant sont les mieux placés pour déterminer son intérêt supérieur. L'adoption de la Convention pourrait donc marquer le début de l'happy-end d'un long et triste récit.

Of 1.2 billion Indians, about 30 million live in 180 countries abroad. This migration includes cross-border matrimonial relationships where offspring live in foreign abodes but connect with Indian soil through their parent(s). Broken multi-jurisdictional marriages lead to removal of children to India or foreign jurisdictions in violation of court custody orders or infringement of parental rights. Sadly, India does not define or recognise inter-parental child removal as

* Malhotra & Malhotra Associates, India (email anilmlhotra11960@gmail.com).

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an offence under any statutory law, even though it is a frequent phenomenon in daily lives of migrant Indians. As a corollary, remedies in law for effective relief are difficult to secure or achieve.

India's accession to the Hague Convention would resolve the issue of inter-country parental child removal since it is based on the principle of reverting the situation to *status quo ante* and on the principle that the removed child ought to be promptly returned to his or her country of habitual residence to enable a Court of that country to examine the merits of the custody dispute and thereupon award care and control in the child's best interest. The Convention considers these courts to be in a better position to determine the best interest of the child. Enacting the Convention may be a start to a happy ending of a long sad tale.

I INTRODUCTION

Intercontinental abduction of children by parents is a contemporary legal issue which baffles and mesmerises different legal systems of nations whose conflicting positions prevent return of children to the country of their habitual residence. Solace can be found among countries which are signatories to The Hague Convention on Civil Aspects of International Child Abduction 1980. But the Convention does not aid those aggrieved parents whose countries are not, and no global family law governs them. Defiant stands in different courts of such jurisdictions create deadlocks. The sufferers are innocent children who are victimised by legal systems.

II RELEVANT LEGISLATION AND FORUM FOR CUSTODY PROCEEDINGS

As far as the forum for securing the return of the children is concerned, it is important to mention that India is not a signatory to The Hague Convention on the Civil Aspects of International Child Abduction 1980.[1] Under Art 226 of the Constitution of India, a parent whose child has been abducted can petition the State High Court to issue a Writ of Habeas Corpus against the abducting spouse for the return of the child. Alternatively, a habeas corpus petition seeking recovery of the abducted child can be directly filed in the Supreme Court of India under Art 32 of the Constitution of India.

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1 In fact, India rejected ratifying the Convention in November of 2016. See Shalini Nair, 'India Will Not Ink Hague Treaty on Civil Aspects of Child Abduction', *Indian Express* (27 November 2016). However, on 3 February 2017, India again opened the issue at a consultation of all stakeholders, reconsidering its refusal to joining the Hague Convention. This consultation by the Ministry of Women and Child Development has asked the Chandigarh Judicial Academy and Non Residents Indian Commission of Punjab to examine in detail the legal issues and report back within 4 months. 'India to review stand on convention on civil aspects of international child abduction', Times News Network, 3 February 2017.

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The aggrieved parent may well seek recourse to the provisions of the Hindu Minority and Guardianship Act 1956 (hereafter 'HMGA 1956'). The HMGA 1956 like the Hindu Marriage Act 1955 (HMA), has extra-territorial application. It extends to the whole of India except the State of Jammu and Kashmir. Under s 4(a) of the HMGA 1956, 'minor' means a person who has not reached the age of 18 years and a 'guardian' in s 4(b) is defined as a person having the care of the person of the minor or of his property or both and includes a natural (parental) guardian, a guardian appointed by his parents' will, a court appointed guardian or a person empowered to act as such under any enactment.

(a) India and The Hague Convention on Civil Aspects of International Child Abduction 1980

While India is not a party to The Hague Convention on Civil Aspects of International Child Abduction 1980, different recent decisions indicate that Indian courts tend to decide the inter-parental child custody disputes on the paramount consideration of the welfare and best interest of the child. A foreign court's custody order is only one of the considerations in adjudicating any such child custody dispute between parents.[2] Foreign courts' orders of child custody are not mechanically enforced and normally the Indian courts look to the merits of the matter to decide the best interest of the child irrespective of any foreign court order. Hence, the position of law in India varies from case to case and there is no uniform precedent which can be quoted or cited as a universal rule.

(b) The position of Indian law on child abduction

Under Art 214 of the Constitution of India, each State in India has its own high court and under Art 124 there is Supreme Court of India. Under Art 141, the law declared by the Supreme Court is binding on all the Courts within India. However, the Supreme Court is not bound by its own earlier decisions and can render new decisions. Part III of the Constitution secures fundamental rights to citizens, which can be enforced directly in the respective high courts of the States or directly in the Supreme Court of India by issue of prerogative Writs under Arts 226 and 32, respectively, of the Constitution of India.

The high courts and the Supreme Court in India entertain petitions for issuance of a Writ of Habeas Corpus for securing the custody of the minor at the behest of a parent who lands on Indian soil alleging violation of a foreign Court's custody order or seeks the return of children to the country of the parent's jurisdiction. Invoking this judicial remedy provides the most effective speedy solution.

Different high courts within India have from time to time expressed different views in matters of inter-parental child custody petitions when their jurisdiction

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2 *Dhanwanti Joshi v Madhav Unde* (1998) 1 SCC 112.

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has been invoked by an aggrieved parent, seeking to enforce a foreign Court's custody order or implementation of their parental rights upon removal of the child to India without parental consent. The Supreme Court of India too has rendered different decisions with different viewpoints on the subject in the past five decades.

In an important 1998 case,[3] the Supreme Court observed that the order of the foreign court will only be one of the facts which must be taken into consideration while dealing with child custody matters. Since India was not a signatory to The Hague Convention, the Court within whose jurisdiction the child is removed will consider the question on the merits, bearing the welfare of the child as of paramount importance. In this case the Supreme Court changed the earlier view and declined to exercise summary jurisdiction in returning the removed children to their parent country.

In a considerably more recent case,[4] the husband and wife were American citizens of Indian origin and a son was born to them in America. The wife left her husband in the United States and returned to India with her son. She moved a Delhi guardian's court and was granted custody rights. In a suit filed by her estranged husband claiming abduction of the child, a United States court issued a 'Red Corner' Notice against the wife, directing her return to the United States. On an appeal, the Delhi high court set aside the order of the Delhi guardian's judge, directing the couple to submit before a US court as they were all US nationals and ordinarily resided in the USA. The wife appealed to Supreme Court. That court set aside the judgment of the Delhi High Court and directed that the proceedings shall go on before the guardian's judge to be disposed of as expeditiously as possible, with interim custody remaining with the mother and the father enjoying visitation rights only.

This verdict is salutary and laudable. It has culled out three questions for determination. The first question relates to the jurisdiction of the guardian's judge to entertain the petition for adjudicating custody issues. Interpreting the phrase 'ordinarily resident', the Court held that the intention of the parties would determine this important question. The fact that the child was studying and resident in Delhi for the preceding 3 years had clearly established that there was no coercion or duress since the father was a party to this arrangement. The conduct of the parties thus led the Court to establish that the guardian's judge was competent to decide the matter as the child was ordinarily resident in Delhi and not in USA.

The second issue led the Court to hold that the jurisdiction of the guardian's judge could not be declined on the principle of comity. Examining earlier precedent, the Court ruled that proceedings in habeas corpus matters are summary in nature, and may lead to determination of custody issues when the child is within the jurisdiction of the high court. Disapproving of the

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3 *Dhanwanti Joshi v Madhav Unde* (1998) 1 SCC 112.
4 *Ruchi Majoo v Sanjeev Majoo*, JT 2011 (6) SC 167.

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application of the comity principle in the matter, the Supreme Court held that no foreign Court order had been violated by the wife. There was no final decision by any US Court, the minor was voluntarily in India, and there was no intention of the wife and child to return to the USA. Comity ensures that foreign judgments and orders are unconditionally conclusive of the matters in controversy, but in the matter of custody of child, since interest and welfare of the minor are paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. Distinguishing earlier judgments, the Supreme Court held that the interest of the minor could be better served if the mother continued to have custody. Even though habeas corpus proceedings are generally summary in nature and are based upon written affidavits, nothing prevents the high court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its *parens patriae* jurisdiction. A High Court may, therefore, invoke its extraordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the Court views the rival claims, if any, to such custody.

Akehya Yalamanchili v State of Andra Pradesh[5] also involved a writ of habeas corpus. This time the dispute was for the custody of a child among her parents who were citizens of the USA with status of Non-resident of Indian Origin. They had obtained a divorce in the USA and both admitted that the home State of the child was India. It was held that, under Art 226 of the Constitution, even if the residence of a person is not within the territory of that State, the high court of the State had jurisdiction to issue writs, including Writs of Habeas Corpus, if the cause of action wholly or partly arose within that State. Here the mother, unsuccessful in receiving custody in the US Courts, filed a petition before the Family Court, Hyderabad seeking permanent custody of the child. In a revision petition filed against the orders of the Family Court, the High Court directed her to return her daughter to the father in India, giving him custody of child pending litigation. Later on he moved with the child to Indonesia without the knowledge of the mother and withdrew his petition on the ground of his successful contested custody proceedings in the USA. The mother had also obtained an interim order to restrain the father from taking the child outside the jurisdiction of Hyderabad. After learning that the father had left Hyderabad, she filed a petition for a Writ of Habeas Corpus. As the father had moved to a foreign country when the dispute of custody of the child between then was pending before the family court, therefore, the contention of father that the high court had no jurisdiction as the child was no longer in Andhra Pradesh was not accepted by the high court which held that its jurisdiction was not ousted because of the absence of child in the State of Andhra Pradesh.

[5] 2012 (3) Andh L T 803.

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In the first of two important 2013 cases,[6] the father of a two-and-a-half-year-old child was staying abroad while the child was in the custody of his grandfather and extended family. A habeas corpus petition was filed by the mother. The child was produced in the court and custody was given her. Although in the normal circumstances, she should have sought custody of the child under the relevant provisions of law contained in the Hindu Minority and Guardianship Act of 1956, in keeping with the peculiar fact situation, the high court exercised its extraordinary writ jurisdiction under Art 226 of the Constitution of India, declaring the mother entitled to the custody of her small son. This did not only avoid another round of unwarranted litigation but also ensured complete and substantial justice between the parties.

In the second case,[7] the father filed a habeas corpus petition in the High Court of Punjab and Haryana alleging abduction of children who had acquired permanent resident status in Canada. The father further stated that the maternal grandparents had taken the children contrary to the sole custody and restriction orders passed by the Supreme Court of British Columbia. It was observed that because the grandparents had genuinely brought the children for a limited family visit to their country of origin, making out no international child abduction case. It was also held that children who have been wrongfully taken or 'wrongfully retained' overseas should normally be returned promptly to their country of habitual residence.

In the 2014 case of *Arathi Bandi v Bandi Jagadrakshaka Rao*,[8] a decree of dissolution of marriage was obtained from a US court giving child custody to the husband. The wife thereafter travelled to India along with the child in defiance of the court's order. The husband then came to India and filed a habeas corpus petition before the high court seeking production of the child and permission to take custody of the minor in compliance with the US order. The high court directed the wife to submit to the jurisdiction of the US Courts. Her appeal was dismissed by the Supreme Court, which held that a parent doing wrong by removing children out of the country does not gain any advantage by the wrongdoing. The contention that the American court, which passed the order/decree had no jurisdiction and that the decree, since inconsistent with Indian laws, could not be executed in India, was not tenable.

Several cases worth mentioning were decided in 2015. In the first,[9] the mother and father contested custody of their very young son. The trial court at Goa awarded interim custody to the mother with visitation rights to the father. On appeal by the father, the Bombay High Court at Goa reversed the award. The father had moved to Bombay from Goa notice to the mother who began a criminal writ proceeding at the Bombay High Court, deferred action, awaiting the decision of the Goa trial court. Subsequently, the Supreme Court was approached by the mother, challenging the interim custody award. The

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6 *Manpreet Kaur v State of Punjab* 2013 (3) Rec Civ Rep (Civil) 422.
7 *Karan Singh Bajwa v. Jasbir Singh Sandhu* 2013 (1) Rec Civ Rep (Civil) 809.
8 AIR 2014 SC 918.
9 *Roxann Sharma v Arun Sharma* (2015) 8 SCC 318.

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Supreme Court held that the custody of a minor shall ordinarily be with the mother. However, the use of word ordinarily cannot be over-stretched.

Interpreting the Guardians and Wards Act, the Supreme Court held that

> 'we must immediately clarify that section 6 or for that matter any other provision including those contained in the Guardians and Wards Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years ….We must again clarify that the father's suitability to custody is not relevant where the child whose custody is in dispute is below five years since the mother is per se best suited to care for the infant during his tender age. It is for the father to plead and prove the mother's unsuitability since Thalbir is below five years of age. In these considerations the father's character and background will also become relevant but only once the Court strongly and firmly doubts the mother's suitability; only then and even then would the comparative characteristic of the parents come into play …'

In a watershed opinion dated 27 February 2015,[10] the Supreme Court directed return of two minor children of 6 and 10 years of age to the United Kingdom and laid down salutary principles which can be condensed as following. First, the principles of comity and the best interest/welfare of child apply in such cases. Comity rules should not be jettisoned except for compelling special reasons to be recorded in writing. If the jurisdiction of the foreign court is not in doubt, whichever court is first seized of the matter will have jurisdiction. Second, interlocutory orders of foreign courts of competent jurisdiction must be respected. An elaborate or summary inquiry by domestic courts when there is a pre-existing order of a competent foreign Court must be based on reasons and not ordered as a routine. In addition to considering the nature and effect of a foreign Court's order, the Supreme Court stressed best interest principles: the reasons for repatriation/non-repatriation, any moral, physical, social, cultural or psychological harm to the child that might result, the harm to the parent in the foreign country and the speed in the foreign court proceeding.

Finally, in *Maninderjit Kaur Atwal v Barinder Singh Pannu*,[11] the High Court of Punjab and Haryana, setting aside the orders of the guardian's judge, permitted two minor children to visit their mother in the USA during their Indian school vacations. The parents were divorced in the USA. The mother resided in the USA and the father in India. Both the minor children, who were US nationals, were studying in a prestigious school in India and living with their father. The US court had ordered that they could be taken to the USA to visit their mother at her expense. The high court permitted the children to visit during winter vacations if the mother agreed before the guardian's judge that if the children were not returned to India, the court would be authorised to recover US$100,000 from her accounts and pay it as compensation to the minor children. Alternatively, she was asked to furnish a local bond in India to the tune of the equivalent of US$100,000 in Indian currency. The father was

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[10] *Surya Vadanan v State of Tamil Nadu* 2015 (5) SCC 450.
[11] Civil Revision No 5533 of 2015, decided on 1 December 2015.

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ordered to accompany the children to the USA and mother granted that the Indian High Court could be enforced by the US authorities.

An analysis of the Indian case law reveals that until 1997, Indian courts whenever approached by an aggrieved parent exercised a power of summary return of a removed child to the country of habitual residence in compliance with a foreign court order to restore parental rights.[12] However, changing the precedent, in 1998, the Indian Supreme Court decided that a custody order of a foreign court shall be only one consideration while determining the matters on merits in which the welfare of the child will be of paramount importance.[13] Since then, child removal and custody matters have been decided on merits in India with no set pattern consistently being followed. However, a different trend set by some of the recent decisions since 2014 onwards indicates that aggrieved parents who invoke the jurisdiction of the high court in Writs of Habeas Corpus are not non-suited simply because determination of the best interest of the child can be done only by an adjudicatory process in the family court or before the guardian's judge. Use of the habeas corpus remedy to enforce the child custody order of a foreign court is proving effective and result-oriented. These recent decisions also indicate a trend to respect foreign court orders wherein an aggrieved parent seeks return of the removed child on the strength of these decisions. The position varies on the facts and circumstances of each case, however.

(c) No provision for mirror orders in India

In light of the prevailing child abduction law in India discussed above, it is not possible to obtain mirror orders, as this is a concept known in the English system. Since foreign court custody orders cannot now be mechanically enforced, it is suggested that, in the event of any litigation in the foreign country of habitual residence, parties obtain a letter from the foreign court in which litigation is pending incorporating safeguards and conditions to ensure the return of the minor child to the country of normal residence.

This letter of request should be addressed by the foreign court to the Registrar General of the High Court within whose jurisdiction the estranged spouse resides with the minor child. Such a letter should also specifically mention that the passports of both the parent and the child should be deposited with the Registrar General of the State High Court to ensure that the child is not taken away from the jurisdiction of the Court where he or she is residing.

(d) The position of Indian law on shared residence orders

Under the relevant Indian statute law pertaining to child custody matters, that is HMGA 1956, supplemented with the provisions of the Guardians and Wards

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12 *Kala Aggarwal v. Suraj Praash Aggarwal* 1993 (1) Hindu LR (Del) 145; *Jacqueline Kapoor v Surinder Pal Kapoor* 1994 (2) Hindu LR (P&H) 97.

13 *Dhanwanti Joshi v Madhav Unde* (1998) SCC 112.

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Act 1890, there exists no concept of shared residence orders. However, there is one recent judgment of the Kerala High Court,[14] where on the facts and circumstances of the case the Court handed down an order close to a shared custody order. This was in a case where divorce and custody proceedings were pending in the USA and the mother was held to be entitled to custody of the children until a final decision was announced by the courts in the USA.

The petitioner mother, the respondent father and the children were all US citizens. The wife had approached the court with a habeas corpus petition seeking a direction that the father produce two twin infants named Roshan and Nishant before the Court and to hand over their custody with their passports to her. The twins were less than 3 years old.

The petitioner and the respondent had been married while in the USA, after which they moved to Bahrain where the twins were born. Because of a change of employment the family went back to the state of Texas in the USA and settled there. According to the mother, their married life was not happy because of domestic violence by the father resulting in a criminal case that was ultimately settled. The father lost his employment in Texas and the parents with their children visited India and came to Kozhikode in the state of Kerala where the father had his roots. While there, according to the mother, there was again ill-treatment by the father, who threw her out of the marital home and forced her to fly back to the USA without the children. According to her, the custody of the children to the father was illegal, and hence the children were illegally detained. She had already filed a petition for custody of the children as well as for the dissolution of the marriage in accordance with the family law applicable in the state of Texas in the USA.

In light of the facts and circumstances of the case, the court, while granting custody of the children to the mother, laid down rigorous conditions, one of which was shared custody with stringently controlled visitation rights involving embargoed passports and significant bonds for a period of 7 days from the time of the court order to the time the petitioner wife left India.

In another reported case of the Delhi High Court,[15] the custody of the older of two sons, who was residing with the father, was not in question and the case was confined to determining the custody of the younger. Thus, the case addresses split rather than shared custody. The court upheld the order of a Canadian court granting custody of the younger son to the mother, allowing him to go back to Canada. The court agreed that it had jurisdiction to order travel out of the country of the minor child with one of the parents and the mere possibility of losing jurisdiction would not dissuade it from permitting the departure of the child with the parent in the interest of the child.

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[14] Reported as *Eugenia Archetti Abdullah v State of Kerala* 2005 (1) Hindu LR (Kerala) 34.
[15] *Leeladhar Kachroo v Umang Bhat Kachroo* 2005 (2) Hindu LR (Del) 449.

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Because there is no statutory concept of a 'shared residence order' under Indian legislation, the Indian courts would view interpreting any such order of a foreign court in the light of the principle of the best interest of the child. Undoubtedly, access rights of the father could be enforced based on a shared residence order and if such rights were violated, they could be enforced in an Indian court of law. However, such a proceeding would be viewed as an enforcement of a private contractual arrangement between the parents. The Court would still go into the welfare of the child to determine the rights of the child. Hence, the position would vary from case to case and there is no uniform principle which can be quoted as a universal rule.

(e) Value attached by the court to the wishes of the child

The courts should certainly consider the wishes of the parents and the minor child, but the child's wishes will be heard at the discretion of the court. As is evident from the case-law analysis, the paramount consideration is the welfare of the minor child.[16]

III A POSSIBLE SOLUTION

(a) Law in the making: an aftermath

Borders divide jurisdictions but families reunite them. The chain to this link is the global citizen. However, this inter-nation cross-flow has with the passage of time generated a new crop of legal issues in the realm of private international law which comprises rules a court would apply whenever there is a case involving a foreign element. Such legal dilemmas of the diaspora baffle systems of law but do not defy solutions if nations make sincere efforts for resolving such gripping complications.

A fugitive Non-Resident Indian (NRI) parent declared the offender in matrimonial proceedings in India cannot even see or talk to his children removed to India. A foreign court refuses to permit NRI children to be taken to India and likewise local courts decline to implement foreign court's orders directing return of NRI children. These daily occurrences find no straightforward resolution for the NRI in any Indian law. International parental child abduction, defined as the removal or retention of a child across international borders by one parent which is either in contravention of court orders or is without the consent of the other parent, is sadly an increasing phenomenon that causes acute emotional distress to the abducted child.

If the Indian Government acceded to The Hague Convention on Civil Aspects of International Child Abduction and India became a member of about 94 contracting convention nations, appropriate Indian legislation will need to be enacted for its implementation. In this way children removed to and from India

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[16] *Leeladhar Kachroo v Umang Bhat Kachroo* 2005 (2) Hindu LR (Del) 449.

would be reunited with their aggrieved parent and India will no longer be a sought-after destination for parking removed NRI children from foreign jurisdictions. Also, foreign courts will be encouraged to permit NRI children to freely visit India without fear of abduction.

The Ministry of Women and Child Development uploaded on its website a proposal to enact a draft of The Civil Aspects of International Child Abduction Bill 2016, considering that before accession to the Hague Convention, it was imperative to have enabling legislation in India to give teeth to the provisions of the Convention in India.[17] The draft Bill provided for designation of a Central Authority and established a procedure for ensuring return of removed children as also seeking return of children wrongfully removed to and from India. The proposed Bill was to be renamed 'The International Child Removal and Retention Bill 2016' and was placed on the website of the Ministry for suggestions and comments until 13 July 2016. The sooner such a bill is enacted and the Convention ratified, the better it will be for children's interests.

The salient and salutary features of this proposed law were as follows:

- The proposed law seeks to create a Central Authority for performance of duties under The Hague Convention for securing the return of removed children by instituting judicial proceedings in the concerned High Court.
- The appropriate authority or a person of a contracting country may apply to the Central Authority for return of a removed child to the country of habitual residence.
- The High Court may order return of a removed child to the country of habitual residence, but may refuse to make such an order if there is grave risk of harm or if return would put the child in an intolerable situation. Consent or acquiescence of the parent may also lead to refusal for return of a child by the Court.
- The High Court may refuse to return a child if the child objects to being returned if the Court is satisfied that the child has attained a sufficient age and degree of maturity to take his views into account.
- The High Court before making an order of return may request the Central Authority to obtain from the relevant authorities of the country of habitual residence a decision or determination as to whether the removal or retention of the child in India would be wrongful.
- The High Court upon making an order of return may direct that the person who has removed the child to India pay the expenses and costs

[17] Government of India, Ministry of Women and Child Development, The Civil Aspects of International Child Abduction Bill, File Nol CW-1-31/59/2016-CW-1 (on file with the General Editor).

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(b) Plugging the holes: suggestions for amendments

As noted previously, India declined to ratify the Hague Convention in 2016.[18] However, as of 3 February 2017, this decision is being re-examined since the Ministry of Women and Child Development, Government of India has called upon the Chandigarh Judicial Academy and the Non Residents Indian Commission to examine in detail the legal issues involved in the proposed law and furnish a report within 4 months. Thereafter, the Government of India will further proceed in the matter.[19] Though the efforts to make the Civil Aspects of International Child Abduction Bill 2016 would have been salutary, the following suggestions could be mooted to improve any proposed Indian law.

(a) Any introductory section should clarify that it would be applicable to every child removed or retained in India within the meaning of the Act from his or her country of habitual residence irrespective of religion, nationality, residence, domicile or status in India. This is necessary because of children of foreign nationals and professing different religions are often brought to India in violation of foreign Court orders. The terms, 'High Court', 'Appropriate Authority' and its quorum will need to be defined.

(b) The chairperson and members of the Central Authority have adequate knowledge and experience in International Child Abduction, access, custody and related issues. An effective Central Authority could consist of a solitary legally qualified Director assisted by case workers rather than ex-officio/non-official members. The Central Authority should be as small as possible and all such appointments should be left to the exclusive discretion of the Supreme Court. The number of members, their qualifications, experience and expertise in handling inter-country, inter-parental child removal issues must be specified.

(c) Article 11 of the Convention enjoins a period of 6 weeks for an expeditious disposal of the proceedings before the judicial or administrative authority of the Contracting State. A time period to be specified in proceedings before the Central Authority/High Court is very essential, since these proceedings are intended to be of a summary and expedient nature and delay is inimical to a child's best interest.

(d) The exclusive use of specialist or designated judges in every High Court of every State as designated 'Convention Judges' may be necessary since unlike the United Kingdom, which has 18 specialist judges of the family division to hear the Convention proceedings, India with neither a family division nor a specialist family law judiciary may find it difficult to cope with Convention proceedings. Likewise specialist practitioners in the field of international child abduction will be required for assistance. Similarly, training of judges by specialists in the field of international child abduction

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[18] Shalini Nair, 'India Will Not Ink Treaty on Civil Aspects of Child Abduction', Indian Express (27 November 2016); 'Gov't Likely to Junk Inter-Parental Child Abduction Bill', Tribune (6 November 2016).

[19] 'India to review stand on convention on civil aspects of international child abduction', Times News Network, 3 February 2017).

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for an understanding of The Hague Convention and any new Indian law may be extremely essential. The Hague Guides to Good Practice are a benchmark in this regard.

(e) To operate effectively, the Central Authority must be able to communicate with at least two liaison judges as is the statutory precedent in the Netherlands. Even the United Kingdom had the benefit of a judge of the Court of Appeal acting as 'Head of International Family Law' who assisted in conferring with the judges abroad. An International Hague Network Judge for England and Wales has now taken over this role. India thus should create and nominate a Hague Network Judge for an effective working and judicial collaboration worldwide. Even the Chairperson of the Central Authority should ideally be a former judge who can effectively communicate with the High Courts for a smooth resolution of overseas child abduction disputes.

(f) A provision should be added creating a jurisdictional bar to parallel proceedings in India under the Guardians and Wards Act 1890 read with the Hindu Minority and Guardianship Act 1956 or under any personal law of the parties in India. This bar would apply in cases of inter-country and inter-parental child removal between contracting States to avoid defeating the purposes of the Hague Convention.

(g) Another effective provision that would need to be added relates to the power to order disclosure of a child's whereabouts. Seeing to the large geographical size of India spread over 29 States and seven Union Territories, it may be necessary to secure information about the child's availability as removal and harm to the child could otherwise result. Disclosure orders with penalties for noncompliance may be necessary to elicit information about the child's location.

(h) Providing an effective mode of recovering costs for the aggrieved spouse is necessary to deter future child removals and provide actual funding (yes). Hence, a section needs to be incorporated in the proposed law to ensure the true spirit of the rule that 'costs must follow the event'.

(i) The necessity of a section to permit making of implementing effective procedural rules is of extreme importance as they lend great assistance. Hence, rules of procedure regarding making of applications before the Central Authority and/or other requirements must be made a part of the new proposed Indian law.

The discussion is still pending since no Bill has achieved finality. Perhaps with the passage of time, more suggestions and views may mature it fully.

IV SOME EXPERIENCES WITH HAGUE CONVENTION COUNTRIES

There are two instances of removal of children from India to a Hague Convention country. Experience of these cases indicate that in such matters

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when children are removed from India to a convention country either against parental consent or by violating Indian Courts' custody orders, the convention country has sought not to summarily return them to the place of habitual residence. Rather, the convention country courts have chosen to determine and adjudicate the best interest of the child. Since these two matters are still in the process of final adjudication, they are being referred to in hypothetical terms.

In the first instance,[20] a minor child was removed from India by a relative to a Convention country in violation of an Indian court's custody order and against the wishes of both the parents. Amicus curiae showed that the travel documents used by the relative to travel to the Convention country violated Indian laws and there was a clear case of overstaying in the Convention country in violation of visa regulations. Still, the courts of the Convention country initially continued to determine the child's best interests in an alien environment and conditions. The orders of the Indian court seeking return of the child to determine its welfare were ignored. Ultimately, when the court of the Convention country directed the return of the removed child back to India, the child was mysteriously abducted again whilst at school in the Convention country. The result was that the indulgence granted to a fugitive of Indian laws by a Convention country, totally inconsistent with the principles of The Hague Convention, led the small child to be used as a pawn for asylum being claimed by the abducting relative. Ultimately, whenever the child returns to India, a long lapse of time may create new problems for the child as well as untold suffering and the misery of the parents.

In the second instance, the minor children were taken by one of the parents from India to a Convention country purportedly for a holiday and were not returned to India. In response to the other parent's claim for return of the children to India, alleged domestic violence and safety issues were voiced. The matter is currently under examination before the Convention country's court to decide whether the children and the parent should go back to the country of habitual residence. The larger issue again would be which country's Court would be the best forum to decide or adjudicate upon the welfare of the minors the country where the children are now resident or the country where the children were habitually resident. The Hague Convention country does not seem to make a departure in dealing with non-Convention countries in such a situation. This is a question which needs to be elaborated and dwelt upon at a forum looking at the practical issues and lessons learned in the implementation of The Hague Convention.

Furthermore, what should be the procedure in dealing with child removal matters when children are removed from Non-Convention countries to Convention countries? Does the Convention provide a side window for dealing on separate principles? How would the courts of Convention countries make departures in this regard? What is the message that a non-Convention country's

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[20] *Seema Kapoor v Deepak Kapoor*, CM No 14931-CII of 2015, 2016 SCC OnLine P&H 1225 (Punjab and Haryana).

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court gets in the adjudication of such disputes in a Convention country's court, and is the principle of reciprocity disturbed? Should it not be reverting to the best interest principle? Is a child in a foreign country uprooted from his or her habitual residence in any position to judge his or her welfare and best interest? Would it be appropriate to determine the child's best interest in the country of habitual residence? Should the abducting parent or relative be given the advantage of his or her own wrong by providing residence in a Convention country when clearly laws of a non-Convention country or parental rights have been violated? Is it fair to expect an aggrieved parent to travel to the Convention country to contest legal proceedings at considerable expense, costs and time to put forward his or her rightful claim in protracted legal proceedings in the Convention country? What country's law will apply in such circumstances to the removed child? Will such precedents retard the process of having more signatory countries to The Hague Convention? These are some issues which may arise for determination and different viewpoints may emerge on these perspectives.

V CONCLUSION

With the increasing number of Non-Resident Indians abroad and multiple problems arising leading to family conflicts, inter-parental child removal to India now needs to be resolved on an international platform. Until India becomes a signatory to The Hague Convention, this may not be possible. The time has now come where it is not possible for the Indian Courts to adapt to different foreign court orders arising in different jurisdictions. It is equally important that to create a uniform policy of law some clear, authentic and universal child custody law be enacted within India by adhering to the principles laid down in The Hague Convention.

VI POST SCRIPT: REWRITING CHILD CUSTODY LAWS

On 3 July 2017, in the case of *Nithya Anand Raghavan (Raghavan)*[21] the Supreme Court ruled that the High Court using its *parens patriae* jurisdiction may examine the return of a child to a foreign jurisdiction if it would be in the interests and welfare of the minor child. The foreign court's order directing return of the child within a stipulated time will only serve as a factor to be taken into consideration.

[21] Criminal Appeal No 972 of 2017, *Nithya Anand Raghavan v State of NCT of Delhi & Anor*, decided on 3 July 2017.

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