MODULE FOR TRAINING OF LEGAL SERVICES LAWYERS

PART-3

NATIONAL LEGAL SERVICES AUTHORITY

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National Legal Services Authority
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RANJAN GOGOI
Chief Justice of India

10, Tees January Marg,
New Delhi-110011

MESSAGE

Capacity building of Panel Lawyers has remained one of the prime areas of focus of the National Legal Services Authority(NALSA) to ensure delivery of competent legal services to the weaker sections of the society. To keep pace with the developments in the area and the need to serve the weaker sections, Panel Lawyers need to be dynamic and capable of meeting the requirements of the time. To address this need, NALSA had constituted a Committee for creating Modules for training of its Panel Lawyers. This is the third and final Module in this series.

This module spells out user friendly learning processes, methods and activities to communicate its course content to trainees. It includes specialized subject matters, such as, Law of Marriage and Divorce in Hindus and Muslims, Law relating to Property especially, Women's right to property under the Hindu law and Muslim law, Consumer Protection Law, etc. Most importantly, this module has a Chapter on professional ethics for lawyers. I hope the module will help the panel lawyers in their mission to deliver justice to the poor and the marginalized.

I appreciate the sincere efforts put in by the Committee under the guidance of its Chairperson Justice Manju Goel (Retd.). I hope and believe that all the State Legal Services Authorities will find this Module helpful in imparting training to the panel lawyers.

[RANJAN GOGOI]

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Ph. : 23794949 Telefax : 011-23017543

Madan B. Lokur
Judge
Supreme Court of India

4, Akbar Road
New Delhi-110011
Phone : 23014102
Fax : 23014107
E-mail : madanlokur@nic.in

FOREWORD

Over the years, Justice Manju Goel (retired) has been a pillar of strength as far as the National Legal Services Authority (NALSA) is concerned. She has devoted considerable time and painstaking efforts in a variety of activities pertaining to legal aid and services.

The present Module for Training of Legal Services Lawyers prepared by a Committee under her guidance is yet another testimony of her commitment. This is the third part of the Module that has successfully been implemented in various parts of the country and has received accolades.

There is no doubt that the training of legal aid lawyers is of great significance. Most persons who approach the authorities constituted under the Legal Services Authorities Act, 1987 for free legal aid and advice as well as services are from disadvantaged sections of society. They approach the authorities, whether the State Legal Services Authority or the District Legal Services Committee for competent legal advice and services. Anecdotal evidence seems to suggest that in some respects, legal aid for the poor gets translated into poor legal aid. This is undoubtedly very unfortunate but it is this misinformed perception that needs to be overcome and rectified. One of the methods of doing this is by providing quality training to legal services lawyers and enhancing their capabilities and infusing confidence into the persons who approach the authorities for free legal aid, advice and services. This is very much in line with the capacity building focus of NALSA in its variety of activities carried out for the benefit of the poor and disadvantaged sections of society

The efforts of the high-powered committee consisting of four retired High Court judges and a Vice Chancellor of a National Law University deserve appreciation and compliments. They have put in unstinted efforts, ably supported by several others including some youngsters, in bringing out the Module in all its three parts. The efforts put in by them must be taken full advantage of not only by NALSA

Madan B. Lokur
Judge
Supreme Court of India

4, Akbar Road
New Delhi-110011
Phone : 23014102
Fax : 23014107
E-mail : madanlokur@nic.in

but also by Bar Associations and, wherever possible, by the State Judicial Academies so that legal services, in all its forms, are given their true meaning to disadvantaged sections of society.

I congratulate the efforts put in by the Committee and hope and expect that the movement for training legal services lawyers will provide more effective and meaningful legal services and is carried forward with vigour and dynamism in the New Year.

New Delhi
9th December, 2018

(Madan B. Lokur)

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PREFACE

Sometime in the year 2013 the Central Authority of National Legal Services Authority assigned the Committee for Developing a Module for training of lawyers with the work of formulating training modules for the legal services lawyers.

The Committee has since produced training modules for legal services lawyers Part-1 and Part-2. The Committee has also prepared a module for paralegal volunteers and a module for training of probation officers and legal services lawyers attached to the Juvenile Justice Boards. The present book is Part-3 of the module for training of legal services lawyers. The three parts together cover all the topics that the Committee chose to work on after a video con-sultation with all the State Legal Services Authorities. We are however not averse to go on to work on other topics not so far dealt with in these three books.

The training was designed to be in 2 parts, the first being the induction training and the other being the advanced training. Part-1 of the module was meant for induction training and accordingly it covered the subjects which a lawyer would be confronted with at the very initial stage of the profession. Further the legal services lawyers are required to be aware of their roles and responsibilities. Thus the subjects covered were:

1. Constitutional Perspective for Legal Services under the Legal Services Authorities Act, 1987 and the schemes framed there under.
2. Roles and responsibilities of Legal Services Lawyers.
3. Basic Knowledge in Criminal Law.
4. Lawyering skills – Criminal: Drafting, Witness Examination and Arguments.
5. Basic Knowledge in Civil Remedies with special emphasis on injunction.
6. Lawyering Skill – Civil: Client Counselling, Drafting, Witness Examination and Arguments.

Part-2 of the module covered the following subjects:

1. Law of Evidence.
2. Law of Persons with Disabilities.
3. Motor Accident Claims.
4. Law of Domestic Violence.
5. Rights of Prisoners and Legal Services.
6. Sexual Harassment of Women at Workplace.
7. Legal Aid for Child Victims of Sexual Offences.
8. Legal Aid for Children affected by Child Marriage using the Prohibition of Child Marriage Act, 2006.
9. Juvenile Justice (Care and Protection of Children) Act, 2015 with reference to Children in Conflict with Law.
10. Labour Law and Industrial Disputes.

The present volume deals with the following topics:

1. Law of Property.
2. Hindu Women's Right to Property.
3. Property Rights of Women under Muslim Law.
4. Hindu Marriage Act.
5. Law of Marriage and Divorce amongst Muslims, Christians, Parsis, Jews and under The Special Marriage Act, 1954.
6. Professional Ethics for Lawyers.
7. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989.
8. Maintenance to Wife under Section-125 of Code of Criminal Procedure and The Protection of Women from Domestic Violence Act, 2005.
9. Consumer Protection Act, 1986.

What do we need to make a good lawyer? We have identified three things which a lawyer should possess to succeed in the profession: knowledge, skill and attitude. The undergraduate law colleges primarily impart basic knowledge in law. However the law is best learned when we are confronted with a problem and are made to search a solution for it. Our modules deal with the possible problems which a lawyer comes across and the solutions thereto preferably derived from case laws.

The skill of a lawyer cannot be learned from the books. From drafting of a plaint to interviewing a client and even beyond into appeal and execution it is the skill of the lawyer which makes or breaks a good case. As can be seen, Part-1 has covered topics dealing with these skills.

Erudition or articulation in law alone is not enough. The lawyer needs to have an appropriate attitude. Our attitude determines how we approach our work. Although attitude is something internal, it reflects in our language, action and conduct. It is the attitude that takes us through all odds and helps us to reach our destination. Some of the topics provided in Part-1 are meant to give an appropriate attitude to the lawyer. The present volume comprehensively covers the topic of ethics, essential for all lawyers to learn not only to be a good lawyer but also to give appropriate ambience to the courts. A teacher asked his students, "Can you distinguish between truth and myth?" One of them stood up to answer, "Sir, it is easy. That you are lecturing is truth but that we are listening is myth". There is some truth in this old joke. There is a gap between teacher's delivery and student's intake. The gap can be reduced by effective methods of teaching. In our design of professional training the teaching or training is not teacher centred. These modules are participant oriented. The resource persons are facilitators who moderate and lead the discussions as also the activities that would take place during the training sessions. It is said that we retain 10% of what we learn by hearing, 80% of what we learn by doing and 95% of what we learn by teaching others. Our modules include all the 3 types of methods. Particular attention has been paid to activities like brain storming, group discussion and presentation so that the participants are active during the training sessions and learn by 'doing'.

In order to give impetus to the work of training legal services lawyers and to obtain the appropriate resource persons, the Committee also organised 3 workshops on training for trainers. More than 100 legal services personnel participated in these programmes. Some State Legal Services Authorities replicated the programmes in their own States. Thus, we believe, there is a large number of resource persons available for conducting training as per these modules.

We gratefully acknowledge the patronage to the work provided by Hon'ble Mr. Justice Dipak Misra, Chief Justice of India & Patron-in-Chief, NALSA. We also acknowledge the encouragement and support provided by Hon'ble Mr. Justice Ranjan Gogoi, Judge, Supreme Court of India and Executive Chairman, NALSA. Mr. Alok Agarwal, Member Secretary, NALSA has taken pain to coordinate between all involved in preparing and publishing the module. We acknowledge the contribution made by the authors namely Mr. O.P. Gupta, Member (Judicial), State Consumer Disputes Redressal Commission, Delhi, Ms. Anuradha Shukla Bhardwaj, Additional Director, Delhi Judicial Academy, Ms. Geetanjli Goel, Special Secretary, Delhi State Legal Services Authority, Dr. Saif Mahmood, PhD, Advocate, Supreme Court of India, Mr. Mahesh Thakur, Advocate and Mr. Mohammad Nasir, Lecturer, Deptt. of Law, Aligarh Muslim University. The three youngsters, Ms. Richa Chauhan, Ms. Pratibha Raghav and Mr. Prateek Sihag, have used their acumen in research to help us create the modules.

We will fail in our duty if we do not acknowledge the guidance and support of Professor Dr. Tahir Mahmood, currently the Distinguished Jurist Chair, Professor of Eminence & Chairman, Institute of Advanced Legal Studies, Amity University, who has also kindly allowed us to incorporate in the module a chapter from his book, "Muslim Law in India and Abroad" (Second edition).

12.02.2018

Committee for Developing a Module for Training of Lawyers

Justice Manju Goel
Former Judge, High Court of Delhi

Justice Rekha Sharma
Former Judge, High Court of Delhi

Justice Kailash Gambhir
Former Judge, High Court of Delhi

Shri P. Vishwanatha Shetty
Sr. Advocate, Supreme Court of India

Prof. P.S. Jaswal
Vice Chancellor, Rajiv Gandhi National University of Law

For the Coordinators and Resource Persons

–Justice Manju Goel (Retd.)[1]

Part 1 of the module was released in March 2015. Part 2 of the module dealing with certain core subjects was released in November 2016. The present book is Part 3 of the module. It is important to explain how to put the book to its best use. Hence I offer the following thoughts for the coordinators and the resource persons who may be entrusted with training of legal services lawyers on the basis of the present work.

WHO IS THE RESOURCE PERSON

Although, the work is produced entirely in Delhi, the actual training sessions are expected to be held at different centres of the country, wherever the legal services lawyers are to be trained. Actual training should preferably be conducted by an expert living in the same area or place where the training is to be done.

The resource person should ideally be an experienced Judge or a competent Advocate with good exposure at the Bench/Bar and who is capable of imparting information and expertise in the concerned areas.

After Part 1 was released under the instructions of the then Executive Chairman Mr. Justice T. S. Thakur, Judge Supreme Court of India, we proceeded to hold courses for Training of Trainers (ToT). In three batches we trained more than 100 lawyers, legal services personnel in training methodologies including communication skill necessary for the resource person to learn. The idea behind the ToT was that those trained can be invited to deliver the sessions not only forming parts of Part 1 but also of the subsequent parts.

HOW TO USE THE MODULES

Adult learners are different from the school students in as much as they already have some knowledge and information on the subject of training. The adult learners like to build on their already existing knowledge. It is also recognized that learning is faster by doing i.e. by applying the information imparted. Accordingly, in the modules we have included activities that make the participants work with their colleagues and use as well as challenge their existing knowledge. The modules are designed with a view to make the training process efficient and interesting. Each Module has two parts. The first part is the exercise/task for the live sessions of training. The second part consists of the necessary information to deal with the exercise/task. For best results, the information part given in 'short notes' should be used by the resource person for his/her preparation before conducting the actual live sessions. The same should also be used for validation. But the same should not be shared with the participants in advance. For every session the organiser/coordinator shall do well to photocopy the first set of pages containing the Module including the programme, exercises like group discussion, role play, experience sharing etc and provide them to the participants for the activities in the class. The "short notes" provided for each Module should not be handed over till the exercises are over. The resource person can refer to the short notes preferably before the actual session and shall share those at the end for the participants to read for themselves.

1 Former Judge, High Court of Delhi and Chairperson, Committee for Developing a Module for Training of Lawyers.

TIME MANAGEMENT

We have given a time management plan in each module. At times it may not be possible to strictly follow the plan as the actual time spent on each part of the module will vary depending upon participation of the groups. However, in case the time allotted turns out to be too short, the resource person may reorganize the time plan to cover the module. We are aware that the training sessions will throw up more questions than what can be dealt with within the given time, but the unanswered questions lead to a quest to be pursued beyond the sessions as well and, hence, would be welcome.

It is often found that the participants are keen for photographs while the sessions are on and thereafter in group and amongst themselves and with visiting dignitaries. While taking the photographs may take only a couple of seconds, organising the group takes much longer and at times the time taken for these photo shoots disturbs the schedule. The co-ordinator shall do well if appropriate arrangements and announcements are made in advance so that time for these activities can be squeezed into the format of time management

PHYSICAL ENVIRONMENT

The number of participants for a session should ideally be around 30. It will be greatly appreciated if the participants are not seated in any hierarchical manner. The seats, as far as possible should not be fixed to the floor so that they may be moved to make small groups. A thought should be given in advance to facilitate breaking the whole group into four or five small groups, as such breakout groups may need separate rooms/ spaces where they can carry out their discussion. The coordinator may form the groups in advance so that time is not lost during the session in dividing the whole group into smaller groups.

ICE BREAKING

A short ice breaking session is extremely useful to motivate the participants in any training session to open up, share and contribute to the discussions in the actual sessions. These ice breaking sessions ensure associative and active rather than passive participation. They are often interactive meaningful fun sessions before a full and focused programme is run. Some small examples are given below by way of suggestions:

1. Participants are divided into groups of two. Each participant is asked to introduce the group-mate by giving the usual information of name and work, adding thereto some interesting facts little known to others e.g. “My friend Rakesh is practicing on the Criminal side in the District Courts of Rohini. Now, he may look obese but he played football and was the captain of the school football team.”

2. Each participant is asked to introduce himself/herself with his/her name and work and say in one sentence what he/she expects to gain from the training. No one is allowed to repeat what a participant has already said.

3. Small games like dumb charades can also be added to the ice breaking activity.

TRAINING METHODOLOGY USED

a) Group discussion and presentation

Group discussions are meant to provide participants an opportunity to find answers to specific questions given to them with the help of their existing knowledge and

experience. In the process they feel to be important contributors in the process of training. They also learn by doing and such learning lasts longer. At the end of the presentation of the views by each group, the resource person may fill the gap in information with his/her own rich experience and learning and can refer to information on the subject given in the book.

b) Quiz

The quiz given in the modules is not meant to be used as a contest. It is meant to show to the participants that although the topics are familiar, there is still scope to learn about them. The resource person can open a discussion on questions that call for elaborate answers.

c) Experience Sharing

The lawyers participating in the programme are already into legal practice and have some experience in the topics they are being trained in. Experience sharing is the way of extracting from the participants themselves information on the subject for the session. The resource person may supply the information which is not provided by the participants in experience sharing. This method saves the participants of the monotony of hearing what they already know. At the same time, this makes the learning participatory since one person's experience informs the rest of the group. The resource person may supplement the information obtained by experience sharing so that the participants can receive full information.

d) Brainstorming

Brainstorming is thinking together. The participants are expected to discuss in whole group but before actual discussion, they are made to think on each sub-topic with the help of one of their fellow participants.

e) Role-Play

Role-Play is one of the best modes of learning by performing. For this exercise the whole group has to be divided in small groups, of say 5. While some participants perform the given role, the others watch and give their feedback. In the process, everyone learns what is intended to be imparted.

f) Snow balling and pyramiding

This method has been used in the session devoted to ethics. Each small group is required to provide 3 points and when the points were pooled on the flip chart or board the total number of points may become 15 or 16. The resource person can then identify which points have found repetition and hence more important to know.

TOOLS USED

i. Power Point Presentation

No one can ignore the importance of traditional teaching method of lecturing. PowerPoint presentations may be provided by the resource person to add values to the lectures. Further, the PowerPoint presentation makes the lectures more effective with audio-visual impact which in turn makes a lasting impression on the mental

horizons of the participants. PowerPoint presentation, if not prepared with sufficient acumen can be very distracting. We subscribe to presentations in which the slides show only a few words at a time so that the participants do not have to engage in reading the slides. In case a long sentence is required to be shown in the slide, the speaker should allow the participants to read the same by pausing his own lecture for a while. It is not a good idea to have long scripts on the power point slide which is not being read by the speaker but the participants are trying to read the slide and hear the speaker at the same time, not getting anything out of any of the two. The slides of the PowerPoint should not have long sentences. Paragraphs are entirely to be discarded. Only the point should appear on the slide so that the focus of the facilitator as well as the audience is retained. If the PowerPoint has reading material the attention of the participants gets divided between the words spoken by the resource person and the writing on the PowerPoint. Such a PowerPoint affects the quality of the lecture and so should be avoided. Pictures and short videos can be profitably used to add to the lecture.

ii. Flip Charts and Black Boards/White Boards/Computer Screens.

These are effective in emphasizing the point being discussed as the participants repeatedly look at the board and remind themselves of the point being taught. Flip charts are provided to the participants to write the result of their group discussion/ brain storming. After the flip charts are written they should be fixed on the walls with blue tack or by some other adhesive. They are very useful for going back to those points on the flip chart in the subsequent discussions or even for personal recalling, should a participant want to do so.

Needless to say that the ingenuity of the resource persons should not be curbed by the modules that we have designed. We shall gratefully welcome all suggestions which may come from the resource persons and the participants so that our work serves the cause better.

SCHEDULE OF THE TRAINING PROGRAMME
LEGAL SERVICES LAWYERS

DAY-I	
Duration	**Details**
9.45 AM to 10.30 AM	Inaugural Session
10.30 AM to 11.00 AM	Tea
11.00 AM to 11.45 AM	Ice Breaking
Session-I (11.45 AM to 1.15 PM)	Hindu Marriage Act
1.15 PM to 2.15 PM	**Lunch Break**
Session-II (2.15 PM to 3.45 PM)	Law of Marriage and Divorce Amongst Muslims, Christians, Parsis, Jews and Under Special Marriage Act, 1954
3.45 PM to 4.00 PM	Tea
Session-III (4.00 PM to 5.30 PM)	Law of Maintenance to Wife
DAY-II	
Session –IV (9.45 AM to 11.15 AM)	Professional Ethics For Lawyers
11.15 AM to 11.30 AM	Tea
Session –V (11.30 AM to 1.00 PM)	Law of Property
1.00 PM to 2.00 PM	Lunch Break
Session –VI (2.00 PM to 3.30 PM)	Property Rights of Women under Hindu Law
3.30 PM to 3.45 PM	Tea
Session –VII (3.45 PM to 5.15 PM)	Consumer Protection Act, 1986.
5.15 PM to 5.45 PM	Preparation for the next day.
DAY-III	
9.30 AM to 10.15 AM	Clarification and Recapitulation
Session-VIII (10.15 AM to 11.45 AM)	Property Rights of Women Under Muslim Law
11.45 AM to 12.00 Noon	Tea
Session-IX (12.00 Noon to 1.30 PM)	Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.
1.30 PM to 2.30 PM	Lunch Break
2.30 PM to 3.00 PM	Writing Parting Messages
3.00 PM to 4.00 PM	Writing Feedback
4.00 PM to 4.15 PM	Group Photo & Tea
4.15 PM to 5.00 PM	Valedictory Session
HIGH TEA	

Session I
Total Time: 90 minutes

MODULE FOR TRAINING OF LEGAL SERVICES LAWYERS

ON

HINDU MARRIAGE ACT

–Justice Manju Goel[1]

SESSION PLAN

Objective

1. To inform the legal services lawyers of the basic concepts of Hindu marriage.
2. To inform the legal services lawyers of the various reliefs available under the Hindu Marriage Act.
3. To inform the legal services lawyers of the nuances of the three most frequently used grounds for divorce namely: cruelty, desertion and mutual consent.
4. To apprise the legal services lawyers about the right manner of conducting themselves in a matrimonial dispute.

Expected learning outcome

1. The legal services lawyers will be sensitized about the concept of Hindu Marriage
2. The legal services lawyers will be able to handle matrimonial disputes in Courts/ Family Courts
3. The legal services lawyers will be of assistance to the Courts and Family Courts

Programme

1. Introduction by resource person 10 minutes

The resource person shall introduce the Hindu Marriage Act, 1955 as it now stands after giving the historical perspective and delineating the salient features of the Act.

2. Group Discussion 20 minutes

The participants will be divided in groups of 5 or 6. Some groups will be given Reading I while the others will be given Reading II. They will do the given exercises and form their answers.

3. Presentation by each group 30 minutes
(15 minutes for each group)

4. Whole group discussion assisted by resource person 10 minutes

Discussion should include skill of drafting in Reading II.

1 Former Judge, High Court of Delhi

5. **Whole Group Discussion assisted by resource person on the role of a lawyer in a matrimonial dispute** 15 minutes

6. **Concluding remarks by one of the participants/resource person/visiting dignitary** 05 minutes

Training method

1. Lecture
2. Group Discussion
3. Whole Group Discussion

Note: The resource person will pool the points on the flip chart/white board. He/she may prepare a power point for the lecture.

Tools required

1. Facility for power point presentation
2. Flip chart
3. Pens
4. Blue tack
5. White board

Reading for Group Discussion- I

Sameer, the petitioner husband sued his wife Neha for divorce alleging that she is guilty of adulterous course of life. According to him, he began suspecting her of infidelity and when questioned, she admitted the same and asked to be pardoned. It was also averred that she concealed her treatment in a Mental Hospital for Schizophrenia but her father fraudulently represented that she was treated for sun-stroke and cerebral malaria.

The wife denied flatly the allegations of adultery stating that she never made any such admission and held it to be a false allegation. For the second allegation she placed on record a letter which showed the communication between her father and the husband's father which stated, *"...after a course of treatment at a Mental Hospital, she was cured, you find her as she is today. If necessary, we can discuss the matter, with the doctors of the Mental Hospital or with one Dr. Das, the doctor who treated her. This letter was written avowedly in order that your family should not be in the dark about an important episode in the life of my daughter, which fortunately, had ended happily".*

She counter alleged in her written statement that her husband has lost his mental equilibrium and is in a morbid mind for which he needs expert psychiatric treatment to make him act as a normal person. She also alleged that the husband suffers from paranoid disorders and mental hallucinations. She also alleged that he is incoherent in his thinking and needed treatment by a psychiatrist for restoration of normal mental health. Further she stated that all the members of the husband's family were lunatics with a streak of insanity running in the entire family. Nonetheless she was prepared to live with the husband in a normal matrimonial relationship. It was also stated that the husband was making attempts to obtain divorce by consent from the wife before a petition for divorce was filed.

The husband then amended his petition to say that the allegations of the streak of insanity running in the family and accusation of his having hallucinations and paranoid disorder caused immense mental cruelty to him and therefore on this ground alone a decree for divorce be granted.

Activity 1

1. What is cruelty according to the Hindu Marriage Act, 1956?
2. Can the allegations made by the wife in her written statement in the case study constitute mental cruelty under Section 13(1)(ia) of the Hindu Marriage Act?
3. Is concealing of mental illness from the spouse before marriage an act of cruelty?
4. What legal action could the petitioner have taken for concealment of the fact that the wife had suffered mental illness before marriage and had been treated for the same?

Activity 2

1. Comment on the skill of the lawyers of the two sides.

Reading for Group Discussion- II

In the petition filed before the Family Court, it was averred by the husband that after the marriage the husband and the wife stayed together for one and a half years in their matrimonial home. But from the very first day the wife was non-cooperative, arrogant and her behaviour towards the family members of the husband was unacceptable. It was pleaded that the wife having left the matrimonial home to live with her parents, took away all her belongings and that she had deserted him severing all ties. All the efforts by the husband to bring her back in the last five years became an exercise in futility inasmuch as the letters written by him and phone calls were never replied. Despite the non-responsive attitude of the wife, he, without abandoning the hope for reconciliation for leading a normal married life, went to the house of his in-laws, but her parents ill-treated him by forcibly throwing him out of the house. Her leaving the matrimonial home was considered an act of desertion and withdrawal from her matrimonial obligations and the husband sought for divorce under Section 13(1)(ib) of the Hindu Marriage Act, 1956.

The wife denied all allegations made in the divorce petition and rather alleged that she was always treated as an intruder and a maid servant by the family members of her husband. She averred that at times she was cursed, abused, scolded and her husband used to slap her in the presence of others to denigrate her. The wife also denied that she ever took away any of her articles and rather such articles, excluding jewellery, were returned by her husband before Crime Against Women Cell (CAW). It is also alleged by him that by now they have been living apart for a considerable period of time and there is no feeling of love left between them and as such the marriage has broken down irretrievably and therefore the marriage should be dissolved.

She alleged that her husband had been demanding money on various occasions and her father gave him some money towards cost of construction of a house purchased by the husband, but he was not satisfied. She further alleged that she was harassed and beaten and the husband threatened to injure her and thus, she left her matrimonial home to live with her parents. As set forth, the conduct of the husband caused immense mental hurt and trauma, and she suffered unbearable mental agony when her husband ill-treated her and so she chose not to communicate with him in whatsoever manner though he tried to contact her at times.

It is in evidence that the wife has filed a complaint against the husband in the CAW Cell and that the husband returned the jewellery in the conciliation proceeding in the CAW Cell. It is also in evidence that the wife has obtained an order for grant of maintenance and the husband has not been regular in complying with that order. The husband, though he filed an affidavit to prove his allegations, admitted during cross examination of accusing the wife of having killed the son, not making any effort to meet the son even once and of leaving the house in order to insist that the wife leaves the matrimonial home and of returning only after she was taken away by her parents. The wife's affidavit alleged that she was a victim of domestic violence and was compelled by her husband and other members of his family to leave the matrimonial home. She also pleads that the husband himself being guilty of cruelty cannot seek dissolution of marriage on the ground of irretrievable breakdown.

Activity for group discussion

1. What is desertion according to Section 13(1)(ib) of the Hindu Marriage Act, 1956?

2. In the above case study, what is your opinion on the husband's claim that his wife deserted him?

3. Should the Court dissolve the marriage as no love is left between them and the marriage has broken down irretrievably?

SHORT NOTE

ON

HINDU MARRIAGE ACT

-Justice Manju Goel[1]

Introduction

Marriage in this country was a well-established institution right from the early days and instructions about marriage can be found in the Rig Veda itself. Hindu marriage has been recognised as a sacrament and an essential religious ceremony or *samskara*. The concept of the *'samskara'* of marriage was transfer of dominion over the maiden from the father to the bridegroom and in this process absorption of the maiden in the family of the husband once and for all whereby she obtained a position of honour and authority in her new home. Marriage was considered a necessity for both men and women unless they aspired for the life of a 'bramachari' or 'sanyasi' for only with marriage a man could perform properly his religious and secular obligations. The participation of the wife in several religious ceremonies was essential. Further, only a son begotten from such a marriage could perform the ceremonies for salvation.

Vedic marriage, despite having several forms, was primarily monogamous. Polygamy was approved form of marriage. No sastrik law approved of Polyandry. There was no sanction for divorce and no concept of women marrying more than once. Widows were not allowed to marry. There was no prescribed minimum age for marriage and early marriage was considered a good practice and beneficial for the parents of the maidens.

Influence of the western culture coupled with endeavour of some social thinkers caused awakening against such practices dealing with marriage. The oppressive caste system was posing a problem for many young men and women who wanted to marry outside their caste. The Sikhs had evolved their own ritual of marriage called Ananda marriage. The Arya Samaj which denounced the caste system had started performing inter caste Hindu marriage.

Reforms

The Hindu Widow's Remarriage Act came into existence in 1856. With the new law widows got the capacity to marry and marriage of widows, before and after the enactment was validated. Simultaneously, remarried widows lost all their rights and interest in the deceased husband's property.

Special Marriage Act came in 1872 which brought in vogue marriage of entirely civil nature. The Act was amended in 1923 and was eventually replaced by the Special Marriage Act of 1954. The Special Marriage Act permits marriage between any two individuals without any restriction regarding caste or religion, provided they fulfil certain eligibility conditions which are quite similar to those mentioned in the Hindu Marriage Act, 1955.

Divorce through court of law was made available by Special Marriage Act. Void and voidable marriages could be annulled. The concepts of judicial separation and restitution of conjugal rights were also incorporated in the Act.

1 Former Judge, High Court of Delhi

Arya Marriage Validation Act, 1937, later amended in 1940, validated the marriages performed by Arya Samaj between persons of different castes and sub-castes and between Hindus and non-Hindus and between non-Hindus.

By 1955, the time was set for a full-fledged reform of Hindu Marriages. Hindus, who wanted the kind of freedom offered by the Special Marriage Act but did not want the consequences of marriage under that Act in the matter of succession, looked for similar provisions for Hindu Marriages. The concept of divorce had already been introduced by the Divorce Act that applied to Christians. Monogamy was the accepted social norm for India and West and the time was right to end polygamy. The Hindu Marriage Act, 1955, thus, was enacted to, "*amend and codify the law relating to marriages among Hindus"*.

This Act does not define a marriage nor does it say that Hindu marriage is a sacrament. The Act does not convert a Hindu Marriage into a contract like the marriage amongst the Muslims. Nonetheless certain elements of contract, like consent, have been introduced by this Act. The provision for dissolution of marriage by a decree of divorce by a Court is introduced unlike the Muslim marriage which can be dissolved even without intervention of the court of law. Certain conditions are necessary for a valid marriage which are available in Section 5 of the Act. In case any of these conditions is not met the marriage maybe void or voidable. Section 11 prescribes that any marriage solemnised after commencement of the Act shall be null and void and maybe so declared by a decree of nullity if it contravenes the conditions specified in clauses i, iv and v of Section 5. These conditions are as under:

i. Neither party has a spouse living at the time of marriage,

ii. The parties are not within the degrees of prohibited relationship unless the custom and usage governing each of them permits marriage between the two.

iii. The parties are not *'sapindas'* of each other unless the custom or usage governing each of them permits a marriage between the two.

Degrees of prohibited relationship has been defined in clause (g) of Section 3. Two persons are said to be within the degrees of prohibited relationship if:

1. One is the lineal descendant of other.
2. One was the wife or husband of lineal ascendant or descendant of other.
3. If one was the wife of the brother or of the father or mother's brother or grandfather or grandmother of the other.
4. If the two are brother and sister, uncle and niece, aunt and nephew or children of brother and sister or of two brothers or two sisters.

Sapinda relationship is defined in Clause (f) of Section 3. *"Sapinda relationship"* with reference to any person extends as far as three generations in line of ascent of mother and fifth generation in the line of ascent of their father. Two persons are said to be sapindas of each other, if one is the lineal descendant 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.

Hindu marriage can be annulled by a decree of nullity if a marriage is voidable. Marriage is voidable if the same contravenes Clause ii of Section 5 namely, if any party was incapable of giving valid consent on account of unsoundness of mind or on account of some

mental disorder to such an extent as being unfit for marriage or procreation of children or has been subject to recurrent attacks of insanity. The other situations when the marriage is voidable are that the marriage has not been consummated on account of impotence or the consent was obtained by force or fraud or that the respondent was at the time of marriage pregnant by some person other than the petitioner. The conditions under which the petitions for annulment for marriage cannot be filed are mentioned in Sub-Section 2 of Section 11.

The grounds on which Hindu marriage can be dissolved are available in Section 13 of the Hindu Marriage Act. Briefly stated the grounds are adultery, cruelty, desertion, conversion to another religion, unsoundness of mind, virulent or incurable form of leprosy, venereal disease, renunciation of the world or not being heard of for 7 years. Apart from these grounds any of the parties to a marriage can seek divorce on the ground that there has been no resumption of cohabitation for a period of 1 year or more after passing of a decree for judicial separation or of restitution of conjugal rights. The wife can file a petition for dissolution of marriage on the ground that the husband had married again or had a wife living when the marriage was performed before the commencement of Hindu Marriage Act, 1955. If the husband is guilty of rape, sodomy or bestiality, the same could also be a ground for divorce. In case the marriage was solemnised before the woman attained the age of 15 years and she repudiated the marriage after attaining that age but before attaining the age of 18 years, the wife can seek a decree for divorce. A woman can also seek divorce if cohabitation between the parties has not resumed after an order for maintenance is passed under Criminal Procedure Code when the parties live apart.

A decree for judicial separation can be passed as an alternative to divorce in certain cases if the Court considers the same as just to do so.

The provisions of Section 13(B), of divorce by mutual consent, were introduced in the Act by an amendment in 1976. The pre-condition of availability of this provision is that the parties have been living apart for 1 year or more. A very important condition imposed is that the parties have to wait for 6 months after a motion for decree of divorce on mutual consent is made. A petition for divorce can be filed only after 1 year of solemnisation of marriage although the Court is empowered to allow a petition to be presented within a period of 1 year.

Each of the grounds for divorce can be amenable to long discussions. However the most frequently used grounds of divorce are cruelty and desertion. Accordingly, the discussion that follows deals with these two grounds. The other current issues in the area of dissolution of Hindu marriage are also dealt with hereunder.

Cruelty

The Marriage Laws (Amendment) Act, 1976, made cruelty a ground for divorce. In the original Act, it was a ground only for judicial separation and the petitioner was required to prove that the respondent had treated him or her with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. But with the amendment, if it can be proved that the petitioner was treated with cruelty after the solemnisation of the marriage, then it becomes a ground for divorce.

It is difficult to define *'cruelty'* for the purpose of divorce. In *Shoba Rani v Madhukar Reddi, 1988 SCR (1)1010,* the Supreme Court held:

"The word 'cruelty' has not been defined. Indeed it could not have been defined.

It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree.

If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted."

Again the Supreme Court in *Samar Ghosh vs. Jaya Ghosh, (2007) 4 SCC 511,* reiterated its stance that there cannot be a comprehensive definition for cruelty but it laid down certain instances which could be deemed cruel. They are as follows:

"(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make it possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannotreasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty. Frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv)Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi)Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very

grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations,

it may lead to mental cruelty."

In *K. Srinivas Rao v D.A. Deepa, 2013(5) SCC 226,* the Supreme Court observed:

"In a series of judgments this Court has repeatedly stated the meaning and outlined the scope of the term 'cruelty'. Cruelty is evident where one spouse has so treated the other and manifested such feelings towards her or him as to cause in her or his mind reasonable apprehension that it will be harmful or injurious to live with the other spouse. Cruelty may

be physical or mental…….

Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse".

The case in Reading I has been taken from the case of *V. Bhagat v D. Bhagat, 1994 SCC (1) 337.* In this case, the husband amended his petition and he alleged a new ground of divorce viz., mental cruelty as according to him, the averments made in the written statement of his wife constitute an act of mental cruelty. The Supreme Court held that:

"Even so, allegations of 'paranoid disorder', mental patient', 'needs psychological treatment to make him act a normal person' etc. are there coupled with the statement that the petitioner and all the members of his family are lunatics and that a streak of insanity runs through his entire family. These assertions cannot but constitute mental cruelty of such a nature that the petitioner, situated as he is and in the context of the several relevant circumstances, cannot reasonably be asked to live with the respondent thereafter. The husband in the position of the petitioner herein would be justified in saying that it is not possible for him to live with the wife in view of the said allegations".

Desertion

Desertion is a ground of divorce under the Hindu Marriage Act, 1955. According to Section 13 (1) (ib) when one of the parties to the marriage has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition a ground for divorce is created.

The High Court of Delhi in *Dharam Dev Malik v. Smt. Raj Rani, AIR 1984 Delhi 389,* defined desertion as, *"the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligation of marriage. The inference of desertion has to be made on a balance of probabilities".*

The Supreme Court in *Bipin Chander Jaisingh Bhai Shah vs Prabhawati, AIR 1957 SC 176, 1956 SCR 838,* laid down two essential elements of desertion. It was held that:

"For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2)

the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned:

(1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid".

In *Ravi Kumar vs Julmi Devi, (2010) 4 SCC 476,* the Supreme Court has observed as under:-

> *"13. It may be noted only after the amendment of the said Act by the Amending Act 68 of 1976, desertion per se became a ground for divorce. On the question of desertion, the High Court held that in order to prove a case of desertion, the party alleging desertion must not only prove that the other spouse was living separately but also must prove that there is an animus deserendi on the part of the wife and the husband must prove that he has not conducted himself in a way which furnishes reasonable cause for the wife to stay away from the matrimonial home."*

The High Court of Delhi reiterated the views taken by the Supreme Court in *Ravi Kumar (Supra),* in *Nisha Rani v. Sohan Singh Nehra, Judgment dated 06.01.2017* and held that:

> *"The desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave, the desertion could be by such conduct of other spouse and compelled to live separately".*

The facts of Reading II have been taken from the case of *Nisha Rani v. Sohan Singh Nehra (Supra)*. On examining the facts provided, the Court said:

> *"20. Thus, the facts above do show that appellant was forced by the conduct of the respondent to leave the matrimonial home and that it is the respondent who is guilty of constructive desertion and had made the appellant and her daughter run from pillar to post even for their bare minimum maintenance and had rather failed to prove the behaviour of the appellant towards him was such that it ever caused a reasonable apprehension in his mind that it was not safe for him to continue the matrimonial relations with the appellant. The respondent herein had failed to bring his case within the parameters of cruelty and desertion as defined and as such, we set aside the impugned judgment dated November 22, 2013 of the learned Judge, Family Court, Dwarka in HMA No.444/2009 tilted "Sohan Singh Nehra vs Nisha Rani".*

Irretrievable breakdown of marriage

Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. Only the Supreme Court in its discretion under Article 142 of the Indian Constitution can grant such prayers to a warring petitioner. In *K. Srinivas Rao v D.A. Deepa, 2013(5) SCC 226,* the Supreme Court held:

> *"Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. This is*

because marriage involves human sentiments and emotions and if they are dried up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree".

The Law Commission 71st Report on the Hindu Marriage Act, 1955, in para 6.5 mentions about Irretrievable Breakdown of Marriage as a Ground of Divorce. It is stated thus:

"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".

In *Vishnu Dutt Sharma v. Manju Sharma, (2009) 6 SCC 379,* the wife filed a divorce petition on the ground of cruelty. Having failed to prove cruelty, the petitioner requested the Hon'ble Supreme Court, in appeal to dissolve the marriage on the ground of its irretrievable breakdown. The Supreme Court held:

"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…… 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".

Nonetheless the Supreme Court is seen to have passed decrees for divorce in several cases on the ground that the marriage had completely broken down and where there was no hope of the parties coming together and cohabitating. In *Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558,* the Supreme Court granted the divorce with such observations. The Supreme Court ended the judgment with the following comments:

"Before we part with this case, on the consideration of the totality of facts, this Court would like to recommend the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce. A copy of this judgment be sent to the Secretary, Ministry of Law & Justice, Department of Legal Affairs, Government of India for taking appropriate steps".

Mutual consent

Dissolution of a marriage by a decree can be sought for when there is mutual consent amongst the husband and wife. Such dissolution of marriage is given in Section 13B of the Hindu Marriage Act, which is extracted below:

> *"(1) Subject to the provisions of this Act 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 (68 of 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.*
>
> *(2) On the motion of both the parties made, not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, 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 to be dissolved with effect from the date of the decree".*

The Supreme Court in *Smt. Sureshta Devi vs Om Prakash, AIR 1992 SC 1904*, observed that:

> *"Sub-section (2) requires the Court to hear the parties which means both the parties. If one of the parties at that stage says that "I have withdrawn any consent" or "I am not a willing party to the divorce" the Court cannot pass a decree of divorce by mutual consent. If the Court is held to have the power to make a decree solely based on the initial petition it negates the whole idea of mutuality and consent for divorce. Mutual consent to the divorce is a sine qua non for passing a decree for divorce under Section 13-B. Mutual consent should continue till the divorce decree is passed it is a positive requirement of the Court to pass a decree of divorce. The consent must continue to decree nisi and must be valid subsisting consent when the case is heard".*

In the case of *Nikhil Kumar v. Rupali Kumar, 2016 (4) SCALE 621,* the parties who held graduate degrees could not work out their marriage and so sought for divorce by mutual consent on 29.03.2016. The Family Court granted the First Motion on 01.04.2016 and the matter was posted in the month of October, 2016. The appellant filed the appeal praying for waving the six months waiting period. The Supreme Court held that in Divorce by Mutual Consent under Section 13 B(1) of the Hindu Marriage Act, six months waiting period required by the section can be waived by invoking jurisdiction Article 142 of the Constitution. The relevant extract of the judgment is extracted below:

> *"8. Having regard to the educational background of the appellant as well as the respondent, and the entire facts and circumstances, we feel*

that it is a very peculiar situation where this Court should invoke its jurisdiction under Article 142 of the Constitution of India for doing complete justice between the parties. We do so.

9. In the above circumstances, the statutory period of six months is waived and the marriage between the parties is dissolved."

In cases where the husband and wife resolve to end the dispute and reach a settlement in divorce matters, such cases can be converted to divorce petition under Section 13 B of the Hindu Marriage Act. In *Anju Garg v Vikas Garg, 2015(2) R.C.R.(Civil) 524,2015(2) Apex Court Judgments (SC) 80,* the parties were living separately and several criminal and civil cases were filed against each other. The matter reached before the Supreme Court in a transfer petition. The parties then requested to adjourn the matter to enable them to settle the dispute amicably. The parties entered into a settlement where the husband promised to pay one time permanent alimony to his wife. The Supreme Court called for record of all cases and quashed the proceedings and the parties were given the liberty to file joint petition for dissolution of marriage by mutual consent under Section 13-B of Hindu Marriage Act. The Supreme Court also directed that if the petition was filed within 15 days, the Family Court will waive statutory period in view of the fact that parties were living separately for more than 2 years.

The Supreme Court by a recent judgment in the case of *Amardeep Singh v. Harveen Kaur, (2017) 8 SCC 746***,** decided on 12-09-2017 held that the provision under Section-13B of The Hindu Marriage Act, requiring the parties to wait for 6 months after the first motion is filed before a decree for divorce by mutual consent is passed is only directory and not mandatory. The Supreme Court has ruled that in appropriate cases the 6 months period can be waived by the Civil Court or the Family Court. Paragraph 21 of the Judgment is extracted below:

"21.Since we are of the view that the period mentioned in Section 13B(2) is notmandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation."

Comments on Lawyering Skill in Reading II

The petition originally drafted was not a good work. It is very difficult to prove adultery. In case such was the demand of the client, the client should have been advised to obtain sufficient evidence for such allegations. For proving adultery it is necessary to prove that the wife had sexual intercourse with somebody other than the husband. Mere friendship or intimacy and even romantic involvement, short of sexual relationship would not amount to adultery.

The grounds in the divorce petition were weak as there was sufficient evidence that the wife's father had disclosed the fact of her being treated for mental illness. Further there was no evidence of adultery. As such it would have been sufficient to deny the grounds of divorce set up by the husband. It was a mistake on the part of the defence lawyer to plead the allegations of the petitioner's family being a bunch of lunatics, the streak of mental illness running through the family, the husband having hallucinations or paranoid disorders. Such

pleas actually gave a lever in the hands of the husband/petitioner to seek divorce on the grounds of such cruelty.

The petitioner's lawyer showed wisdom by picking up the allegations in the reply and making them his own grounds for seeking divorce.

Duties of a lawyer in a matrimonial dispute

The lawyers are the officers of the Court in the sense that their duty is to assist the Court in arriving at the right conclusions and in delivery of justice. They are also representatives and friends of the parties. A matrimonial case is distinct from all other types of cases. A lawyer, particularly a legal services lawyer should understand the distinction between a matrimonial case and other cases in order to perform in a just and fair manner as a lawyer to one of the two parties so that he adopts an appropriate attitude in these matters.

While other civil litigations may deal with properties, services or business of a person, a matrimonial litigation squarely deals with the personal lives of the contracting parties. By the time the parties are in Court, they are already in great distress and feel wronged and ruined. The parties are deeply concerned with their present and future. Apart from the two parties, namely the husband and the wife, several other persons like the parents and the children also get affected when a marriage is on the verge of collapse. The parties are so shaken by the dispute that both the judge and the lawyers need an extra degree of sensitivity to deal with them.

The lawyers should treat the clients kindly and in a friendly manner and should help them to adopt an attitude of resolving the dispute rather than winning a litigation. The lawyer should inform the parties about the desirability as well as availability of services like counselling and mediation and wherever possible lead them to one such centre. In case mediation/counselling does not succeed in reconciliation, the parties should be advised for divorce by mutual consent.

The next duty of the counsel is to inform the parties concerned of the consequences of a decree for divorce. The husband should be informed of the liability to maintain the wife and the children as also the likely amount which might be fixed as monthly maintenance. The parties should be briefly told how the custody issues are settled and that although one party may have the custody the other party may have the visitation rights. The Court may also direct joint custody in which both parties share the responsibilities. Therefore, both parties should be advised not to create any bitterness in the mind of the child about the other parent.

The lawyer should also take care not to call the parties repeatedly and not to seek adjournments as far as possible. The lawyer should be able to demonstrate his lawyering skill. But more importantly, he should demonstrate that he is a true friend of his client without, however, undermining his own assignment and profession.

When the case is over, he should take leave of his client with the assurance that his services will be available, should such a need arise in the future also.

Session II
Total time: 90 minutes

MODULE FOR TRAINING OF LEGAL SERVICES LAWYERS

ON

LAW OF MARRIAGE AND DIVORCE AMONGST MUSLIMS, CHRISTIANS, PARSIS, JEWS AND UNDER THE SPECIAL MARRIAGE ACT, 1954

- Ms Geetanjli Goel[1]

SESSION PLAN

Objectives

1. To inform the participants about the different aspects of the law relating to marriage amongst the Muslims, Christians, Jews, Parsis and under the Special Marriage Act, 1954.

2. To provide the young lawyers an insight into the grounds for divorce available to the different communities and the legal framework governing family disputes.

Expected learning outcomes

1. The legal services lawyers will be equipped with the relevant information required to handle cases of marital disputes amongst the different communities.

2. The legal service lawyers will learn to find the law for themselves and to assist the courts in matters relating to marriage and divorce amongst the different communities.

Programme

1. Introduction 10 minutes

The resource person will introduce the subject by telling how the different communities are governed by their personal laws in matters of marriage and divorce and how the law has made inroads in certain spheres and how broadly family relationships are similar despite differences in personal law.

2. Group Discussion 30 minutes

The whole group will be divided into small groups of 5 or 6. The groups will be given the case studies as provided here for group discussion/ activity. The groups will try to find answers to the questions given in the activity sheet.

3. Presentation by groups and whole group discussion 20 minutes

The groups will make their presentations and present their views and a discussion will follow lead by the resource person. The resource person will provide the points not covered.

1 Special Secretary, Delhi State Legal Services Authority and Officer of Delhi Higher Judicial Service

4. Lecture by resource person 20 minutes

The resource person will cover the areas not covered thus far.

5. Concluding remarks 10 minutes

Concluding remarks will be given by the resource person/one of the participants/the visiting dignitary.

Training Method

1. Lecture and/ or power point presentation
2. Group Discussion

Tools Required

1. Flip Chart
2. White board with white board pens
3. Facility for making a power point presentation

Reading for Group Discussion - I

Saima got married to Sultan on 2.4.2004 according to Muslim rites. The parties lived together till 8.4.2005. On that day, according to Saima, she was thrown out of the house on account of non-fulfillment of dowry demands whereas according to Sultan, Saima left the house without informing him and out of her own will. On 22.10.2005, Saima gave birth to a daughter. Towards the end of October, 2005, the brother in law and sister of Sultan attempted to arrange for the return of Saima to her matrimonial home but in vain. On coming to know of the failure of the mission, according to Sultan, he became very sad and extremely angry and in his mental condition, in the presence of his brother in law and another man, he uttered the words giving talaq to Saima approximately three times or more. He thereafter forgot the incident and continued to make efforts for the return of his wife. The factum of the purported talaq was not communicated to Saima. On 23.3.2006, Sultan, wanting the return of his wife filed a suit for restitution of conjugal rights stating that Saima was still his wife.

The purported talaq of October 2005 was not mentioned in the plaint. On 13.4.2006, on the basis of the statements of the parties that Saima was ready to join the company of Sultan, the suit was disposed of. Saima returned with Sultan to their matrimonial home on 13.4.2006 from the court itself. Subsequently, a second nikah was performed between the parties on 19.4.2006 which according to Saima, she got to know about only upon receiving a duplicate copy of the nikahnama from the Qazi who performed the ceremony. According to Sultan, the nikah was necessitated because after the settlement of 13.4.2006, he was reminded by his brother in law that he had already divorced Saima by way of a triple talaq in October, 2005. He did not want any illegitimacy in his marital status so he sought an opinion from a mufti who gave a fatwa that three talaqs pronounced in one sitting would be regarded as one talaq e rajai and consequently Sultan could have taken back Saima during the iddat period of three months. But as that period had elapsed, Sultan and Saima could renew their matrimonial relationship only by performing a fresh nikah. Accordingly, the second nikah was performed on 19.4.2006 which was witnessed by Saima's brother who also signed as a witness on the nikahnama. It was alleged by Saima that the factum of the nikah was not in her knowledge and came to light much later before the CAW Cell and according to her, the signatures were taken on the pretext that the documents had to be filed in court as a formality.

After her return to her matrimonial home on 13.4.2006, Saima continued to reside with Sultan. Once again, there was discord between them and Sultan pronounced talaq on 28.8.2006. Saima was thereafter living at her parental home. On 6.9.2006, she filed a complaint before the CAW Cell. According to her, during the inquiry, it came to light that Sultan had given her talaq in October, 2005 and this was disclosed by Sultan on 3.10.2006 when he appeared before the CAW Cell. Saima then alleged that she for the first time came to know that a fraud had been played upon her and Sultan had sexual intercourse with her between 13.4.2006 and 19.4.2006 when, in law, he was not her husband. She thereafter lodged a complaint alleging rape and FIR was registered. Thereafter Sultan sought bail.

Find answers to the following questions in a group discussion:

1. Whether a valid talaq took place in October, 2005?
2. Whether communication of talaq to the wife is necessary, and if so, why?
3. What is the effect of second nikah on 19.4.2006?

(The facts of this case have been taken from the judgment of the High Court of Delhi in *Masroor Ahmed v. State (NCT of Delhi) and Another, 2008 (103) DRJ 137* though the names have been changed).

Reading for Group Discussion– II

Sakina Bibi and Rafiq were married some time in 1968 according to Muslim law. Four sons were born out of the wedlock. On 12.4.1979, Sakina Bibi, on behalf of herself and for her two minor children, filed an application under Section 125 Cr.P.C. complaining of desertion and cruelty on the part of Rafiq with her. Rafiq in his written statement dated 5.12.1990 denied all the averments made in the application and took the additional plea that he had divorced Sakina Bibi on 11.7.1987 and since then the parties had ceased to be spouses and therefore, Sakina Bibi was not entitled to any maintenance. No particulars of divorce were pleaded excepting making a bald statement regarding the divorce. Sakina Bibi denied any such divorce.

Find answers to the following questions in a group discussion:

1. Whether a valid talaq had taken place, and if so from when?

2. Whether communication of talaq to the wife is necessary, and if so, why?

(The facts of the case have been taken from the judgment of the Supreme Court in *Shamim Ara v. State of UP and Anr., AIR 2002 SC 3551* though the names of the parties have been changed)

SHORT NOTE

ON

LAW OF MARRIAGE AND DIVORCE AMONGST MUSLIMS, CHRISTIANS, PARSIS, JEWS AND UNDER THE SPECIAL MARRIAGE ACT, 1954

– Ms. Geetanjli Goel[1]

In India, the field of family law is quite diverse. This is because different communities are allowed to follow their personal law in matters such as marriage, divorce, inheritance, custody except to the extent that they might have been regulated by some law. Thus customs, beliefs and religious tenets hold field in the area of family law. Hindus, Jains, Sikhs and Buddhists are governed by Hindu Law, much of which has now been codified (which has been dealt with in a separate section), Muslims by their own personal law and Parsis and Christians by their respective laws.

A. Muslim Law

A.1.1 Muslim law applies to all Muslims, whether they are so by birth or by conversion. A Muslim is anyone who professes the religion of Islam i.e. accepts the unity of God and that Muhammad is his Prophet.

A.1.2 For getting a better picture about Muslim law, it is necessary to know about the sources of Muslim law and the different schools of Muslim law. The law as it exists today is the result of a continuous process of development during the fourteen centuries of existence of Islam. Islamic jurisprudence (*fiqh)* has developed from four roots (*usul al-fiqh)*:

a) Express injunctions of the Koran which contain the very words of God and are the primary source;

b) *Hadis* or Sunna – practice of Prophet though as per one view, sunna is not so much the practice introduced by the Prophet as the practice of the Uniayyads of Damascus, supported by tradition of the Prophet and in some cases the pre-Islam custom accepted by the Prophet;

c) When the opinion of the jurists coincides on a point, it is known as *ijma* or consensus;

d) When the opinion of the jurists does not coincide, it is called *qiyas* or analogical deduction.

The latter three are secondary sources and the last two refer to the interpretations placed by jurists on Koranic verses.

As referred to in the judgment of the High Court of Delhi in *Masroor Ahmed v. State (NCT of Delhi) and Another, 2008 (103) DRJ 137 :*

> *"employing these usul al-fiqh, the ulema (the learned) conducted a scientific and systematic inquiry. This is known as the process of ijtihad.*

1 Special Secretary, Delhi State Legal Services Authority and Officer of Delhi Higher Judicial Service

Through this process of ijtihad sprung out various schools of law each of which owed its existence to a renowned master. For example, the jurisprudence (fiqh) developed by Abu Hanifah and continued by his disciples came to be known as the Hanafi school. The Maliki school owed its origin to Malik b. Anas, the Shafie school to al-Shafi'I, the Hanbali school to Ibn-Hanbal and so on. These are the sunni schools. Similarly, there are shia schools such as the Ithna Ashari, Jaffariya and Ismaili schools. In India, Muslims are predominantly sunnis and, by and large, they follow the Hanafi school. The shias in India largely follow the Ithna Ashari school.

14. In essence, the Shariat is a compendium of rules guiding the life of a Muslim from birth to death in all aspects of law, ethics and etiquette. These rules have been crystallized through the process of ijtihad employing the sophisticated jurisprudential techniques. The primary source is the Quran. Yet, in matters not directly covered by the divine book, rules were developed looking to the hadis and upon driving a consensus. The differences arose between the schools because of reliance on different hadis, differences in consensus and differences on qiyas or aql as the case may be.

15. The question which arises is, given the shariat and its various schools, how does a person proceed on an issue which is in dispute. The solution is that in matters which can be settled privately, a person need only consult a mufti (juriconsult) of his or her school. However, if a matter is carried to the point of litigation and cannot be settled privately, then the qazi (judge) is required to deliver a qaza (judgment) based upon the Shariat. The difference between a fatwa and a qaza must be kept in the forefront. A fatwa is merely advisory whereas a qaza is binding. Both, of course, have to be based on the shariat and not on private interpretation de hors the shariat."

Thus, there are several schools of Muslim law and when a case arises, it is for the judge to first determine the law of the school or the sub-school which is applicable. In *Bafatun v. Bilaiti Khanum, (1903) 30 Cal 683,* it was observed that in India 'there is a presumption that the parties are Sunnis, to which the great majority of the Mahomedans of this country belong, as has been pointed out by Baillie in the Introduction to his Digest of the Imameea law'. But while this is so, the Shiite law is also the law of the land and has been applied to Shiites since the decision of the Privy Council in *Rajah Deedar Hossein v. Ranee Zuhoor-oon Nissa, (1841) 2 MIA 44.* The usual practice is to use the terms 'Sunni law' or 'Shia law', however by the former is meant the Hanafi law and by the latter the *Ithna Ashari* school of the Shias.

A.1.3 The general position regarding the applicability of Muslim law is:

a) where both the parties to a suit are Muslims and belong to the same school, the Muhammadan law of that school will apply;

b) where the parties to a suit differ in religion or do not belong to the same school of Muhammadan law, the law of the defendant will apply;

c) where a person in good faith changes his religion, or his school of law in Islam, ordinarily the personal law changes with immediate effect from the time of such conversion- for instance if a Hindu embraces Islam, the Muhammadan law will apply from the date of such conversion;

d) where a person who is a convert to a new faith, or has changed his school of law in Islam, dies, the law of succession applicable to the estate will be the law of the religion or the school which he professed at the time of his death.

Shia School: The term 'shia' by itself means 'faction' and being an abbreviation of the term Shiat Ali, it refers specifically to that party which after the death of the Prophet attached itself to Ali, the son-in-law of the Prophet considering him the successor of the Prophet both in temporal and religious matters. For them the Imam is the final interpreter of the law on earth, law is what he interprets and not dictated by other sources.

Sunni School: According to the Sunnite doctrine, the leader of the Muslims at any given moment is the Khalifa or the Caliph, literally the 'successor' of the Prophet. For them any controversy has to be resolved by looking to Koranic interpretations. Majority of the Indian Muslims belong to the Sunni school i.e. they go by Koran, *ijma* and *qiyas*. It actually refers to Hanafi law.

A.1.4 Applicability of Muslim law – Shariat Act, 1937

Muhammadan law was applied to Muslims in British India as a matter of policy. This policy was the result of the adoption of a tradition inherited from the Mughal rulers of India who applied the Hindu and Islamic law to their subjects conformable with their own views, to safeguard and guarantee to each of these communities the practice of its own religion. In India at present the Shariat laws are not applied in their entirety; only a portion is made applicable and this is:

i) rules which are expressly applied for example inheritance and succession.

ii) rules which are applied as a matter of justice, equity and good conscience for example pre-emption within a limited scope.

iii) rules which are not applicable for example criminal law, law of evidence.

The most important enactment which deals with the application of Muslim law in India and set at rest the confusion regarding the application of customary law as part of Muslim law is the Muslim Personal Law (Shariat) Application Act, 1937 which came into effect from 7th October, 1937. This Act is applicable to all Muslims irrespective of the school to which they belong but does not define the word 'Muslim'. It is a Code of duties and obligations of a Muslim – what he should do in a particular situation and what he should not do – whatsoever is good and beautiful should be done and what is evil and ugly should not be done.

A.2 Marriage

A.2.1 Amongst the Muslims, marriage is essentially a civil contract and not a sacrament. As per Ameer Ali, marriage is an institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and unchastity (this definition is based on the Koran and traditions). Mahmood J. in the case of *Abdul Kadir v. Salima, (1886) 8 All 149* observed:

'marriage amongst Muhammadans is not a sacrament, but purely a civil contract; and though solemnized generally with recitation of certain verses from the Kuran, yet the Muhammadan law does not positively prescribe any service peculiar to the occasion.'

A.2.2 Marriage in Islamic law has the following aspects:

Legal aspect has three characteristics:

i) there can be no marriage without consent;

ii) as in a contract, provision is made for its breach;

iii) terms of a marriage are within legal limits capable of being altered to suit individual cases.

On the social side, the Prophet encouraged the status of marriage. As regards the religious aspect, marriage is recognized as the basis of society and though it is a contract, it is also a sacred covenant. The objects, thereof, are the promotion of a normal family life and the legalization of children'. Thus, a marriage under Muslim law (*nikah*) is a civil contract, a social bond between two persons of opposite sexes with the object of,

a) legalizing sexual intercourse

b) procreation and legalizing children.

A.2.3 Since the marriage is a contract, the persons must have the capacity to enter into the contract. Thus every Muslim of sound mind who has attained majority can enter into a contract of marriage. The age of majority here coincides with puberty. Puberty is normally presumed to have been reached when a boy or girl reaches the age of fifteen. In the case of Shias, the age of puberty for girls begins with mensuration. But in the absence of any such evidence, the age of puberty is presumed to be fifteen years. It is a question of fact in each case when this age is reached. Thus, the 'age of majority' when applied under the Muslim law does not carry the same meaning as given in the Indian Majority Act, 1875 (reference may also be made to the Prevention of Child Marriage Act, 2006).

A.2.4 Lunatics or persons of unsound mind and minors who have not attained puberty may be validly contracted into marriage by their respective guardians. The right to contract a minor in marriage belongs successively to the father, paternal grandfather how highsoever, or any other guardian which includes brother and other relations on the father's side or in default of paternal relations, the right devolves upon the mother, maternal uncle or aunt and other maternal relations within the prohibited degrees. In default of maternal kindred, it devolves upon the ruling authority. Under Shia law, the only recognized guardians for effecting marriage are father and paternal grandfather how highsoever. It follows that a marriage brought about by a person other than the father or grandfather is wholly ineffective until it is ratified by a minor on attaining puberty.

A.2.5 The marriage of the minors contracted by the guardians, although valid, is capable of being repudiated by the minor on attaining majority. This is called *khiyar al-bulugh,* the option of puberty. By the older law, a minor girl contracted in marriage by her father or grandfather could not exercise the option of puberty; this restriction was

removed by statute i.e. by enactment of the Dissolution of Muslim Marriages Act, 1939. This Act fixes 15 as the age without any opportunity of rebuttal. It states:

"Grounds for decree of dissolution of marriage

2. A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more the following grounds namely:

vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated."

Thus, a woman who has before the age of fifteen years been given away in marriage by her guardian is allowed to repudiate her marriage for a period of three years after she attains the age of fifteen before she attains the age of eighteen. Under this section, a girl married during minority is entitled to the dissolution of her marriage if she proves:

a) that she was given in marriage by her father or other guardian;

b) that the marriage took place before she attained the age of 15;

c) that she repudiated the marriage before she attained the age of 18 by her act or conduct – words, action, not fulfilling her obligations towards marriage; and

d) that the marriage has not been consummated.

Consummation of marriage before the age of puberty does not deprive the wife of her option unless it is established that such consummation took place thereafter. In *Mst. Sakina v. Falak Sher, AIR 1950 Lah 45*, it was observed:

" 'Puberty' under Muhammadan laws is presumed, in the absence of evidence, on completion of the age of 15 years. It would, therefore, necessary follow that the minor should exercise the option after the age of 15 years unless there was evidence to the contrary that the puberty had been attained earlier and the burden of proving this shall lie upon the person so pleading. Anything done by the minor during the minority would not destroy the right which could accrue only after puberty. The cohabitation of a minor girl would not thus put an end to the 'option' to repudiate the marriage after puberty. The assent should come after puberty and not before, for the simple reason that the minor is incompetent to contract; nor should the consummation have taken place without her consent. This assent might either be express or implied. It might be by words or by conduct like cohabitation with the husband. It is also essential that a girl should be aware of the marriage before she could be expected to exercise her option (vide para 78) Muhammadan Law by Faiz B. Tyabji."

The right of repudiation is lost, first, on consummation. It has, however, been held that a wife's right is not determined by mere consummation if she was ignorant of her right.

The right is also lost in case of a female if on attaining puberty and on being informed of the right, she does not repudiate the marriage within a reasonable time. By statute, the wife must exercise the option before she attains the age of 18.

A.2.6 The position of the male minor has not in any way been affected by the Act. The husband, married during minority has the same right to dissolve his marriage, but in his case, there is no statutory period of time within which he must exercise his right. The right to exercise the option on attaining majority continues until he has ratified the marriage expressly or impliedly, for example, by payment of dower or by cohabitation. Lunatics get the option when they get reason.

A.2.7 Besides these conditions regarding soundness of mind and age, the persons should not be within the prohibited degrees of relationship.

A.3 Solemnization of marriage

A.3.1 Under Muslim law, marriage is a civil contract and a valid marriage, must therefore fulfill the essentials of a contract. Thus no religious ceremony is needed to validate a marriage, there are no special rites. The main emphasis is on form and ceremony can be dispensed with. The essential requirements of a Muslim marriage are:

a) Both parties are Muslims

b) An offer – *ijab* i.e. proposal made by or on behalf of one of the parties to the marriage;

c) Acceptance – *qabul* of the proposal by or on behalf of the other party with free consent;

d) Consideration – *dower* which husband agrees to pay to wife in consideration of marriage;

e) Presence of sufficient witnesses i.e. in Hanafi law, two male or one male and two female witnesses who must be sane and adult Muslims; in Shiite law witnesses are not necessary;

f) The words spoken must be clear and unambiguous i.e. they must indicate with reasonable certainty that a marriage has been contracted and should not be merely an indication of an intention to marry, nor a mere promise to marry at some future time; and

g) The proposal and acceptance must both be expressed at the same meeting. The proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. A mere betrothal does not create any rights in Muhammadan law.

A.3.2 The declaration and acceptance may be made by the parties, or by their agents, if both are competent. In case of legal incompetence like minority or unsoundness of mind, the guardians may validly enter into a contract of marriage on behalf of their wards.

A.3.3 In recent years, the question has arisen whether a Muslim marriage can be contracted over telephone. Such a marriage would not be possible both according to Sunni or Shia law because ‘at the same meeting’ lays emphasis on both place and time. Also the importance of the institution of marriage should not be underestimated. Further a marriage is a social contract and not a commercial contract.

A.3.4 'Dower' under the Muhammadan law is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife as a necessary effect of marriage. According to the Hedaya, "the payment of dower is enjoined by the law merely as a token of respect for its object (the woman) wherefore the mention of it is not absolutely essential to the validity of a marriage; and for the same reason, a marriage is also valid, although the man were to engage in the contract on the special condition that there should be no dower (Hamilton's Hedaya by Grady). Since Muslim marriage is a civil contract, it is the basis of the contract whereby the wife agrees to live with her husband and cohabit with him.

A.3.5 The amount of *'mahr'* or dower may either be fixed or not, if it is fixed, it cannot be a sum less than the minimum laid down by the law i.e. 10 dirhams according to Hanafi law while the Shias do not fix any minimum. Lord Parker in *Hamira Bibi's* case observed, "regarded as a consideration for the marriage, it is, in theory payable before consummation, but the law allows its division into two parts, one of which is called 'prompt' payable before the wife can be called upon to enter the conjugal domicile, the other 'deferred' payable on the dissolution of the contract by the death of either of the parties or by divorce. Dower is payable whether the sum has been fixed or not.

A.3.6 On the basis of the amount payable, dower is of two types:

i) specified

ii) unspecified

A.3.7 On the basis of time of payment, specified dower may be divided into:

i) prompt

ii) deferred

Specified: Usually the *mahr* is fixed at the time of marriage and the *kazi* performing the ceremony enters the amount in the register but it may also be fixed either before or after the celebration of the marriage. A father has the power to make a contract for dower on behalf of his minor son and the contract so entered into is binding. Under Hanafi law, in such a case, the father is not personally liable for the *mahr* but under Shiite law, he is.

Unspecified or proper: The obligation to pay dower is a legal responsibility on the part of the husband and is not dependent upon any contract between the parties. If the amount of dower is not stipulated in the contract, the wife is entitled to proper dower which should be reasonable. While fixing the amount of proper dower, reference has to be made to the social position of her father's family and her own personal qualification. The Hedaya lays down that her 'age, beauty, fortune, understanding and virtue' must be taken into consideration. Therefore, the rights of a wife are safeguarded and an attempt is made to ensure her an economic status consonant with her own social standing.

Prompt (*muajjal)* and deferred (*mu' ajjal*): The law allows division of dower into two parts, one called prompt and the other deferred. The former means that which has

been hastened or given a priority in point of time while the latter means delayed.

Prompt dower becomes payable immediately after the marriage and must be paid immediately on demand but deferred dower is payable on the dissolution of the marriage either by the death of either party to the marriage or by divorce or on the happening of a special event. But where at the time of the marriage, no specification in this respect is made, the whole dower is presumed to be prompt and due on demand according to Shiite law. According to Hanafi law, the whole of the dower may be promptly awarded but the present position is that the usage of the wife's family is the main consideration and second is that in the absence of proof of custom, the presumption is that one half if prompt and the other half deferred and the proportion may be changed to suit particular cases.

A.3.8 If the husband refuses to pay prompt dower, the guardian of a minor wife has the right to refuse to allow her to be sent to the husband's house. The wife may refuse the husband his conjugal rights if prompt dower is not paid, provided the marriage has not been consummated and non-payment of dower is a complete defence in a suit for restitution of conjugal rights by the husband where marriage is not consummated. If in such circumstances, she stays apart from the husband, he is bound to maintain her. If however, the marriage is consummated and the husband files a suit for restitution of conjugal rights, the court would pass a decree for restitution conditional on payment of prompt dower. Non-payment of deferred dower cannot confer any right of refusal on the wife.

A.3.9 The husband may at any time after marriage increase the dower, likewise, the wife may remit the dower wholly or partially and a Muslim girl who has attained puberty is competent to relinquish her *mahr*.

A.3.10 The claim of the wife to dower cannot be displaced by any event, not even by her death in which case the right to claim dower passes on to her heirs. The claim of the wife or a widow for the unpaid portion of *mahr* is an unsecured debt due to her from her husband or his estate respectively and ranks rateably with other unsecured debts and is an actionable claim. During her lifetime the wife can recover the debt herself from the estate of the deceased husband. If she predeceases the husband, the heirs of the wife, including the husband become entitled to her dower. The Supreme Court has laid down:

i) the widow has no priority over other creditors

ii) *mahr* as a debt has priority over the other heir's claims (*Kapore Chand v. Kadar Unnissa, (1950) SCR 747*) and the heirs of the deceased are not liable to pay the dower; they are liable rateably to the extent of the share of the inheritance which comes to their hands.

A.3.11 After the dissolution of the marriage:

i) if the marriage was consummated, then the wife is entitled to the whole of the dower amount whether prompt or deferred;

ii) if the marriage was not consummated, then the wife can claim only half of the dower fixed.

A.3.12 Widow's right to dower: Muhammadan law gives to the widow, whose dower has remained unpaid, a very special right to enforce her demand. This is known as the widow's right of retention. A widow lawfully in possession of her deceased husband's estate is entitled to retain such possession until her dower debt is satisfied. It is a personal right and it is a right to retain and not to obtain possession of her husband's estate. Once she loses possession of her husband's estate, she loses her special right and is in no better position than an unsecured creditor. But if her husband mortgages some properties to her in lieu of her dower and charges some properties on this account, she becomes a secured creditor and then her claim will have priority over the claim of other unsecured creditors of the husband. The retention does not confer any title upon her and she cannot legally alienate the property in her possession by sale, mortgage, gift or otherwise and if she attempts to do so, then she loses her right of retention. She is also entitled to interest on the amount of dower. If she is wrongfully dispossessed of the property, she may sue for the recovery of the same. If the widow is paid the full amount of the dower along with the interest, then her right to hold the property disappears. Thus the widow has limited rights in the property of her husband.

A.4 Classification of Muslim marriages

A.4.1 A marriage according to Muslim law may be:

i) valid (*sahih)*

ii) void (*batil)*

iii) irregular (*fasid)*

A.4.2 Valid Marriage : A marriage which conforms to all legal requirements is termed *sahih* i.e. correct and is of a permanent and *nikah* form. It gives rise to certain rights and duties between the parties:

a) it legalizes enjoyment of sexual intercourse;

b) wife becomes prohibited from going out and appearing in public;

c) it renders her dower and maintenance obligatory on the husband and confers upon the wife the right of residence in her husband's house;

d) it creates mutual rights of inheritance;

e) parties shall continue to be governed by the respective schools to which they belong;

f) wife has to observe *iddat* i.e. period observed in case of death of husband or dissolution of marriage as a mark of respect to husband before she can remarry;

g) it confers legitimacy to the children;

h) the prohibitions regarding marriage due to the rites of affinity come into operation; and

i) where there is an agreement between the parties, entered into either at the time of marriage or subsequent to it, its stipulations will be enforced in so far as they are not inconsistent with the provision or policy of law.

A.4.3 Void Marriage: A marriage which has no legal effects is termed *batil* or void. It has the semblance of marriage without the reality. A marriage forbidden by the rules of

blood relationship, affinity or fosterage is void. The issue of such a union is illegitimate and law knows no process whereby the union may be legalized. Marriage with the wife of another, or remarriage with a divorced wife when the legal bar still exists is void. Such a marriage does not create any rights or obligations between the parties. There is no right of dower unless there has been consummation; the death of one of them does not entitle the other to inherit from the deceased. The illegality of such a union commences from the date when the contracts are entered into and the marriage is considered as totally non-existing in fact as well as in law.

A.4.4 Irregular Marriage: This means a marriage which is neither lawful nor unlawful. If the unlawfulness is absolute, it results in a void (*batil*) marriage but if it is relative, then an irregular (*fasid*) marriage arises. The following marriages have been considered irregular:

a) a marriage without witnesses;

b) a marriage with a woman undergoing *iddat*;

c) a marriage prohibited by reason of difference of religion;

d) a marriage with two sisters or contrary to the rules of unlawful conjunction; and

e) a marriage with a fifth wife.

A.4.5 The Shiite schools do not recognize the distinction between void and irregular marriages. A marriage is, according to these systems either valid or void, hence the abovementioned unions would be treated as void marriages.

A.4.6 An irregular marriage has no legal effect before consummation. An irregular marriage may be terminated either before or after consummation by words showing an intention to separate. The legal effects are:

a) As between the parties themselves, the union is a flimsy tie, giving very few rights but as regards the issue, they are given full legal status.

b) The union may be terminated by either party at any time; neither divorce nor the intervention of a court is necessary.

c) If there has been consummation, the wife is entitled to dower and she must observe *iddat* for three courses.

d) No rights of inheritance are created between the husband and the wife.

e) The issues are treated as legitimate and are entitled to a share of the inheritance.

A.4.7 Muta or temporary marriage

The word *muta* literally means 'enjoyment use' and in its legal context it may be rendered according to Heffening, a 'marriage for pleasure'. This custom is forbidden by all schools Sunni as well as Shiite and is permitted only by the *Ithna Ashari* Shiite school. This is a temporary marriage contracted by parties only for sexual pleasures and its duration is fixed by agreement between the parties. It may be for a day, a month, a year or a term of years and the marriage comes to an end after the expiration of the specified period. The essentials of such a union are:

a) Form: There must be a proper contract: declaration and acceptance are necessary.

b) Subject: A Shia of the male sex may contract a *muta* marriage with a woman

professing the Muslim, Christian or Jewish religion or even with a woman who is a fire worshipper but not with a woman following any other religion. But a Shiite woman may not contract a *muta* marriage with a non-Muslim. Relations prohibited by affinity are also unlawful in temporary marriage. A man may contract a *muta* marriage with any number of women.

c) Term: This must be specified else a lifelong *muta* will be presumed if the original cohabitation commenced with a lawful *muta*. A *muta* terminates by the efflux of time or by death. On the expiry of the term, no divorce is needed. During the period, the husband has no right to divorce the wife but may make a gift of the term (unexpired portion of the term for which the marriage was contracted) and thereby terminate the contract without the wife's consent. Term of a *muta* marriage can be extended. On the expiry of the period, where there has been cohabitation, a short *iddat* of two courses is prescribed, where however, there has been no consummation, no *iddat* is necessary.

d) Dower is a necessary condition of such a union. If the term is fixed but the dower is not specified, the contract is void.

The *muta* marriage does not confer on the wife any right or claim to her husband's property or vice versa but if there is such a stipulation, it will be effectual. The children conceived while it exists are legitimate and are capable of inheriting from their father.

A.5 Bars/ Prohibitions/ Disabilities

A.5.1 Prohibitions to a marriage can exist on various grounds and there may be:

a) absolute impediments which render a marriage void.

b) relative impediments which would render the marriage only irregular and not void.

However, amongst the Shias, all the impediments render the marriage void. These include:

i) Number of spouses or subsisting marriages which a male or a female can have at a particular time. The Koran does not speak of any number but derived from the practice of Prophet, the rule in Islamic law is that a Muslim man may marry any number of wives not exceeding four, but a Muslim woman can marry only one person. If the male goes in for a fifth marriage during the existence of four wives, such a marriage would not be void but irregular as it can be regularized in time by divorcing one of the existing wives but if a Muslim woman marries a second husband during subsistence of the earlier marriage, the marriage is void and she is liable for bigamy, the offspring of such a marriage are illegitimate and cannot be legitimated by any subsequent acknowledgement. However, a man must treat all his wives with equality, but if he is apprehensive that he will not be able to do justice between them and treat them with perfect equality, he is enjoined to marry one wife only.

ii) Religion: As regards the prohibition of marriage on the basis of religion, sect and status amongst the Muslims, it depends on the school of Islam to which the parties adhere. Muslims belonging to different schools may intermarry freely with one

another, and a mere difference of school of law such as Shiite or Sunnite, Hanafi or Shafii is entirely immaterial. Both continue to be governed by their respective schools and no rule of law compels the wife to adopt the husband's school. A man in Sunnite law may marry a Muslim woman or a *kitabia* but a Muslim woman cannot marry anyone except a Muslim. The term *kitabia* means a person who believes in a holy book containing revelations. In India, this is a term applied to Jews and Christians, each of whom possess a revealed book (*kitab*) but it extends to some other religions as well and according to Shias, to Zoroastrians as well. A Muslim cannot marry an idolatress or a fire worshipper. Amongst the Shias, a Shiite, whether male or female cannot marry a non-Muslim in the *nikah* (permanent) form but he can contract a muta or temporary marriage with a *kitabia* including a fire worshipper. Ameer Ali has argued that marriage of a Muslim male to a Hindu woman would only be irregular and not affect the legitimacy of the offspring as she may at any time adopt Islam which would remove the bar and validate the marriage. Mulla and Fyzee also support this view.

If one of the spouses changes his or her religion, the marriage becomes invalid by supervening illegality or prohibition.

iii) **Relationship**: This includes absolute impediments to marriage which are the prohibitions based on:

a) Consanguinity

b) Affinity

c) Fosterage

Consanguinity refers to near blood relationships. The prohibitions based on consanguinity apply to all schools of Sunnis and Shias and a marriage performed in violation of the prohibition on the basis of consanguinity is null and void. A man is prohibited from marrying:

1) his mother or grandmother how high so ever;

2) his daughter or grand-daughter how low so ever;

3) his sister whether full, consanguine or uterine;

4) his niece or grand-niece how low so ever;

5) his aunt or grand aunt how high so ever, paternal or maternal.

A marriage with a woman prohibited by reason of blood relationship is totally void and the issue illegitimate. Similarly a female cannot marry:

1) her father or grand-father how high so ever;

2) her son or grand-son how low so ever;

3) her brother

4) her nephew or grand-nephew how low so ever;

5) her uncle or grand uncle how high so ever, maternal or paternal.

Thus one cannot marry his brother's daughter, brother's daughter's daughter, brother's daughter's daughter's daughter and so on and a female can marry her paternal and maternal uncle's son. There is no prohibition on marriage between first cousins and marriages between children of paternal and maternal aunts

and uncles how lowsoever are valid. There may be some difference in different schools on the prohibition on the basis of consanguinity arising out of legitimate birth or illegitimate birth.

Affinity: The Muslim law prohibits marriage to certain persons, relationship with whom arises on account of marriage i.e. on the basis of affinity. Both the Sunni and Shia schools accept that the relationship by affinity comes into being, not merely when a marriage is valid (irrespective of whether the marriage has been consummated) but also when a marriage is invalid or when there is an adulterous connection and a person is prohibited from marrying all relations of the woman with whom the relationship by affinity would have arisen, had he married her. The only exception is the Shafi school. A man cannot marry any ascendant or descendant of the wife or the wife of any ascendant or descendant. Thus he cannot marry:

a) his mother in law or grandmother in law, how highsoever;

b) daughter or granddaughter, how lowsoever, of his wife with whom his marriage has been actually consummated (if he marries a widow who has a daughter, he can marry her provided his marriage with his wife is not consummated).

c) wife of his son or son's son or daughter's son, how lowsoever; and

d) wife of his father or grandfather, paternal or maternal, how highsoever.

The rule also applies to women so a woman cannot marry her daughter's husband.

Fosterage: It is unlawful for a Muslim (except in some cases) to marry a woman so connected with him through an act of suckling, while he was under two years of age, that if it had been instead an act of procreation, marriage with her should have been unlawful by reason of consanguinity or affinity. Whoever is prohibited by consanguinity or affinity is prohibited by reason of fosterage (such as foster mother or foster sister) except certain foster relations such as sister's foster mother or foster sister's mother, or foster son's sister or foster brother's sister with any of whom a valid marriage may be contracted. A marriage prohibited by reason of fosterage is void.

iv) Unlawful conjunction: A man cannot have two wives at the same time, so related to each other by consanguinity, affinity or fosterage that they could not have lawfully inter married with each other, if either of them had been a male. Thus, a man cannot marry two sisters or an aunt and her niece or sister of an existing wife though he can marry his wife's sister after the death or divorce of his wife. Unlawful conjunction renders a marriage irregular but not void as per the majority of the High Courts.

v) Prohibition of marriage with a woman under *iddat*: *Iddat* is the period during which it is incumbent upon a woman whose marriage has been dissolved by divorce or death, to remain in seclusion and to abstain from contracting another marriage. The period of *iddat* is calculated on the termination of a marriage in interest of certainty of paternity of any child conceived prior to the termination of the marriage. It is the term by the completion of which a new marriage is rendered lawful. A statutory definition of *iddat* is given by the Muslim Women (Protection of Rights on Divorce) Act, 1986.

There are different periods of *iddat* according to whether the marriage was dissolved by divorce or death. The observance of *iddat* is necessary where cohabitation has taken place- cohabitation may be lawful as in the case of consummation of marriage or unlawful as in the case of illicit intercourse. If pregnancy follows illicit intercourse, *iddat* must be observed. If marriage is dissolved by divorce, she is bound to observe *iddat* only if the marriage was consummated and the duration of *iddat* is three courses, if the woman is subject to menstruation and if not so subject, it is three lunar months, or if the woman is pregnant, till delivery. If the marriage is dissolved by death, the wife is bound to observe *iddat* whether the marriage was consummated or not. The duration of *iddat* is four months and ten days or, if the woman is pregnant, till delivery whichever is longer. A marriage with a woman undergoing *iddat* is irregular but not void and the woman is prohibited from marrying during the period of *iddat*.

vi) **Doctrine of equality:** The marriage to bear the character of a suitable union in law, the husband must be the equal of the woman in social status. There is no corresponding provision that the wife should be of an equal social status with the husband, for by marriage he was assumed to raise her to his own position. The Sunnis hold that equality between the two parties is a necessary condition. In determining equality, factors such as family, religion, profession, freedom, good character and means are considered. It is not an absolute prohibition to marry but it allows the *kazi* to reverse the marriage in certain cases of mis-alliance.

vii) **Marriage with a divorced woman**: Once a Muslim husband pronounces talaq thrice, the marriage is irrevocably dissolved and remarriage is impossible unless the woman observes *iddat,* lawfully marries another man, the marriage with the second husband is actually consummated, the second marriage is lawfully dissolved and the woman has observed *iddat*.

viii) **Illicit intercourse and undue familiarity:** If a person has illicit intercourse with a woman or commits acts of 'undue familiarity', some of the woman's relations are forbidden to him, although he can marry the woman herself.

ix) **Pilgrimage:** Under the tenets of Islam, a man who has come within the sacred precints of the *Kaba* and put on the pilgrim's dress may not enter into a contract of marriage while on the pilgrimage.

Void marriages	**Irregular marriages**
Against principles of Consanguinity	During period of *Iddat*
Against principles of Affinity	Taking more than four wives
Against principles of Fosterage	Religion
Second marriage of woman during subsistence of first	Unlawful Conjunction
	Marriage contracted in absence of witnesses

A.6 Restitution of Conjugal Rights

A.6.1 Under Muslim law, marriage is a civil contract but it confers important rights and entails corresponding obligations both on the husband and the wife. Some of these

are capable of being altered by an agreement freely entered into by the parties. An important obligation is 'consortium' which not only means living together but implies a union of fortunes. A fundamental principle of matrimonial law is that one spouse is entitled to the society and comfort of the other. Both the spouses are obliged to cohabit with each other. The husband has additional obligation to provide maintenance to his wife whatever his financial condition be. Where a wife, without lawful cause, refuses to live with her husband, the husband is entitled to sue for restitution of conjugal rights and similarly the wife has the right to demand the fulfillment by the husband of his matrimonial duties. The cause of action accrues to a spouse only when the other spouse fails in marital obligations, neglects his or her spouse or deserts the other without any valid reason.

A.6.2 This right is not absolute and the spouse who has withdrawn from the society of the other can put up a valid defence founded on any reasonable ground. The court does recognize circumstances which would justify the refusal to live with the spouse. The principles of justice, equity and good conscience not inconsistent with any positive rule or Muslim law may well be applied in determining the claim for restitution of conjugal rights. The court would grant restitution to the husband if the wife is anxious to go to the husband but is restrained by her relatives. However, the husband would not be entitled to a decree for restitution of conjugal rights, even though the marriage was consummated if it was irregular marriage performed during the period of *iddat* or marriage and consummation were denied by the wife having exercised option of puberty. The grounds of defence to a suit for restitution of conjugal rights filed by the husband are generally:

i) that it is unsafe for her to live with her husband because of his cruelty;

ii) the husband has grossly neglected the performance of marital obligations; and

iii) the marriage is irregular.

A.6.3 If the husband accuses his wife of adultery or immorality and heaps insults and the accusation was held to be unfounded, the facts were held to constitute legal cruelty and the husband was not entitled to a decree for restitution of conjugal rights. If the husband sues for restitution of conjugal rights before consummation takes place, non-payment of dower is a complete defence to the suit. If, however, the suit is brought after consummation of marriage has taken place with the wife's free consent, the proper decree would be for restitution of conjugal rights conditional on payment of prompt dower.

A.6.4 Cruelty to a degree rendering it unsafe for the wife to live with her husband is a valid defence to a suit for restitution. Not only actual physical violence of such a character as to endanger the wife's health and safety or to render it unsafe for the wife to return to her husband's domain but also a reasonable apprehension of it would constitute a valid defence to a suit for restitution. Long neglect on husband's part or gross failure by the husband in performance of matrimonial obligations is sufficient to entitle the wife to refuse to go with him. A husband's second marriage may, in certain circumstances involve cruelty to the first wife, justifying her refusal to live with him. In *Itwari v. Ashgari, AIR 1960 All 684* it was laid down that in a suit for restitution of conjugal rights by a Muslim husband against the first wife after he has taken a second wife, if the court feels that the circumstances are such as to make it inequitable for the

court to compel the first wife to live with him, it will refuse relief.

Muslim law permits polygamy but does not encourage it and the Koranic injunction shows that in practice perfect equality of treatment on the part of the husband is, for all practical purposes impossible of achievement. Expulsion of the husband from caste has been held to be sufficient ground for refusing restitution of conjugal rights.

A.7 Dissolution of Marriage

A.7.1 Under Islamic law, the dissolution can be classified as under:

1) By the death of spouse/ Act of God- When one of the parties dies, it leads to absolute and automatic dissolution of the marriage. When the wife dies, the husband may remarry immediately, but the widow has to wait for a certain period before she can remarry i.e. called the *iddat* period which in case of death is four months and ten days from the death of her husband and if she is pregnant, till the delivery.
2) By the Act of Parties
3) By Judicial Process

A.7.2 By the Act of Parties:

Divorce is primarily of three types i.e. *talaq* which refers to modes of divorce at the instance of the husband, *khula* which is divorce at the instance of the wife and *mubarat* which is essentially divorce by mutual consent.

By husband: The word talaq usually rendered as repudiation comes from a root (tallaqa) which means to release (an animal) from a tether. In law it signifies the absolute power which the husband possesses of divorcing his wife at all times. Thus, when divorce proceeds from husband at his will, it is known as divorce by talaq. A talaq may be effected orally (by spoken words) or by a written document called a *talaq-nama*. In case of oral talaq, no particular form of words is prescribed for effecting a talaq. If the words are express (*sahih*) or well understood as implying divorce, no proof of intention is required. If the words are ambiguous, the intention must be proved. It is not necessary that the talaq should be pronounced in the presence of the wife or even addressed to her but the words should refer to her. Where it is a written divorce, the words must indicate an intention to dissolve the marriage. If the words are express, they clearly indicate an intention to dissolve the marriage and no proof of intention is necessary but if they are ambiguous, the intention must be proved.

A Muslim husband of sound mind who has attained the age of puberty may divorce his wife whenever he desires without assigning any reason. Under Sunni law, the husband can enforce talaq at any time either orally or by executing a document called *talaq-nama*. No witness is required for performing it. But Shiite law insists on strict formalities. It recognizes only oral talaq but if talaq cannot be pronounced orally, then only the document is recognized. It should be in the presence of two adult male witnesses who are Muslims of approved probity and if there is no intention to divorce the spouse, mere pronouncement of talaq is not valid such as where the words are ambiguous. Divorce given under the influence of liquor is not valid under Shiite law unlike under Hanafi law.

The emphasis under Sunni law is that the words must be clear, express (*sahih*) and unambiguous indicating the intention to do what he is doing. They should make reference to wife even though the words may not be pronounced in the presence of the wife and neither is there any need of notice to be given to her. However, till they are communicated to her, she is entitled to maintenance. It has been held that talaq is valid even if it is pronounced under compulsion or in jest or in a state of voluntary intoxication.

The pronouncement of talaq may either be revocable or irrevocable. The revocable forms are considered as the 'approved' and the irrevocable forms are treated as the 'disapproved' forms. The forms of talaq may be thus classified as:

1. talaq al-Sunna (in conformity with the dictates of the Prophet)
   i) talaq ahsan (most approved)
   ii) talaq hasan (approved)
2. *talaq al bida* or *talaq-i-biddat* (i.e. of innovation, therefore, not approved)
   i) three declarations (triple talaq) at one time
   ii) one irrevocable declaration

1. Talaq al-Sunna

These forms are approved by the Koran and Hadith.

i) Ahsan: The *ahsan* (or most approved) form consists of a single pronouncement of divorce by the male during the period of *tuhr* (purity i.e. when the woman is free from her menstrual courses) followed by abstinence from sexual intercourse for the period of *iddat* i.e. 3 months or three menstrual courses in case the wife is menstruating or three lunar months in case she is not, if marriage has been consummated or if pregnant, till the delivery of the child. If any sexual intercourse takes place during the above period, the divorce becomes void and of no effect and the marriage remains valid. Thus, an opportunity exists to revoke it or resume cohabitation. Such revocation may be by express words or by conduct (resumption of conjugal intercourse is a clear case of revocation). If there is no resumption of cohabitation, then divorce becomes effective and irrevocable after the period of *idda*t. It is irrevocable in the sense that the former husband and wife cannot resume a legitimate marital relationship unless they contract a fresh *nikah* with a fresh *mahr*. However, if the talaq was the third time such a talaq was pronounced, then they cannot remarry unless the wife were to have, in the intervening period, married someone else and her marriage had been dissolved either through divorce or death of that person and the *iddat* of divorce or death has expired i.e. the process of *halala*. Moreover, the process of *halala* cannot be employed as a device to remarry the same spouse but, it must happen in the natural course of events. It is, in effect, a near impossibility and the third talaq brings about a final parting of the spouses.

This is the most approved or regular or proper form of divorce and there are a lot of opportunities for the parties to marry lawfully again after expiry of *iddat*. Where the parties have been away from each other for a long time, or where the wife is old and beyond the age of menstruation, the condition of *tuhr* is

unnecessary.

A Muslim wife, after divorce is entitled to maintenance during the *iddat* and so also her child in certain circumstances.

ii) *Hasan*: This is also an approved form of divorce but less approved than *ahsan* form. It consists in three successive pronouncements during three consecutive periods of purity (*tuhr)* with the pronouncement being made at a time when no intercourse has taken place during that particular period of purity. If there is no second pronouncement, it can never be *hasan* but if he does make the second pronouncement, it shows his seriousness or firmness. When the third pronouncement is made in the third consecutive period, divorce becomes final and irrevocable. The first two pronouncements are revocable and can be revoked during *iddat* but the third pronouncement cannot be revoked. Sexual intercourse becomes unlawful, remarriage between the parties becomes impossible unless the woman lawfully marries another man, and that husband lawfully divorces her after the marriage has been actually consummated. Thus *ahsan* is a single pronouncement of talaq followed by abstinence during the period of *iddat* while *hasan* is three pronouncements – one each in three successive months with abstinence.

This is also an approved form because the parties had sufficient time to repent and revoke it and there is a chance for the parties to be reconciled by the intervention of friends or otherwise.

These two forms are recognized by both the Shiite and Sunnite schools. The Shiite law does not recognize the forms of irrevocable talaq.

2. *Talaq-i-biddat* or *talaq al-bid'a* (disapproved forms)

i) Triple declaration: In this form, three pronouncements are made in a single *tuhr* at shorter intervals or even in immediate succession either in one sentence for example, 'I divorce thee triply or thrice' or in three sentences 'I divorce thee, I divorce thee, I divorce thee'. Such a talaq becomes effective and irrevocable the moment it is pronounced and is lawful, although sinful in Hanafi law while Shiite school does not recognize it.

ii) Single irrevocable declaration- Another form of the disapproved divorce is a single, irrevocable pronouncement made either during the period of *tuhr* or even otherwise and may be given in writing. It comes into operation immediately from the moment of pronouncement or the execution of the writing of divorce and severs the marital tie. This is also not recognized by Shiite law.

They are the unapproved forms as there is no time to repent and they cannot even be revoked as they become effective the moment they are pronounced. Triple talaq has been an issue of controversy since a long time with different judicial pronouncements looking at it differently. The Supreme Court in *Shamim Ara v. State of UP and Anr. AIR 2002 SC 3551* discussed various judgments of the High Courts and referred to the judgments of the Kerala and Gauhati High Courts extensively. The Court agreed with the view taken by the Gauhati High Court and observed:

"There is yet another illuminating and weighty judicial opinion available in two decisions of Gauhati High Court recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in Sri Jiauddin Ahmed v. Mrs. Anwara Begum, (1981) 1 GLR 358 and later speaking for the Division Bench in Mst. Rukia Khatun v. Abdul Khalique Laskar, (1981) 1 GLR 375. In Jiauddin Ahmed's case a plea of previous divorce, i.e. the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid talaq of the wife by the husband under the Muslim law?

The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But inspite of the sacredness of the character of the marriage-tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution. (Para 6). Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-recognised scholars of great eminence, the learned Judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters – one from the wife's family and the other from the husband's' if the attempts fail, talaq may be effected. (Para 13). In Rukia Khatun's case, the Division Bench stated that the correct law of talaq, as ordained by Holy Quran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected."

In *Smt. Riaz Fatima and Anr. v. Mohd. Sharif, I (2007) DMC 26*, the High Court of Delhi held that divorce cannot be said to have taken place till the following prerequisites are proved:

1. Divorce must be for a reasonable cause that is mandatory in Holy Quran. Therefore, when a dispute arises, the husband has to give evidence of what was the reason which compelled him to divorce his wife.

2. He has to prove that there was proclamation of Talaq thrice in presence of witnesses or in a letter (as pleaded in the instant case). Till it is proved, Talaq is not valid. (Referred to M. Shahul Hameed v. A. Salima AIR 2003 Madras 162)

3. There has to be proof of payment of Meher (dower) amount or observance of period of iddat.

4. The husband has also to prove that there was attempt for settlement/ conciliation prior to the divorce.

In another set of judgments on the subject, it has been held that talaq by the husband in one sitting whether through a single irrevocable pronouncement or through three simultaneous pronouncements does not have the effect of granting divorce to the wife. In *Masroor Ahmed v. State (NCT of Delhi) and Another, 2008 (103) DRJ 137*, the High Court of Delhi has held that triple talaq be regarded as one revocable talaq and it would enable the husband to have time to think and to have ample opportunity to revoke the same during the *iddat* period. Meanwhile, the family members could make sincere efforts at bringing about a reconciliation. Moreover, even if the *iddat* period expires and the talaq can no longer be revoked as a consequence of it, the estranged couple still has an opportunity to re-enter matrimony by contracting a fresh *nikah* on fresh terms of *mahr*.

The facts in Reading I have been taken from the judgment of the High Court of Delhi in *Masroor Ahmed's case (supra)*. The talaq in October, 2005 cannot be regarded as valid as first of all, it was given, if at all, in extreme anger. Secondly, it was never communicated to the complainant, at least not by the relevant period (i.e., till 13.04.2006 or even by 19.04.2006). Thirdly, there was no attempt at reconciliation either before or after the purported pronouncement of talaq in October 2005. Consequently, the marital tie of the petitioner and the complainant subsisted during the relevant period (ie., 13.04.2006 to 19.04.2006).

Further, if the pronouncement of talaq is communicated to the wife, the talaq shall take effect on the date it is so communicated. However, if it is not communicated at all the talaq would not take effect, hence communication of talaq to the wife is regarded as necessary.

As regards the effect of the second nikah of 19.4.2006, it was not at all necessary. Since the marriage was subsisting, the second nikah would be of no effect.

The facts in Reading II have been taken from the judgment of the Supreme Court in *Shamim Ara Vs State of UP and Anr. (supra)*. In this case it was held that there was no valid talaq as there was no proof of talaq having taken place on 11.7.1987. It was held that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. The husband ought to have adduced evidence and proved the pronouncement of talaq on 11.7.1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife.

Thereafter the question of validity of triple talaq came up before a Constitution Bench of the Supreme Court in *Shayara Bano v. Union of India and others, Writ Petition No.118 of 2016* along with other writ petitions which was disposed of by the Supreme Court on 22.8.2017. In this case Hon'ble Mr. Justice J.S. Khehar, the then Chief Justice of India with Hon'ble Mr. Justice Abdul Nazeer concurring with him held that triple talaq is an essential

part of the practice of Islam and as such was protected by Article 25 of the Constitution of India. However, exercising extraordinary jurisdiction under Article 142 of the Constitution, the Hon'ble Judges directed the Union of India to consider appropriate legislation, particularly with reference to '*talaq-e-biddat'*. Till such time as legislation in the matter was considered, the Muslim husbands were injuncted from pronouncing triple talaq as a means of severing matrimonial relationship which would in the first instance, be operative for a period of six months.

By a separate judgment, Hon'ble Mr. Justice Kurian Joseph did not agree with the above view that triple talaq is an integral part of the religious practice of Islam and held that there could not be any Constitutional protection to such a practice observing that 'what is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well. The law declared in *Shamim Ara's* case was reiterated.

A third and separate judgment was pronounced by Hon'ble Mr. Justice R.F. Nariman and Hon'ble Mr. Justice U.U. Lalit who held that triple talaq was not an essential part of practice of Islam and held it to be in violation of the Fundamental Right contained under Article 14 of the Constitution of India. Thus in effect triple talaq has been held to be illegal.

Legal Effects of Divorce or talaq

After the husband has pronounced talaq, various consequences arise:

i) The wife has to observe *iddat* during which the parties continue to have mutual rights to inheritance. If the husband or the wife dies during the period of *iddat* following a revocable pronouncement of divorce, each is entitled to inherit from the other. If the pronouncement of divorce was irrevocable (*talaq-I biddat or talaq-I bain)* neither of them can inherit from the other.

ii) Both the parties are freed from marital obligations. While the husband can marry again immediately, the wife has to observe *iddat* after which she can get remarried. If the husband has four wives, then he must wait until the completion of the divorced wife's *iddat* period. Where the marriage was not consummated, the parties can marry immediately without waiting for the expiry of the *iddat*.

iii) During the period of *iddat* the wife is entitled to maintenance from her husband. It is important that the factum of divorce is communicated to the wife, otherwise the wife is entitled to maintenance till such time she is informed about the divorce.

iv) Where the divorce has become irrevocable, marital intercourse becomes unlawful between the couple, but they may remarry (*ahsan* form) unless there have been more than two pronouncements.

v) Where there has been a triple divorce, remarriage can only take place under certain stringent conditions.

vi) If the marriage was consummated, the whole dower is immediately due, if not, half the dower is payable.

Reconciliation and Remarriage

i) Where there are one or two declarations in the approved forms, a reconciliation can take place during *iddat* without a regular remarriage. The reconciliation may be by a

formal revocation of *talaq* or by resumption of marital life.

ii) Where there have been one or two declarations in the approved forms, and the period of *iddat* has expired, a mere reconciliation is not enough. A regular marriage is necessary and possible.

iii) Where there have been three declarations, amounting to an irrevocable talaq, the remarriage is possible only by adopting the following course, otherwise the second remarriage is irregular. In case no second marriage takes place, the union is void and the offspring of such union are illegitimate. This procedure is:

a) the wife observes the period of *iddat*

b) the wife should lawfully marry another person

c) the marriage must be actually consummated

d) the marriage should then be dissolved with the husband pronouncing divorce or death of the husband

e) the wife then observes the period of *iddat*

f) after the expiry of *iddat*, a remarriage can lawfully take place between the couple.

This procedure has to be strictly followed.

By wife

The husband can enforce *talaq*, but the wife also has a limited right (this is peculiar as *talaq* virtually flows from the husband). This is *talaq-e-tafwid* or delegated power of divorce where a contingency is involved. The husband has the power to delegate his own right of pronouncing divorce to some third person or the wife herself. A stipulation that, under certain specified conditions or in specific contingencies, the wife can pronounce divorce upon herself has been held to be valid, provided first, that the option is not absolute and unconditional and secondly, that the conditions are reasonable and not opposed to public policy. This form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court. An agreement by which the husband authorizes the wife to divorce herself from him in the event of his marrying a second wife without her consent has been repeatedly held to be both valid and irrevocable. The mere happening of the contingency is not sufficient, the wife must clearly establish that the events entitling her to exercise her option have occurred and that she has actually exercised her option. When a wife empowered to divorce herself in specific contingencies exercises the power at the happening of any of them, the divorce will take effect to the same extent, as if talaq had been pronounced by the husband. The delegation of such power is not revocable.

Divorce by mutual consent: *Khula or Mubarat*

Khula: In this case the initiative for divorce comes from the wife and the husband also agrees on her giving or agreeing to give a consideration to the husband for her release from the marriage tie. *Khula* means liberty and the wife desires to be released and the husband agrees for a certain consideration which is usually a part or the whole of the *mahr*. However, the terms of the bargain are a matter of arrangement between the husband and the wife. The husband cannot refuse it if the wife is firm about it, and if

he does, she can seek intervention of an outside agency including, but not only, the court.

Mubarat: This is a divorce by consent where the husband and the wife desire dissolution and the offer of divorce may proceed from the husband or wife. When the other party accepts the offer, the dissolution is complete. '*Mubarat*' denotes the act of 'freeing one another mutually'.

Under both *khula* and *mubarat* there is no need for specifying any reason for the divorce. *Khula* and *Mubarat* operate as a single, irrevocable divorce. Therefore, marital life cannot be resumed by mere reconciliation, a formal remarriage is necessary. *Iddat* is incumbent on the wife and in the absence of agreement to the contrary, the wife and her children do not lose the right of maintenance during the period of *iddat*.

A.7.3 Divorce by Judicial Process

All the above modes of divorce are recognized under Islam and do not call for any intervention by the court. However, there are some forms where it is necessary to approach the court. These are:

i) *Laan or Lian*: The Islamic law punishes the offence of adultery severely, and so it takes a serious view of an imputation of unchastity against a married woman. If a husband accuses his wife of adultery (*zina*) but is unable to prove the allegation, the wife in such cases is entitled to file a suit for dissolution of marriage. The husband in such a case can either prove the charge in court or withdraw the charge before the commencement of the suit and the withdrawal should be unconditional and bonafide and not intended merely to frustrate the judicial process. If the husband retracts the charge of adultery, the suit fails. However, if he persists then he is required to make four oaths in support of the charge. The wife makes four oaths of her innocence, after which the court declares the marriage dissolved.

ii) *Faskh*: The word '*faskh*' means annulment or abrogation. It comes from a root which means 'to annul (a deed)' or 'to rescind (a bargain)'. It refers to the power of the Muslim Kazi to annul a marriage on the application of the wife. It refers to the dissolution or rescission of the contract of marriage by judicial decree. The same is governed by the Dissolution of Muslim Marriages Act, 1939. This Act is applicable to all Muslims in India regardless of the school or sub-school to which they belong. The Act seeks to clarify the provisions of Muslim law relating to dissolution of marriages by women married under Muslim law.

Section 2 of the Act lays down that even a single ground mentioned in the Act is sufficient for a married woman to obtain a dissolution of her marriage. These grounds are:

i) The whereabouts of the husband have not been known for a period of four years. Under the Hindu law, if the whereabouts of a person are not known for seven years to those persons who would have in the ordinary course of nature known or heard of him, then such a person is considered to be civilly dead. Under Muslim law, the wife is entitled to obtain a decree for the dissolution of her marriage if the whereabouts of the husband have not been known for a period of four years. However, the decree passed on this ground will not take effect for a period of six

months from the date of such decree; and if the husband appears either in person or through an authorized agent within that period and satisfies the court that he is prepared to perform conjugal duties, the court would set aside the decree.

This has to be read alongside Section 3 of the Act which reads:

"In a suit to which clause (i) of Section 2 applies-

a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of filing of the plaint shall be stated in the plaint.

b) notice of the suit shall be served on such persons, and

c) such persons shall have the right to be heard in the suit:

Provided that paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs."

ii) The husband has neglected or has failed to provide for her maintenance for a period of two years: This clause has been the subject of judicial controversy. It has been held that under the Muslim law, a husband is bound to maintain his wife and provide maintenance for her under all circumstances. There is nothing in the wording of Section 2(ii) to suggest that the failure to maintain the wife must be willful. Thus, where the husband failed to provide maintenance to a wife owing to loss of employment, poverty, failing health, imprisonment or some other valid reasons, such failure though unintentional entitled the wife to obtain divorce under this clause. The phrase 'failure to maintain' under the Act clearly envisages a proper inquiry into the conduct both of the husband and the wife. The rule appears to be:

a) that the failure to maintain under the statute need not be willful; mere inability is sufficient, but

b) the wife, willfully refusing to live with the husband, would be out of the court if she proceeded under this section.

The rationale behind the above view seems to be that the very basis of a Muslim marriage is a contract. Thus, a Muslim marriage lasts till the agreement lasts, the implied clause of such agreement being that the husband must maintain his wife under all circumstances. However, a Muslim husband is bound to maintain his wife so long as she is faithful to him and obeys his reasonable orders. If the wife due to her own conduct leads her husband to stop maintenance, the court will not allow dissolution of marriage on this ground on the wife's suit.

iii) the husband has been sentenced to imprisonment for a period of seven years or upwards: No decree can be passed on this ground unless the sentence has become final and the husband has exhausted all legal remedies to get the sentence set aside. It is immaterial whether the

husband's sentence is remitted by the government for his good behavior and he is released after two or three years. Such remission of sentence does not disentitle the wife to move the court under this clause.

iv) the husband has failed to perform, without reasonable cause his marital obligations for a period of three years. This has generally been interpreted to mean marital cohabitation. If a Muslim husband denies marital intercourse to his wife for three years, the wife can get divorce under this clause. But where the husband takes a vow of continence and swears by God that he would not approach his wife for four months, this is called ila and such a vow takes the form of a valid talaq. The husband in such a case may revoke the oath by resumption of marital life. After the expiry of the period of four months, in Hanafi law, the marriage is dissolved without legal process but under Shiite law, legal proceedings are necessary. However, the ground under this clause (iv), is where the husband intentionally refuses to have any intercourse with his wife although he may have sexual intercourse with any of his other wives.

v) the husband was impotent at the time of the marriage and continues to be so: This had been recognized as a ground for suing for divorce even before the Act but the Act changed the law and procedure applicable to suits for dissolution of marriage on the ground of the husband's impotency. Before the Act, the right of the wife to claim divorce on the ground of impotency was contingent on her succeeding to establish that the husband was impotent at the time of marriage, she did not know of his impotency at the time of her marriage and the impotence must have continued till the time of the suit. No suit could be filed if the wife knew that the husband was impotent at the time of marriage, nor if the marriage had been consummated even once. In these circumstances, the suit would be adjourned for a year to ascertain whether the impotence continued. After the probationary year, if the incapacity of the husband continued, the marriage would be dissolved.

By virtue of proviso, before passing a decree on this ground, the court would, on application by the husband, make an order requiring the husband to satisfy the court within a period of one year from the date of such order that he has ceased to be impotent and if the husband so satisfied the court within such period, no decree would be passed on the said ground. It is significant that contrary to the position prior to the Act, the ignorance of the wife regarding the impotency of the husband need not be proved. She could obtain a decree on this ground even if she knew it. Also the adjournment of the case is not essential and the proviso enjoins the postponement of a decree of dissolution only when the husband makes an application for an opportunity to establish the cessation of impotence. The opportunity contemplated under the proviso does not make it a duty of the wife to allow access to husband during the period of one year referred, either in her parental house or elsewhere. Also, under the statute, the onus is on the husband to prove that he is

free from impotence.

vi) the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease.

vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years; provided that the marriage has not been consummated.

viii) that the husband treats her with cruelty. What constitutes cruelty has been set out in the section itself. Cruelty is not only a ground for obtaining divorce by the wife but is also a defence in a suit for restitution of conjugal rights filed by the husband. Even prior to the statutory provision, cruelty was considered a sufficient ground for dissolving the marriage at the suit of the wife to say:

a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

b) associates with women of evil repute or leads an infamous life: Apparently a stray act of immorality or faithlessness would not be a sufficient cause and it implies a conduct amounting to gross immorality or leading a shameful life.

c) attempts to force her to lead an immoral life, or

d) disposes of her property or prevents her from exercising her legal rights over it; or

e) obstructs her in the observance of her religious profession or practice, or

f) if he has more wives than one and does not treat her equitably in accordance with the Koranic injunctions.

The Fiqh books contain numerous injunctions of this character. It is only a very gross failure to render to a wife her just rights that could be considered by a court as a ground for dissolution of the marriage.

ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim law. The Act lays down this residuary provision in order that the wife may not lose the benefit of any other ground which may have escaped the attention of the legislature. The words 'Muslim law' in the section are used by legislature to convey that divorce could be granted by the courts for reasons for which it could have been granted under the Shariat regardless of the fact whether that reason had been recognized by the Indian courts or not. This has been interpreted to include lian, ila and zihar, khula, mubarat. Although ila and zihar (when a husband compares his wife to such female relations as are within prohibited degrees within which a marriage is unlawful, such

a comparison entitles the wife to get divorce and this form of divorce has been given legal validity under Section 2 of the Shariat Act, 1937. If the husband intends to revoke this declaration, he has to pay money by way of expiation, or fast for a certain period. After the oath has been taken, the wife has the right to go to court and obtain divorce) are mentioned in the Shariat Act, 1937, they are very rare in India. Incompatibility of temperament, dislike or ill will are not grounds for divorce under the Muslim law.

Under Section 5 of the Dissolution of Muslim Marriages Act, 1939, a dissolution of marriage obtained by a Muslim woman does not affect her rights of dower. As observed by the High Court of Delhi in *Masroor's case (supra):*

"…the position after the 1937 and 1939 Acts is that dissolution of a Muslim marriage is permissible by the modes of talaq, ila, zihar, lian, khula and mubarat (as mentioned in the 1937 Act) as also on a wife's suit under the 1939 Act, on any of the grounds mentioned therein or on any other ground which is recognized as valid for the dissolution of marriages under Muslim law which would include lian. Divorce through talaq, ila, zihar, khula and mubarat takes place without the intervention of the court. Divorce under the 1939 Act (which would also include lian) is through a wife's suit and by a decree of the court. The Muslim wife, therefore, can seek divorce either outside the court (through khula) or through court (under the 1939 Act or lian). She can also put an end to the marital tie by pronouncing talaq upon herself in the case of talaq-e-tafwiz where the husband delegates the power of pronouncing talaq to his wife. On the other hand, the Muslim husband can dissolve the marriage only outside court through talaq (ila and zihar being virtually non-existent in India). Both the husband and wife can mutually decide to dissolve the marriage, again without the intervention of court, through mubarat."

A.7.4 Apostacy or change of religion

The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage. After such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2 of the Shariat Act, 1937.

A Muslim may renounce Islam and this is known as apostacy or a non-Muslim may embrace Islam and this is called conversion. According to the general principles of Muslim law, a person who embraces Islam is immediately governed by Islamic law.

But a man who renounces Islam suffers greatly under civil law. The act of apostacy or conversion legally affects the marital status of the apostate or the convert in the following manner:

i) When the husband renounces Islam, the Lahore High Court has held that a formal declaration is sufficient and a genuine conversion to some other religion need not be

proved (*Mst. Resham Bibi v. Khuda Bakhsha, (1937) 19 Lah 277*). Apostacy may be either express or by conduct. When a Muslim husband renounces Islam, his marriage with his Muslim wife is dissolved *ipso facto*.

ii) Wife renounces Islam: The mere renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam does not by itself dissolve her marriage. However, the provisions of the section do not apply to a woman converted to Islam from some other faith who re-embraces her former faith i.e. marriage to a Muslim husband would stand dissolved when it took place after her embracing Islam.

iii) Husband embraces Islam: According to Islamic law, conversion to Islam on the part of a man following a scriptural religion, such as Judaism or Christianity (a *kitabi* male) does not dissolve his marriage with a woman belonging to the earlier creed (a *kitabiya* female). But when a non-*kitabi* male (for example a Hindu) embraces Islam, he cannot lawfully retain a non-*kitabiya* wife. Earlier the position was that Islam was to be offered to her, and on her refusal, a decree for dissolution was to be passed.

But now, it is accepted that principles of one religion cannot be applied to a person belonging to a different faith.

iv) Wife embraces Islam: The conversion of a non-Muslim wife to Islam does not *ipso facto* dissolve her marriage with her husband, and the ancient procedure of 'offering Islam' to the husband, and, on his refusal, obtaining a dissolution of marriage cannot be followed in India.

When a court of law has to decide a case involving change of marital status due to conversion or apostacy, it must never be overlooked that since the rules were formulated in Islamic jurisprudence, social conditions have changed and a blind adherence to some of the rites would not lead to justice. The question that arises is 'who is the person that seeks relief?' If the husband changes his religion, it is understandable that the wife should complain and sue for dissolution and vice versa. But it would not be right and just that one spouse should declare himself or herself a convert and then ask the court to declare the marriage dissolved as by these means a party to a marriage would be able to evade the legal obligations of a marriage entered into at a prior time and in accordance with a different system of personal law.

(The note is taken in parts from Ameer Ali: *Mahommedan Law*; Fyzee: *A Modern Approach to Islam*; Mulla: *Principles of Mahomedan Law*; Tyabji: *Muslim Law* and Fyzee: *Outlines of Muhammadan Law (edited and revised by Tahir Mahmood)*

B. Marriage and Divorce amongst Christians

B.1 In the early Roman era, there were no formalities surrounding marriage and divorce and Romans could marry and divorce as per their choice. However, with the rise of Christianity, marriage came to be regarded as a sacrament and dissolution of marriage came to be frowned upon. The Church of Rome became the supreme ecclesiastical authority even in respect of matrimonial matters. Marriage had to be sanctified by a religious ceremony and it could be dissolved only by the death of either party. With the Reformation, the Christian world became divided into Catholics and Protestants with the former advocating marriage as a sacrament and indissolubility of marriage and the latter considering the marriage as a dissoluble union and subject to the jurisdiction of

civil courts. While consent of both spouses to marriage had always been regarded as essential but now it came to be viewed as a civil contract and man-made as far as the Protestants were concerned though it was a special contract and not like a commercial contract and could be dissolved only in cases of failure of marriage.

B.2 The Indian Christians are governed by the Indian Christian Marriage Act, 1872 (hereinafter referred to as the Act of 1872) and every marriage between persons of whom one or both is a Christian is to be solemnized in accordance with the provisions of the Act. It is laid down that every marriage not so solemnized shall be void. Thus a marriage between a Christian and a non-Christian is not invalid if it is permitted by the personal law of the parties but it would be invalid if the personal law of either party prohibits such a marriage (Section 88 of the Act of 1872). Marriages amongst Christians belonging to any denomination of Christians are valid.

B.3 Any person, professing the Christian religion, is a Christian for the purpose of the Indian Christian Marriage Act, although not baptized. The marriage is regarded as a sacrament, having been ordained by God, and is an indissoluble solemn union entered into by the parties with their full and free volition for life. Amongst the Indian Christians, marriage is regarded as a civil contract.

B.4 Although no traditional ceremonies are required with regard to marriage under the Christian Marriage Act, the certificate of marriage, issued by the pastor of a church, is a statutory document and is *prima facie* evidence of marriage between the parties. The marriage may be solemnized:

a) By any person who has received Episcopal ordination, provided that the marriage be solemnized according to rules, rites, ceremonies and customs of the Church of which he is a Minister;

b) By any Clergyman of the Church of Scotland, provided that such marriage be solemnized according to rules, rites, ceremonies and customs of the Church of Scotland;

c) By any Minister of Religion licensed under the Act to solemnize marriages;

d) By, or in the presence of, a Marriage Registrar appointed under the Act;

e) By any person licensed under the Act to grant certificates of marriage between Indian Christians.

B.5 As regards the capacity to marry, Section 60 of the Indian Christian Marriage Act, 1872 lays down the condition that the age of the man intending to be married shall not be under twenty one years and the age of the woman intending to be married shall not be under eighteen years and neither person intending to be married shall have a wife or husband still living.

B.6 Under the Indian Divorce Act, a marriage is void on the following grounds:

i) Respondent was impotent at the time of the marriage and at the time of the institution of suit.

ii) Parties are within the prohibited degrees of consanguinity or affinity.

iii) Either party was idiot or lunatic at the time of marriage.

iv) A former marriage was in force.

v) Consent of either party was obtained by force or fraud.

A marriage may also be declared null and void if it was performed within six months of the confirmation of the decree of dissolution of the former marriage or on the ground of non-performance of the requisite formalities of marriage.

B.7 There is no concept of a voidable marriage under the Indian Divorce Act, 1869.

B.8 Under Sections 32 and 33 of the Act, when either the husband or the wife, without reasonable excuse, withdraws from the society of the other, either wife or husband may apply for restitution of conjugal rights. It is also provided that nothing shall be pleaded in answer to a petition for restitution of conjugal rights, which would not be ground for a suit for judicial separation or for a decree of nullity of marriage.

B.9 Sections 22 and 23 of the Act provide for judicial separation and as per the same, the husband or wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion without reasonable excuse for two years or upwards.

B.10 Divorce:

B.10.1 Section 10 para 1 contains the ground of divorce on which the husband alone can file a petition and it provides that the husband may present a petition for dissolution of his marriage on the ground that his wife has, since the solemnization thereof, been guilty of adultery. A wife can file a petition for divorce on the ground that since the solemnization of marriage, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman; or has been guilty of incestuous adultery; or of bigamy with adultery; or of marriage with another woman with adultery; or of rape, sodomy or bestiality; or of adultery coupled with such cruelty as without cruelty would have entitled her to a divorce; or of adultery coupled with desertion, without reasonable excuse for two years or upwards.

B.10.2 Section 7 of the Act provides that subject to the provisions contained in the Act, the High Courts and District Courts shall in all suits and proceedings, act and give relief on principles and rules which, in the opinion of the Courts are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. The Supreme Court in *Reynold Rajmani v. Union of India, AIR 1982 SC 1261* has held that Section 7 of the Act did not have the effect of engrafting into the Indian law, the substantive grounds for divorce which were introduced into English statutes from time to time. Thereafter the Andhra Pradesh High Court in *Amarthala Hemalatha v. Dasari Balu Rajendra Varaprasad, AIR 1990 AP 220* held that under Section 7 of the Act, the principles of English law are applicable to cases under the Act but they are limited to procedural provisions and not to substantive law.

B.10.3 The Indian Divorce Act, 1969 does not make any provision for divorce by mutual consent nor for irretrievable breakdown of marriage.

B.10.4 A decree for divorce under the Indian Divorce Act, 1969 needs confirmation by the High Court but the decree of judicial separation does not need such confirmation and comes into effect from the date it is passed.

C. Marriage and Divorce amongst Parsis and Jews

C.1 Marriage is regarded as a contract amongst the Parsis and the Indian Jews. In a Parsi marriage, consenting mind is essential though a religious ceremony, known as ashirbad which means blessings and is a prayer or exhortation to the parties to observe their marital obligations is mandatory for its validity. A Parsi marriage is solemnized by a Parsi priest in the presence of two witnesses. Amongst the Jews, a religious ceremony is essential. In a Jew marriage, a written contract called *katuba* between the parties is essential for the validity of the marriage. Under the Parsi Marriage and Divorce Act, 1936 (hereinafter referred to as the Act of 1936) a Parsi below the age of 21 years could marry only with the consent of his father and in his absence with the consent of the guardian of his person [Section 3(c)] However, by the amending Act of 1988, it has been laid down that a girl who has not completed the age of 18 years and a boy who has not completed the age of 21 years cannot marry and marriage below the said age is void.

C.2 Parsi law prohibits the marriage of a Parsi with a non-Parsi and if such a marriage takes place, it would be invalid under the Act of 1936. Further prohibitions on the grounds of consanguinity and affinity apply as set out in Schedule I to the Act. A marriage can be declared null and void if either party was impotent. If the marriage is not solemnised according to the Parsi form of ceremony called ' *ashirbad*' by a priest in the presence of two Parsi witnesses other than the priest, the marriage shall not be valid. The Parsi Marriage and Divorce Act, 1936 does not recognise the concept of voidable marriage.

C.3 The Act makes a provision for restitution of conjugal rights and under Section 36 of the Act, when a husband deserts or without lawful cause ceases to cohabit with his wife, or where the wife deserts or without lawful cause ceases to cohabit with her husband, the party so deserted or with whom cohabitation has ceased may sue for restitution of his or her conjugal rights.

C.4 Under Section 32 of the Parsi Marriage and Divorce Act, 1936, the grounds of divorce include any one or more of the following:

a) marriage has not been consummated within one year of its solemnization owing to the wilful refusal of the defendant to consummate it;

b) defendant at the time of the marriage was of unsound mind and has been habitually so upto the date of the suit provided that the plaintiff should have been ignorant about the said fact at the time of the marriage and the suit has been filed within three years from the date of the marriage;

c) the defendant has been incurably of unsound mind for a period of two years or upwards immediately preceding filing of the suit;

d) if the wife is pregnant from another man and there is no sexual intercourse after the husband comes to know of the same and the suit is filed within two years and the plaintiff was at the time of the marriage ignorant of the fact alleged;

e) adultery, fornication, bigamy, rape or unnatural offence;

f) the defendant has since the solemnization of the marriage treated the plaintiff with cruelty or has behaved in such a way as to render it in the judgment of the court

improper to compel the plaintiff to live with the defendant;

g) the defendant since the marriage has voluntarily caused grievous hurt to the plaintiff or has infected the plaintiff with a venereal disease or compelled the wife to submit to prostitution;

h) the spouse has been sentenced to imprisonment for seven years or more;

i) the defendant has deserted the plaintiff for at least two years;

j) that an order has been passed against the defendant awarding separate maintenance to the plaintiff and the parties have not had marital intercourse for one year or more since such decree or order;

k) conversion to another religion.

C.5 Likewise, under Section 34 of the Act, any married person may sue for judicial separation on any of the grounds for which such person could have filed a suit for divorce such as adultery, fornication, bigamy, rape or unnatural offence (suit should be filed within 2 years of the incident); cruelty or bad behaviour; apostacy (suit should be filed within 2 years); unsound mind, non-consummation of marriage for one year etc.

C.6 The Parsi Marriage and Divorce (Amendment) Act, 1988 has inserted Section 32B thereby introducing divorce by mutual consent i.e. a petition for divorce may be presented by both the parties to a marriage together 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 provided that one year should have lapsed since the date of the marriage. Section 32A which was also introduced in 1988 provides that either party to a marriage may sue for divorce on the ground that there has been no resumption of cohabitation between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation or a decree for restitution of conjugal rights.

D. Special Marriage Act, 1954

D.1 The Special Marriage Act, 1954 was enacted to provide a secular option for marriage to those who decided to get married under the same. The Act can be availed by any person in India and by all Indian nationals in other countries, irrespective of their religion. Thus under the Act interreligious and intercommunal marriages may be performed. The Act also incorporates a provision to enable those who are already married under any other form of marriage to get their marriage registered under it by a Marriage Officer in the territories to which the Act extends. For this the following conditions must be fulfilled:

a) a ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since;

b) neither party has at the time of registration more than one spouse living;

c) neither party is an idiot or a lunatic at the time of registration;

d) the parties have completed the age of 21 years at the time of registration;

e) the parties are not within the degrees of prohibited relationship;

f) where the marriage is solemnised in the State of Jammu and Kashmir, both parties

are citizens of India domiciled in the territories to which the Act extends.

D.2 The Special Marriage Act lays down that a marriage between any two persons may be solemnized under the Act, if at the time of the marriage, the following conditions are fulfilled:

a) neither party has a spouse living;

b) neither party-

i) is incapable of giving a valid consent to such marriage due to unsoundness of mind, or

ii) 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 procreation of children, or

iii) has been subject to recurrent attacks of insanity or epilepsy.

c) the male has completed the age of twenty-one years and the female the age of eighteen years;

d) the parties are not within the degrees of prohibited relationship, provided that where a custom governing at least one of the parties permits a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and

e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which the Act extends (Section 4 of the Act).

If the above conditions are not fulfilled the marriage may be declared invalid as also if the respondent was impotent at the time of marriage and at the time of institution of suit. These grounds do not apply to a marriage registered under the Act and the registration of a marriage may be cancelled if the conditions for registration are unfulfilled.

D.3 Under the Act, a marriage is voidable on the following grounds:

a) non-consummation of marriage on account of wilful refusal of respondent to do so.

b) pre-marriage pregnancy of the respondent of which the petitioner was not the cause and of which the petitioner was ignorant at the time of the marriage and marital intercourse had not taken place after the knowledge of pregnancy and the petition should be presented within one year from the date of marriage.

c) petitioner's consent was obtained by fraud or force, provided that the petitioner did not live with the respondent as husband or wife after the discovery of fraud or cessation of force and the petition was presented within one year of the discovery of fraud or cessation of force.

D.4 Once a marriage is solemnized under the Special Marriage Act, all matters relating to marriage, alimony, maintenance, custody would also be governed by the said Act. As regards succession to property, the same would be governed by the Indian Succession Act, 1925 and not the personal law of the parties (Section 21 of the Act). Even the succession to the issues of such persons would be governed by the Indian Succession

Act, 1925. However, if both the parties to a marriage are Hindus, then succession to their property would continue to be governed by Hindu law and not by the Indian Succession Act, 1925 (Section 21A of the Act).

D.5 Under the Special Marriage Act the registration of the marriage is automatic and compulsory. The parties may observe any ceremonies for the solemnization of their marriage (Section 12(2) of the Act), but certain formalities are prescribed before the marriage can be registered under the Act. The marriage is a civil contract and the Act requires notice of marriage to be given by both the parties to the marriage to the Marriage Officer of the District where one of the parties to the marriage has resided for a period of not less than 30 days immediately preceding the date on which such notice was given. The Marriage Officer is required to keep all notices and enter a true copy of every such notice in the Marriage Notice Book which is open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same.

The notice of marriage is also required to be published by the Marriage Officer by getting one of its copies affixed at some conspicuous place of his office. Any person who has any objection to the solemnization of the marriage should file his objections to the Marriage Officer before the expiration of 30 days from the date on which such notice was published by the Marriage Officer. The objection can be taken only on the ground that the intended marriage would contravene any of the conditions laid down in Section 4 of the Act. The Marriage Officer has to then look into the objections and if he is satisfied that none of the objections is valid or the objections are withdrawn, he would permit the solemnisation of marriage. If the objections are found to be valid, the Marriage Officer would not proceed to solemnise the marriage.

In such a case, either party to the intended marriage has the right, within a period of 30 days from the date of such refusal, to prefer an appeal to the District Court within the local limits of whose jurisdiction the Marriage Officer has his office. The Act also requires the presence of three witnesses.

D.6 Section 22 of the Act provides that where either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply for restitution of conjugal rights. Where the question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

D.7 Section 23 of the Act deals with judicial separation and lays down that a petition for judicial separation may be presented either by the husband or the wife on any of the grounds specified in Section 27 sub sections (1) and (1A) on which a petition for divorce might be presented or on the ground of failure to comply with a decree for restitution of conjugal rights. It also provides that where the court grants a decree for judicial separation, it shall be no longer obligatory for the petitioner to cohabit with the respondent, but the court may on the application of either party rescind the decree if it considers it just and reasonable to do so.

D.8 Section 27 lists the grounds of divorce on which either the husband or wife may present a divorce petition:

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

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

iii) the respondent is undergoing a sentence of imprisonment for seven years or more for an offence as defined in IPC; or

iv) the respondent has since the solemnization of the marriage treated the petitioner with cruelty; or

v) the respondent 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; or

vi) the respondent has been suffering from venereal disease in a communicable form; or

vii) the respondent has been suffering from leprosy, the disease not having been contracted from the petitioner; or

viii) the respondent 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 the respondent if the respondent had been alive.

D.9 The wife can additionally seek divorce on the ground that:

a) her husband has, since the solemnization of the marriage been guilty of rape, sodomy or bestiality; or

b) an order for maintenance has been passed against the husband and since the passing of the order, cohabitation between the parties has not been resumed for one year or upwards.

D.10 Further, under Section 28 of the Act, a petition for divorce may also be presented by both the parties together 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 i.e. provision for divorce by mutual consent.

D.11 The Special Marriage Act recognises the concept of irretrievable breakdown of marriage and Section 27(2) of the Act lays down that either party to a marriage may sue for divorce on the ground that there has been no resumption of cohabitation between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation or a decree for restitution of conjugal rights.

Session III
Total Time: 90 minutes

MODULE FOR TRAINING OF LEGAL SERVICES LAWYERS

ON

LAW OF MAINTENANCE TO WIFE

-Justice Manju Goel[1]

SESSION PLAN

Objective

1. To inform the participants of various issues involved in grant of maintenance generally and particularly to women.
2. To inform the participants of the case law on each of these various aspects.

Expected Learning Outcome

1. The participants will grasp the entire gamut of the law relating to maintenance.
2. The participants will be able to find the appropriate case law in any given circumstance.
3. The participants will be able to draft the pleadings and conduct cases more efficiently.
4. Participants will be able to assist the courts and tribunals in matters relating to maintenance.

Programme

1. Introduction 15 minutes

The resource person will introduce the subject by informing the various laws under which maintenance is available to women, children, old person and those who are unable to maintain themselves and how the law has changed over time.

2. Presentation by 5 Groups 50 minutes

The Presentation should be audio-visual i.e. lecture supported by power point. Each Presentation will be followed by brief discussion of 2-3 minutes. Resource person/ participants may use a power point or a flip chart for their presentations.

3. Lecture by resource person 10 minutes

Resource person shall make her own Presentation by adding points not stated so far and sum-up the entire discussion.

4. Experience Sharing 10 minutes

One or two of the participants will share their experience of success or failure in getting maintenance for his or her client and analyse the cause of success or failure.

1 Former Judge, High Court of Delhi

5. Concluding remarks by resource person/one of the participants or by the visiting dignitary. 5 minutes

Training Method

1. Lecture
2. Group Work
3. Prior reading
4. Presentation
5. Experience Sharing

Note: The different rulings on various aspects of law of maintenance have been collected for this purpose. The judgments will be provided to the participants on the evening preceding the day of session. Each group of 5/6 participants will pick up one of the judgments, read and discuss the same and plan how to present the same on the next day.

Tools Required

1. Facility for power point presentation
2. Flip chart
3. Pens
4. Blue tack
5. White board

READINGS

Reading for Group I

Amutha @ Symaladevi vs K.Thirumoorthy @ Thirumalaisamy

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated: 05.07.2012
Coram

THE HON'BLE MR.JUSTICE C.S.KARNAN
Crl.R.C.No.1130 of 2008

K.Thirumoorthy .. Petitioner

Vs.

1. Amutha @ Syamaladevi,
D/o. Chenniappa Gounder,
Pallakattuthottam, Odakattuvalasu,
Vadugapatti Post, Arasalur Via,
Erode District.

2. Minor T.Kokiladevi @ Rithika
D/o. K.Thirumoorthy,
Rep. by her Mother, Amutha @ Syamaladevi,
Pallakattuthottam, Odakattuvalasu,
Vadugapatti Post, Arasalur Via.,
Erode District. .. Respondents

Prayer :- Criminal Revision is filed under Section 397 r/w 401 of Cr.P.C., to call for the entire records so far relate to the order passed in M.C.No.63 of 2006, dated 29.07.2008, on the file of Chief Judicial Magistrate Court, Erode, Erode District and set-aside the same.

For Petitioner : Mr.C.Prakasam

For Respondents : Mr.S.Dhanasekaran

ORDER

The revision petitioner / respondent, has preferred the present revision against the order passed in M.C.No.63 of 2006, on the file of Chief Judicial Magistrate Court, Erode, Erode District.

2. The short facts of the case are as follows:-

The first petitioner submits that she is the wife of the respondent and that the second petitioner is her daughter. It was submitted that the first petitioner married the respondent on 06.11.2000 at Sivasakthi Marriage Hall at Arachalur. At the time of marriage, the first petitioner's parents gave 25 sovereigns of gold jewellery and Rs.3,000/- in cash and house-hold articles with Rs.20,000/- as Sreedhana. It was submitted that the respondent was in the habit of taking tablets at night, frequently. When the first petitioner questioned the respondent about this habit, the respondent had informed her that he would be able to partake in sexual activity only, if he takes the tablet and threatened the first petitioner not to ask for any details. It was submitted that within a short period of time, the respondent brought another woman named as Papathi to stay in their house. It was submitted that the respondent was having an illicit affair with the said Papathi for a long time and that the respondent told the first petitioner not to ask the details regarding their affair and beat her. It was submitted that when the first petitioner became pregnant, the respondent threatened her to abort the child. Due to fear, the first petitioner went to her parents place and stayed there.

3. It was submitted that after the birth of her daughter, the respondent had taken the family in the month of September 2011 to Kangeyam Kadeeswarer Temple and subsequently taken them to his house and assaulted the first petitioner. As the first petitioner sustained injuries on her stomach, she was admitted at Thangam Hospital, Erode and received treatment. Hence, the parents of the first petitioner had brought her to their house. It was submitted that at present, the respondent is living with the said Papathi in his house. Subsequently, the parents of the first petitioner sent her to the respondent's house in order to conduct the ear ring ceremony of the second petitioner and gave Rs.30,000/- to the respondent for conducting the ceremony. Subsequently, the respondent after telling her that he had allowed them to stay with him only due to the request made by his relatives, took away all her jewels and sent the petitioners out of the house. It was submitted that the first and second petitioners do not have any income to live upon and are not in a position to maintain themselves.

It was submitted that the respondent is running a yarn power loom and earning Rs.10,000/- per month and that in addition to this, he gets an income of Rs.5,000/- per month through cultivation of 5 acres of agricultural land owned by him. It was submitted that the respondent, at present, is spending his entire income on the said Papathi. Hence, the petitioners have filed the Maintenance Case praying for direction to the respondent to pay a sum of Rs.2,000/- to each of the first and second petitioners as monthly maintenance.

4. The respondent, in his counter has submitted that the first petitioner lived with him in a normal manner after marriage only for two months and that subsequently, the first petitioner's mother, had taken the first petitioner to her house by saying that it is advisable that this respondent and the first petitioner should live separately for

one year. It was submitted that subsequently when this respondent wanted the first petitioner to come to his house in order to celebrate "Valaikappu" function, the first petitioner, heeding the advice of her mother refused to go to the house. It was submitted that this respondent brought his wife and child to his house in order to celebrate the function of naming of the three months old child, but the first petitioner's mother had immediately come to his house and taken them with her. Subsequently, this respondent led his marital life with the petitioner from the year 2004, for about 1 1/2 months. Subsequently, the first petitioner started complaining that she felt that someone was pressing her in the night and scratching her with nails and left the marital home along with her child and went to her mother's house. It was submitted that this respondent remitted the fees of Rs.1,460/- in order to admit the second petitioner in School on 06.06.2006. The averments in the petition that this respondent was having an illicit affair with one Papathi was not admitted. It was submitted that the first petitioner, by falsely stating that she is having hallucination lie that someone is pressing her, had intentionally deserted this respondent and as such, she is not entitled to get any maintenance from this respondent.

5. The Chief Judicial Magistrate framed an issue, viz.,

> *"Are the petitioners entitled to get monthly maintenance from the respondent? If so, what is the quantum of maintenance, which they are entitled to get?"*

6. On the petitioner's side, the first petitioner was examined as P.W.1 and 7 documents were marked as Exs.P1 to P7, viz., Ex.P1-school certificate showing that the second petitioner is studying in school, Ex.P2- wedding invitation, Ex.P3-birth certificate, Ex.P4-medical reports, Ex.P5-school fees report details, Exs.P6 and P7-school fees receipts. On the side of the respondent, 4 documents were marked as Exs.R1 to R4, viz., Ex.R1-wedding photos, Exs.R2 and R3-school fees receipts dated 06.06.2006 and 19.10.2007 and Ex.R4-memo showing details about purchase of gold jewelleries dated 01.11.2010.

7. P.W.1 had adduced evidence that the respondent used to take tablets a night and has an illicit affair with one Papathi and that when she questioned the respondent about it, he had threatened to make her leave the house and also beaten her. She deposed that the respondent had also insisted that she should not beget children and threatened her.

8. R.W.1, the respondent had adduced evidence that the first petitioner's mother did not permit him and the first petitioner to live together and that the first petitioner had left the house within two months after the marriage. He deposed that when he had set up a separate house to lead his life with the first petitioner, the first petitioner, after stating that she was having hallucination and that some one is pressing her down and scratching her with her nails, had left the house and gone to her mother's place. R.W.1 further deposed that he was not having an illicit affair with one Papathi as alleged by the first petitioner. He deposed that as the first petitioner had left on her own accord, she is not entitled to get any maintenance from him.

9. R.W.2, Shanmugasundaram, Panchayat Union President had adduced evidence that the respondent gave 7 1/2 sovereigns of gold jewellery to the first petitioner at the time of her marriage, and that the first petitioner lived with the respondent only for

three months after the marriage. R.W.3 also had adduced evidence on similar lines to the evidence of R.W.2.

10. The learned Magistrate, on scrutiny of evidence of P.W.1 and R.W.1 opined that the contention made by the respondent that his wife had left the house as she was having hallucination could not be accepted as the respondent had not made any effort to take his wife to a Psychologist to set right the alleged disorder. The learned Magistrate further opined that if the respondent had really wanted to live with the first petitioner, he could have set up his family in a separate house, and that he had not done so. The learned Magistrate, opined that the first petitioner would not have left the house without reasonable cause and hence, observed that there are merits in the contentions of the first petitioner that she had left the house as the respondent was having an illicit affair with one Pappathi. The learned Magistrate, on observing that the respondent is running a power-loom, opined that he would be earning a sum of Rs.5,000/- per month. The learned Magistrate, on observing that the petitioners do not have any source of income held the respondent, liable to give maintenance to them and directed the respondent to pay a monthly maintenance of Rs.1,000/- to the first petitioner and Rs.500/- as monthly maintenance to the second petitioner, from the date of filing the maintenance petition.

11. Aggrieved by the order passed in the Maintenance Case, the respondent has preferred the present revision.

12. The learned counsel for the revision petitioner has contended in his revision that the lower court failed to consider the evidence of R.W.2, who had clearly deposed that it was the petitioner herein who had given 7 1/2 sovereigns of gold jewellery to the first petitioner at the time of marriage and that the first respondent herein had lived with the petitioner herein only for three months after the marriage. It was submitted that the lower Court failed to note that the first respondent herein had left the matrimonial home on the ground that she had a psychological problem and also due to the fact that her mother had come and taken her to her house stating that as per astrology, her daughter should not live with her husband for some time. It was contended that the trial Court failed to consider that when the Panchayat was convened for reunion, the first respondent herein had adamantly refused to live with the petitioner, even though, the petitioner frequently requested the first respondent to live with him. It was contended that the trial Court failed to note that the petitioner has only one power loom and on most days he is not able to run it for want of power supply and scarcity of yarn and hence, he is able to earn only Rs.2,000/- per month. It was contended that out of the sum of Rs.2,000/- being earned by him, he has to pay money for electricity consumption charges and also pay the female servant, who assists the petitioner for running power loom. It was also contended that the trial Court erred in holding that this petitioner was having an illicit affair with one Papathi, without any material evidence and hence, the conclusion of the trial Court is illegal and arbitrary. Hence, it was prayed to setaside the order passed by the learned Chief Judicial Magistrate, Erode.
13. The learned counsel Mr.S.Dhanasekaran, appearing for the respondents submits that the revision petitioner/husband is owning vast cultivable lands to an extent of 5 acres and earning Rs.5,000/- per month. Besides this, he is also running a power loom unit and earning Rs.10,000/- per month. The second respondent is a school going girl

and the first respondent is the natural mother of the second respondent and caretaker. Further, the second respondent has no income as she is not employed. Further, the monthly maintenance of a sum of Rs.1,000/- and Rs.500/- granted in fravour of the first and second respondents respectively is not on the higher side. Considering the education expenses of the second respondent and the other maintenance expenses incurred by both the respondents.

14. On considering the fats and circumstances of the case and arguments advanced by the learned counsels on either side and on perusing the impugned order of the trial Court, this Court does not find any discrepancy in the conclusions arrived at for granting maintenance to the respondents herein considering their relationship. Further, the quantum of maintenance is not on the higher side since the first respondent is not an earning lady and the second respondent is a student. Therefore, considering the expenses incurred by them for food, shelter, medical expenses, cosmetics, transport, communication, entertainment, dress and educational expenses etc., the maintenance awarded is appropriate. Hence, the revision is dismissed. Further, this Court directs the revision petitioner herein to pay the entire arrears, as per the trial court's order within a period of two months from the date of receipt of a copy of this order. Thereafter, the revision petitioner shall pay the monthly maintenance on or before 10th of every succeeding English calendar month.

15. In the result, the above revision is dismissed. Consequently, the order passed in M.C.No.63 of 2006, on the file of Chief Judicial Magistrate Court, Erode, Erode District, dated 29.07.2008, is confirmed.

05.07.2012

Reading for Group II

K.R. Sagayaraj vs Mrs.C. Rajammal

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 12.11.2010
CORAM

THE HONOURABLE MR. JUSTICE G.M. AKBAR ALI
CRL.O.P.No.22949 of 2009
and M.P.Nos.1 of 2009 and 1 of 2010

K.R. Sagayaraj .... Petitioner vs

1. Mrs.C. Rajammal
2. S. Vineet Roy … Respondents

Criminal Original Petition filed under Section 482 Cr.P.C. for the reliefs as stated therein.

For petitioner	:	Mr.T. Arul
For respondents	:	Mr.Auxilia Peter

ORDER

1. The petition is filed seeking a direction to call for the records in M.C.No.379 of 2009 on the file of the learned II Additional Family Court, Chennai and quash the same.

2. A short point arises for consideration in this petition is whether the proceedings under Sec.125 Cr.P.C is maintainable when a civil court has disallowed maintenance for the wife in a civil suit?

3. The petitioner is the husband and the respondents are the wife and chid of the petitioner. The petitioner and the 1st respondent got married on 10.2.1992 according to Christian Rights and Customs. The 2nd respondent was born on 13.8.1993. The matrimonial relationship between the petitioner and the 1st respondent lasted only for a short time and difference arose between them and the matter was taken to various forums for conciliation and the conciliation failed. The husband and wife are living separately from 1997 and the 2nd respondent is with the mother.

4. The 1st respondent filed a suit in OS.No.58/97 before the Family Court at Chennai for maintenance claiming Rs.3000/-for each respondents. The petiitoner filed O.P.No.14/98 for dissolution of marriage on the grounds of desertion and cruelty u/s 10(1)(ix) and 10 of Indian Divorce Act.

5. The petitioner contested the maintenance suit stating that the 1st respondent has deserted him and is living separately without any reason and therefore, she is not entitled for maintenance.

6. The Principal Family Court passed a common order dated 30.6.2004, partly allowing the maintenance suit thereby decreeing a sum of Rs.3000/- for the 2nd respondent/ child and held that the 1st respondent is not entitled for maintenance as she has not proved desertion by the husband. The Court has also dismissed the petition for dissolution of marriage as the husband has not proved the desertion and cruelty. Aggrieved by the order of maintenance, the petitioner has preferred in appeal in A.S.No.956/2005 before this court and the same is pending.

7. Meanwhile, the 1st respondent has initiated proceedings under Sec.125 Cr.P.C before the Family Court in M.C.NO.379/2009. The husband has come forward with the above petition to quash the above proceedings on the sole ground that the petition is not maintainable as the civil court has already disallowed the maintenance. Therefore, the only point for consideration arises is whether a subsequent application under Sec.125 Cr.P.C is mainteinable when the wife's suit for maintenance was dismissed on merits.

8. Mr.T.Arul, learned counsel for the petitioner would submit that the civil court had gone into detail in the suit for maintenance and has held that the 1st respondent is not entitled for maintenance and therefore, the subsequent application for the same relief under Sec.125 Cr.P.C is not maintainable.

9. The learned counsel relied on a judgment of the Bombay High Court reported in Vol II. 1986 DMC 386 (MuralidharChintamanWaghmare vs PratibhaMuralidharWaghmare and another). The High Court of Bombay answering to a similar question held as follows:

"Once the Civil Court of competent jurisdiction comes to the conclusion that the wife is not entitled to maintenance, the Criminal Court under Sec.125 Cr.P.C is bound by that decision as proceedings in Civil Court are substantial whereas proceedings under Section 125 Cr.P.C are of a summary nature".

10. The learned counsel relied on a decision reported in 1989 Crl.LJ 2037 (1) (G. Ramanathan vs Mrs. Revathy) wherein David Annoussamy J has held as follows:

" 4. When a competent Civil Court has already (sic) of the matter and when it is possible without incurring any expenditure or any other inconvenience to approach, by way of a simple petition, the Civil Court so as to obtain maintenance, it is not proper on the part of the wife to go before the Magistrate for an order. The proper course is to approach the Civil Court which is already seized. Further under S.127 of the Cr.P.C, if an order regarding maintenance is passed by the competent Civil Court, the Magistrate should have to set aside its own order which is more in the nature of a temporary measure made after a summary hearing to meet an emergent situation. Therefore, the fact of seizing the Magistrate when the competent Civil Court has been already seized would cause only judicial waste of time since the order obtained is ultimately liable to be cancelled. I therefore come to the conclusion that the institution of a proceeding under Sec.125 Cr.P.C when a civil proceeding is already pending between the parties under the Hindu Marriage Act is against the scheme of law contemplated under the Hindu Marriage Act, 1955 and Chap IX of the Cr.P.C.

11. On the contrary Mrs. Auxila Peter, learned counsel for the respondents would submit that the proceedings in a civil court for maintenance is not a bar for the proceedings under Sec.125 Cr.P.C. The learned counsel pointed out that the right under Sec.125 Cr.P.C is an independent right. The learned counsel relied on a decision reported in (1991 (1) MLJ 290 (Vanaja vs Gopu), wherein on consideration of a claim of interim maintenance under Sec.24 of the Hindu Marriage Act and simultaneous claim of maintenance under Sec.125 Cr.P.C , this Court held as follows:

"It is thus clear that the right to claim maintenance or litigation expenses under Section 24 of the Hindu Marriage Act, is not made available generally to the parties to a marriage, but only when a proceeding between the spouses is pending under that Act, and in that respect, the right conferred under Section 24 of that Act, is in the nature of a special statutory right not in any manner outside the provisions Section 24 of the Hindu Marriage Act. The purpose behind Section 24 of the Hindu Marriage Act is that parties to a matrimonial cause should not take undue and unfair advantage of a superior financial capacity to defeat the rightful claims of a weaker party and the proceedings under Section 24 of that Act serve a limited purpose, i.e., during the pendency of proceedings under that Act, to enable the weaker party to establish rights without being in any manner hindered by lack of financial support. If the special nature of the statutory right under Section 24 of that Act and its purpose, are borne in mind, it is at once clear that the enforcement of that right, cannot in any manner be hedged in by a consideration of proceedings otherwise initiated, either under Section 125, Cr.P.C or under the ordinary law".

12. The learned counsel also relied on an unreported judgment in C.R.P(PD) NO.4001 of 2008 dated 25.8.2009, wherein this court has again dealt with the question whether a

pre-existing order for payment of maintenance granted by the Chief Judicial Magistrate under Sec.125 Cr.P.C is a bar for maintaining an application under Sec.24 of Hindu Marriage Act and held that it is not a bar and both are independent proceedings.

13. Heard and perused the materials available on record.

14. This is a pathetic case of a wife who has been denied of maintenance from her husband from 1997. She had filed O.S.No.58/97 before the Family Court for maintenance for herself and her child. The Family Court declined to grant the relief holding that she has not proved her case of desertion by her husband. But the Court has granted maintenance for her child against which, the husband has gone an appeal and this court has passed an order of stay on a condition that the husband shall deposit the arrears of maintenance till the date of order. That was the period from 4.12.1997 to 9.11.2005. The petitioner has moved the Family Court again under Sec.125 Cr.P.C in MC No.379 of 2009. This is also opposed by the husband. The parties are governed by the Indian Christian Marriage Act, 1872 and the Divorce Act, 1869. None of the above Acts deals with maintenance to a Christian wife.

15. Sec.37 of the Divorce Act, 1869 reads as follows:

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.

16. Except this there is no other provision in the Special Acts providing maintenance for a Christian wife.

Sec.125 of Cr.P.C reads as follows:

"Order for maintenance of wife, children and parents:

(1) If any person having sufficient means neglects or refuses to maintain -

(a) his wife, unable to maintain herself

.....

(4) No wife shall be entitled to receive an allowance 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."

17. The right of a Christian wife to claim maintenance under the Divorce Act 1869 is subject to a proceeding under the Act. Unlike the right of a Hindu wife under the Hindu Law or under The Hindu Maintenance and Adoption Act or the right of Muslim woman under the Mohamedan Law, the right of maintenance to a Christian wife is not under any statute. It is based on law of equity and justice. A Division Bench of this Court in Mrs.StellaPakkam vs RajiahRatnam (AIR 1966 Madras 225) S. Ramachandra Iyer, CJ and KunhamedKutty, J dealt with the law applicable to the Christians in India and observed as follows:

"19……

That a wife, in England, could not, but for the statute, agitate her claim for maintenance against her husband by an action, is more or less due to a historical development of the law due perhaps to thebasic concept of the spouses being one in the eye of law. That rule has not been accepted in America. There isless reason in this country for the acceptance of any such rule, where under S.9.CP.C the court has jurisdiction to try all suits of a civil nature except those the cognizance of which has been either expressly or impliedly barred.

21. Devasahayam vs Devamony, ILR 16 Mad 133 (AIR 1923 Mad 211) was a case where the husband's application for dissolution of the marriage with his wife was dismissed. But while so doing, the lower court granted a certain sum of money, payable every month as permanent maintenance to the wife. A Bench of this Court held that, apart from the provisions of S.37 of the Indian Divorce Act, there would be no power in the Court to grant permanent alimony and the suit for dissolution of marriage having been dismissed, there was no justification for the award of maintenance. At the same time, it was observed:

"If she wants maintenance without either judicial separation or divorce, she can have the remedy only by filing a suit or an application under the Criminal Procedure Code" A right to agitate the wife's claim to separate maintenance apart from proceedings under the Indian Divorce Act, has thus been accepted".

18. The question whether a Christian wife is entitled for a maintenance from her husband and if so, under what statute and procedure she should adopt for enforcing such a right, will have to be decided not on the technical notions but on principles of equity and justice and by adopting the procedural law. The defences available for refusal of such maintenance by the husband will also based on equity and justice.

19. The method and manner of enforcing this right is by way of filing a civil suit or claiming a maintenance in a proceeding pending under the Divorce Act. Like any other person the Christian wife may also resort to the proceedings under Sec.125 Cr.P.C with an expectation that she would get quicker and speedy relief in those proceedings. The wife is entitled to resort to proceedings before a Civil Court for the enforcement of such maintenance right. It is only the adoption of different methods for the enforcement of right to maintenance.

20. While dealing with the question whether a pre-existing order for payment of maintenance under Sec.125 of Cr.P.C is a bar for maintaining an application under Sec.24 of the Hindu Marriages Act, the Courts are of the uniform view that it is not a bar and both the reliefs are independent of each other. It is well settled that a claim under Sec.24 of the Hindu Marriages Act is a relief of interim maintenance during the pendency of matrimonial proceedings. Initiation of a legal proceedings under the Hindu Marriages Act is a condition precedent whereas the claim under Sec.125 Cr.P.C is a social relief. The civil courts granting maintenance have only to take into consideration of the pre-existing order of such payment of maintenance by the criminal court.

21. The decisions relied on by both counsels deals with the right of a Hindu wife under two enactment. As stated above the Christian wife can claim maintenance from her husband through criminal proceedings and through civil proceedings. She may pursue both criminal and civil proceedings simultaneously as there is no legal bar. Denial of maintenance by a civil court for maintenance will not act as bar for a claim under Sec.125 Cr.P.C.

22. Under Sec.125 Cr.P.C a wife who is unable to maintain herself is entitled for maintenance. Under clause 4 of Sec.125 Cr.P.C., She is not entitled to receive such maintenance from her husband if, without any sufficient reason refuses to live with her husband.

23. The civil suit was dismissed on the ground that the wife has not proved desertion by her husband. The wife has not filed an appeal against this finding, but has chosen an alternative remedy of approaching Criminal Court, which is a statutory right and a summary proceeding. Both are independent rights. While granting maintenance, if there is any pre-existing order of maintenance, the court has to take into consideration of such order to pass a decree. Except that there is no bar for approaching a criminal court under Sec.125 Cr.P.C.

24. The order passed in the civil court will not be a bar. Therefore, there is no merit in the petition. Hence the criminal original petition stands dismissed. Consequently, connected Mps are closed.

Reading for Group III

Badshah vs Sou.Urmila Badshah Godse & Anr
Crl. Misc. Pet. No. 19530 of 2013 In SLP(Crl)No.8596/2013

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL MISCELLANEOUS PETITION No.19530/2013
IN
SPECIAL LEAVE PETITION (CRL.) No.8596/2013

Badshah ....Petitioner

Versus

Sou. Urmila Badshah Godse & Anr. ...Respondents

JUDGMENT

A.K. SIKRI,J.

1. There is a delay of 63 days in filing the present Special Leave Petition and further delay of 11 days in refilling Special Leave Petition. For the reasons contained in the application for condonation of delay, the delay in filing and refilling of SLP is condoned.

2. The petitioner seeks leave to appeal against the judgment and order dated 28.2.2013 passed by the High Court of Judicature at Bombay, Bench at Aurangabad in Criminal Writ Petition No.144/2012. By means of the impugned order, the High Court has upheld the award of maintenance to respondent No.1 at the rate of Rs.1000/- per month and to respondent No.2 (daughter) at the rate of Rs.500/- per month in the application filed by them under Section 125 of the Code of Criminal Procedure (Cr.P.C.) by the learned Trial Court and affirmed by the learned Additional Sessions Judge. Respondents herein had filed proceedings under Section 125, Cr.P.C. before Judicial Magistrate First Class (JMFC) alleging therein that respondent No.1 was the wife of the petitioner herein and respondent No.2 was their daughter, who was born out of the wedlock.

3. The respondents had stated in the petition that respondent No.1 was married with Popat Fapale. However, in the year 1997 she got divorce from her first husband. After getting divorce from her first husband in the year 1997 till the year 2005 she resided at the house of her parents. On demand of the petitioner for her marriage through mediators, she married him on 10.2.2005 at Devgad Temple situated at Hivargav-Pavsa. Her marriage was performed with the petitioner as per Hindu Rites and customs. After her marriage, she resided and cohabited with the petitioner. Initially for 3 months, the petitioner cohabited and maintained her nicely. After about

three months of her marriage with petitioner, one lady Shobha came to the house of the petitioner and claimed herself to be his wife. On inquiring from the petitioner about the said lady Shobha, he replied that if she wanted to cohabit with him, she should reside quietly. Otherwise she was free to go back to her parents house. When Shobha came to the house of petitioner, respondent No.1 was already pregnant from the petitioner. Therefore, she tolerated the ill-treatment of the petitioner and stayed alongwith Shobha. However, the petitioner started giving mental and physical torture to her under the influence of liquor. The petitioner also used to doubt that her womb is begotten from somebody else and it should be aborted. However, when the ill-treatment of the petitioner became intolerable, she came back to the house of her parents. Respondent No.2, Shivanjali, was born on 28.11.2005. On the aforesaid averments, the respondents claimed maintenance for themselves.

4. The petitioner contested the petition by filing his written statement. He dined his relation with respondent Nos.1 and 2 as his wife and daughter respectively. He alleged that he never entered with any matrimonial alliance with respondent No.1 on 10.2.2005, as claimed by respondent No.1 and in fact respondent No.1, who was in the habit of leveling false allegation, was trying to blackmail him. He also denied co-habitation with respondent No.1 and claimed that he was not the father of respondent No.2 either. According to the petitioner, he had married Shobha on 17.2.1979 and from that marriage he had two children viz. one daughter aged 20 years and one son aged 17 years and Shobha had been residing with him ever since their marriage. Therefore, respondent No.1 was not and could not be his wife during the subsistence of his first marriage and she had filed a false petition claiming her relationship with him.

5. Evidence was led by both the parties and after hearing the arguments the learned JMFC negatived the defence of the petitioner. In his judgment, the JMFC formulated four points and gave his answer thereto as under:

1.	Does applicant no.1 Urmila proves that she is a wife and applicant No.2 Shivanjali is daughter of non applicant?	Yes
2.	Does applicant No.1 Urmila proves that nonapplicant has deserted and neglected them to maintain them through having sufficient means?	Yes
3.	Whether applicant No.1 Urmila and Applicant No.2 Shivanjali are entitled to get maintenance from nonapplicant?	Yes
4.	If yes, at what rate?	Rs. 1,000/- p.m. to Applicant No.1 and Rs. 500/- p.m. to Applicant No. 2.

6. It is not necessary to discuss the reasons which prevailed with the learned JMFC in giving his findings on Point Nos.1 and 2 on the basis of evidence produced before the Court. We say so because of the reason that these findings are upheld by the learned Additional Sessions Judge in his judgment while dismissing the revision petition of

the petitioner herein as well as the High Court. These are concurrent findings of facts with no blemish or perversity. It was not even argued before us as the argument raised was that in any case respondent No.1 could not be treated as "wife" of the petitioner as he was already married and therefore petition under Section 125 of the Cr.P.C. at her instance was not maintainable. Since, we are primarily concerned with this issue, which is the bone of contention, we proceed on the basis that the marriage between the petitioner and respondent No.1 was solemnized; respondent No.1 co-habited with the petitioner after the said marriage; and respondent No.2 is begotten as out of the said cohabitation, whose biological father is the petitioner. However, it would be pertinent to record that respondent No.1 had produced overwhelming evidence, which was believed by the learned JMFC that the marriage between the parties took place on 10.2.2005 at Devgad Temple. This evidence included photographs of marriage. Another finding of fact was arrived at, namely, respondent No.1 was a divorcee and divorce had taken place in the year 1997 between her and her first husband, which fact was in the clear knowledge of the petitioner, who had admitted the same even in his cross-examination.

7. The learned JMFC proceeded on the basis that the petitioner was married to Shobha and was having two children out of the wedlock. However, at the time of solemnizing the marriage with respondent No.1, the petitioner intentionally suppressed this fact from her and co-habited with respondent No.1 as his wife.

8. The aforesaid facts emerging on record would reveal that at the time when the petitioner married the respondent No.1, he had living wife and the said marriage was still subsisting. Therefore, under the provisions of Hindu Marriage Act, the petitioner could not have married second time. At the same time, it has also come on record that the petitioner duped respondent No.1 by not revealing the fact of his first marriage and pretending that he was single. After this marriage both lived together and respondent No.2 was also born from this wedlock. In such circumstances, whether respondents could filed application under Section 125 of the Cr.P.C., is the issue. We would like to pin point that in so far as respondent No.2 is concerned, who is proved to be the daughter of the petitioner, in no case he can shun the liability and obligation to pay maintenance to her. The learned counsel ventured to dispute the legal obligation qua respondent No.1 only.

9. The learned counsel for the petitioner referred to the judgment of this Court in Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhay & Anr.[1] In that case, it was held that a Hindu lady who married after coming into force Hindu Marriage Act, with a person who had a living lawfully wedded wife cannot be treated to be "legally wedded wife" and consequently her claim for maintenance under Section 125, Cr.P.C. is not maintainable. He also referred to later judgments in the case of Savitaben Somabai Bhatiya vs. State of Gujarat & Ors.[2] wherein the aforesaid judgment was followed. On the strength of these two judgments, the learned counsel argued that the expression "wife" in Section 125 cannot be stretched beyond the legislative intent, which means only a legally wedded-wife. He argued that Section 5(1) (i) of the Hindu Marriage Act, 1955 clearly prohibits 2nd marriage during the subsistence of the 1st marriage,

1 (1988) 1 SCC 530
2 (2005) 3 SCC 636

and so respondent No.1 cannot claim any equity; that the explanation clause (b) to Section 125 Cr.P.C. mentions the term "divorce" as a category of claimant, thus showing that only a legally wedded-wife can claim maintenance. He, thus, submitted that since the petitioner had proved that he was already married to Shobha and the said marriage was subsisting on the date of marriage with respondent No.1, this marriage was void and respondent No.1 was not legally wedded wife and therefore had no right to move application under Section 125 of the Cr.P.C.

10. Before we deal with the aforesaid submission, we would like to refer two more judgments of this Court. First case is known as Dwarika Prasad Satpathy vs. Bidyut Prava Dixit & Anr.[3] In this case it was held:

> *"The validity of the marriage for the purpose of summary proceeding under s.125 Cr.P.C. is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceeding is not as strict as is required in a trial of offence under section 494 of the IPC. If the claimant in proceedings under s.125 of the Code succeeds in showing that she and the respondent have lived together as husband and wife, the court can presume that they are legally wedded spouse, and in such a situation, the party who denies the marital status can rebut the presumption. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe into whether the said procedure was complete as per the Hindu Rites in the proceedings under S.125, Cr.P.C. From the evidence which is led if the*
>
> *Magistrate is prima facie satisfied with regard to the performance of marriage in proceedings under S.125, Cr.P.C. which are of summary nature strict proof of performance of essential rites is not required.*

It is further held:

> *It is to be remembered that the order passed in an application under section 125Cr.P.C. does not finally determine the rights and obligations of the parties and the said section is enacted with a view to provide summary remedy for providing maintenance to a wife, children and parents. For the purpose of getting his rights determined, the appellant has also filed Civil Suit which is spending before the trial court. In such a situation, this Court in S.Sethurathinam Pillai vs. Barbara alias Dolly Sethurathinam, (1971) 3 SCC 923, observed that maintenance under section 488, Cr.P.C. 1898 (similar to Section 125, Cr.P.C.) cannot be denied where there was some evidence on which conclusion for grant of maintenance could be reached. It was held that order passed under Section 488 is a summary order which does not finally determine the rights and obligations of the parties; the decision of the criminal Court that there was a valid marriage between the parties will not operate as decisive in any civil proceeding between the parties."*

11. No doubt, it is not a case of second marriage but deals with standard of proof under

3 (1999) 7 SCC 675

Section 125, Cr.P.C. by the applicant to prove her marriage with the respondent and was not a case of second marriage. However, at the same time, this reflects the approach which is to be adopted while considering the cases of maintenance under Section 125,Cr.P.C. which proceedings are in the nature of summary proceedings.

12. Second case which we would like to refer is Chanmuniya vs. Virendra Kumar Singh Kushwaha & Anr.[4] The Court has held that the term "wife" occurring in Section 125, Cr.P.C. is to be given very wide interpretation. This is so stated in the following manner:

> *"A broad and expansive interpretation should be given to the term "wife" to include even those cases where a man and woman have been living together as husband and wife for reasonably long period of time, and strict proof of marriage should not be a pre-condition for maintenance under Section 125 of the Cr.P.C. so as to fulfill the true spirit and essence of the beneficial provision of maintenance under Section 125."*

13. No doubt, in Chanmuniya (supra), the Division Bench of this Court took the view that the matter needs to be considered with respect to Section 125,Cr.P.C., by larger bench and in para 41, three questions are formulated for determination by a larger bench which are as follows:

> *"1. Whether the living together of a man and woman as husband and wife for a considerable period of time would raise the presumption of a valid marriage between them and whether such a presumption would entitle the woman to maintenance under Section 125,Cr.P.C.?*
>
> *2. Whether strict proof of marriage is essential for a claim of maintenance under Section 125,Cr.P.C. having regard to the provisions of the Domestic Violence Act, 2005?*
>
> *3. Whether a marriage performed according to the customary rites and ceremonies, without strictly fulfilling the requisites of Section 7(1) of the Hindu Marriage Act, 1955, or any other personal law would entitle the woman to maintenance under Section 125,Cr.P.C.?"*

14. On this basis, it was pleaded before us that this matter be also tagged along with the aforesaid case. However, in the facts of the present case, we do not deem it proper to do so as we find that the view taken by the courts below is perfectly justified.

We are dealing with a situation where the marriage between the parties has been proved. However, the petitioner was already married. But he duped the respondent by suppressing the factum of alleged first marriage. On these facts, in our opinion, he cannot be permitted to deny the benefit of maintenance to the respondent, taking advantage of his own wrong. Our reasons for this course of action are stated hereinafter.

15. Firstly, in Chanmuniya case, the parties had been living together for a long time and on that basis question arose as to whether there would be a presumption of marriage between the two because of the said reason, thus, giving rise to claim of maintenance under Section 125,Cr.P.C. by interpreting the term "wife" widely. The Court has

4 (2011) 1 SCC 141

impressed that if man and woman have been living together for a long time even without a valid marriage, as in that case, term of valid marriage entitling such a woman to maintenance should be drawn and a woman in such a case should be entitled to maintain application under Section 125,Cr.P.C. On the other hand, in the present case, respondent No.1 has been able to prove, by cogent and strong evidence, that the petitioner and respondent No.1 had been married each other.

16. Secondly, as already discussed above, when the marriage between respondent No.1 and petitioner was solemnized, the petitioner had kept the respondent No.1 in dark about her first marriage. A false representation was given to respondent No.1 that he was single and was competent to enter into martial tie with respondent No.1. In such circumstances, can the petitioner be allowed to take advantage of his own wrong and turn around to say that respondents are not entitled to maintenance by filing the petition under Section 125,Cr.P.C. as respondent No.1 is not "legally wedded wife" of the petitioner? Our answer is in the negative. We are of the view that at least for the purpose of Section 125 Cr.P.C., respondent No.1 would be treated as the wife of the petitioner, going by the spirit of the two judgments we have reproduced above. For this reason, we are of the opinion that the judgments of this Court in Adhav and Savitaben cases would apply only in those circumstances where a woman married a man with full knowledge of the first subsisting marriage. In such cases, she should know that second marriage with such a person is impermissible and there is an embargo under the Hindu Marriage Act and therefore she has to suffer the consequences thereof. The said judgment would not apply to those cases where a man marriages second time by keeping that lady in dark about the first surviving marriage. That is the only way two sets of judgments can be reconciled and harmonized.

17. Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section 125,Cr.P.C. While dealing with the application of destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalized sections of the society. The purpose is to achieve "social justice" which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society.

18. Of late, in this very direction, it is emphasized that the Courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate. There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently:

> *"It is, therefore, respectfully submitted that "social context judging" is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the*

socialeconomic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication."[5]

19. Provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from "adversarial" litigation to social context adjudication is the need of the hour.

20. The law regulates relationships between people. It prescribes patterns of behavior. It reflects the values of society. The role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both Constitutional and statutory interpretation, the Court is supposed to exercise direction in determining the proper relationship between the subjective and objective purpose of the law.

21. **Cardozo** acknowledges in his classic[6]

"….no system of jus scriptum has been able to escape the need of it", and he elaborates: "It is true that Codes and Statutes do not render the Judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however, obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a stature."

Says **Gray** *in his lecture*[7]

"The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine that the legislature did mean on a point which was present to its mind, but to guess what is would have intended on a point not present to its mind, if the point had been present."

5 Delivered a key note address on "Legal Education in Social Context"
6 The Nature of Judicial Process
7 From the Book "The Nature and Sources of the Law" by John Chipman Gray

22. The Court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision— "libre recherché sceintifique" i.e. "free Scientific research". We are of the opinion that there is a non-rebuttable presumption that the Legislature while making a provision like Section 125 Cr.P.C., to fulfill its Constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances.

23. This approach is particularly needed while deciding the issues relating to gender justice. We already have examples of exemplary efforts in this regard. Journey from **Shah Bano**[8] **to Shabana Bano**[9] guaranteeing maintenance rights to Muslim women is a classical example.

24. In **Rameshchandra Daga v. Rameshwari Daga**[10], the right of another woman in a similar situation was upheld. Here the Court had accepted that Hindu marriages have continued to be bigamous despite the enactment of the Hindu Marriage Act in 1955. The Court had commented that though such marriages are illegal as per the provisions of the Act, they are not 'immoral' and hence a financially dependent woman cannot be denied maintenance on this ground.

25. Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in Heydon's Case[11] which became the historical source of purposive interpretation. The court would also invoke the legal maxim *construction ut res magis valeat guam pereat,* in such cases i.e. where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125, Cr.P.C., such a woman is to be treated as the legally wedded wife.

26. The principles of Hindu Personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against destitution. The manifest purpose is to achieve the social objectives for making bare minimum provision to sustain the members of relatively smaller social groups. Its foundation spring is humanistic. In its operation field all though, it lays down the permissible categories under its benefaction, which are so entitled either because of the tenets supported by clear public policy or because of the need to subserve the social and individual morality measured for maintenance.

27. In taking the aforesaid view, we are also encouraged by the following observations of

8 AIR 1985 SC 945
9 AIR 2010 SC 305
10 AIR 2005 SC 422
11 (1854) 3 Co.Rep.7a,7b

this Court in Capt.Ramesh Chander Kaushal vs. Veena Kaushal[12]:

> *"The brooding presence of the Constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause – the cause of the derelicts."*

13. For the aforesaid reasons, we are not inclined to grant leave and dismiss this petition.

.....J.
[Ranjana Prakash Desai]

.....J.
[A.K.Sikri]

New Delhi,
October 18, 2013

12 (1978) 4 SCC 70

Reading for Group IV

Shamima Farooqi vs Shahid Khan

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.564-565 OF 2015
[Arising out of SLP (Crl.) Nos. 6380-6381 of 2014]

SHAMIMA FAROOQUI … Appellant

Versus

SHAHID KHAN … Respondent

JUDGMENT

Dipak Misra, J.

Leave granted.

2. When centuries old obstructions are removed, age old shackles are either burnt or lost their force, the chains get rusted, and the human endowments and virtues are not indifferently treated and emphasis is laid on "free identity" and not on "annexed identity", and the women of today can gracefully and boldly assert their legal rights and refuse to be tied down to the obscurant conservatism, and further determined to ostracize the "principle of commodity", and the "barter system" to devoutly engage themselves in learning, criticizing and professing certain principles with committed sensibility and participating in all pertinent and concerned issues, there is no warrant or justification or need to pave the innovative multi-avenues which the law does not countenance or give its stamp of approval. Chivalry, a perverse sense of human egotism, and clutching of feudal megalomaniac ideas or for that matter, any kind of condescending attitude have no room. They are bound to be sent to the ancient woods, and in the new horizon people should proclaim their own ideas and authority. They should be able to say that they are the persons of modern age and they have the ideas of today's "Bharat". Any other idea floated or any song sung in the invocation of male chauvinism is the proposition of an alien, a total stranger – an outsider. That is the truth in essentiality.

3. The facts which are requisite to be stated for adjudication of these appeals are that the appellant filed an application under Section 125 of the Code of Criminal Procedure (CrPC) contending, inter alia, that she married Shahid Khan, the respondent herein, on 26.4.1992 and during her stay at the matrimonial home she was prohibited from

talking to others, and the husband not only demanded a car from the family but also started harassing her. A time came when he sent her to the parental home where she was compelled to stay for almost three months. The indifferent husband did not come to take her back to the matrimonial home, but she returned with the fond and firm hope that the bond of wedlock would be sustained and cemented with love and peace but as the misfortune would have it, the demand for the vehicle continued and the harassment was used as a weapon for fulfilment of the demand. In due course she came to learn that the husband had illicit relationship with another woman and he wanted to marry her. Usual to sense of human curiosity and wife's right when she asked him she was assaulted. The situation gradually worsened and it became unbearable for her to stay at the matrimonial home. At that juncture, she sought help of her parents who came and took her to the parental home at Lucknow where she availed treatment. Being deserted and ill-treated and, in a way, suffering from fear psychosis she took shelter in the house of her parents and when all her hopes got shattered for reunion, she filed an application for grant of maintenance at the rate of Rs.4000/- per month on the foundation that husband was working on the post of Nayak in the Army and getting a salary of Rs.10,000/- approximately apart from other perks.

4. The application for grant of maintenance was resisted with immense vigour by the husband disputing all the averments pertaining to demand of dowry and harassment and further alleging that he had already given divorce to her on 18.6.1997 and has also paid the Mehar to her.

5. A reply was filed to the same by wife asserting that she had neither the knowledge of divorce nor had she received an amount of Mehar.

6. During the proceeding before the learned Family Judge the wife-appellant examined herself and another, and the respondent-husband examined four witnesses, including himself. The learned Family Judge, Family Court, Lucknow while dealing with the application forming the subject matter Criminal Case No. 1120 of 1998 did not accept the primary objection as regards the maintainability under Section 125 CrPC as the applicant was a Muslim woman and came to hold even after the divorce the application of the wife under Section 125 CrPC was maintainable in the family court. Thereafter, the learned Family Judge appreciating the evidence brought on record came to opine that the marriage between the parties had taken place on 26.4.1992; that the husband had given divorce on 18.6.1997; that she was ill treated at her matrimonial home; and that she had come back to her parental house and staying there; that the husband had not made any provision for grant of maintenance; that the wife did not have any source of income to support her, and the plea advanced by the husband that she had means to sustain her had not been proved; that as the husband was getting at the time of disposal of the application as per the salary certificate Rs.17654/- and accordingly directed that a sum of Rs.2500/- should be paid as monthly maintenance allowance from the date of submission of application till the date of judgment and thereafter Rs.4000/- per month from the date of judgment till the date of remarriage.

7. The aforesaid order passed by the learned Family Judge came to be assailed before the High Court in Criminal Revision wherein, the High Court after adumbrating

the facts referred to the decisions in ***Anita Rani v. Rakeshpal Singh***[1], ***Dharmendra Kumar Gupta v. Chander Prabha Devi***[2], ***Rakesh Kumar Dikshit v. Jayanti Devi***[3], ***Ashutosh Tripathi v. State of U.P.***[4], ***Paras Nath Kurmi v. The Session Judge***[5] and ***Sartaj v. State of U.P. and others***[6] and came to hold that though the learned principal Judge, Family Court had not ascribed any reason for grant of maintenance from the date of application, yet when the case for maintenance was filed in the year 1998 decided on 17.2.2012 and there was no order for interim maintenance, the grant of Rs.2500/- as monthly maintenance from the date of application was neither illegal nor excessive. The High Court took note of the fact that the husband had retired on 1.4.2012 and consequently reduced the maintenance allowance to Rs.2000/-from 1.4.2012 till remarriage of the appellant herein. Being of this view the learned Single Judge modified the order passed by the Family Court. Hence, the present appeal by special leave, at the instance of the wife.

8. We have heard Dr. J.N. Dubey, learned senior counsel for the appellant. Despite service of notice, none has appeared for the respondent.

9. It is submitted by Dr. Dubey, learned senior counsel that Section 125 CrPC is applicable to the Muslim women and the Family Court has jurisdiction to decide the issue. It is urged by him that the High Court has fallen into error by opining that the grant of maintenance at the rate of Rs.4,000/- per month is excessive and hence, it should be reduced to Rs.2000/- per month from the date of retirement of the husband i.e. 1.4.2012 till her re-marriage. It is also contended that the High Court failed to appreciate the plight of the appellant and reduced the amount and hence, the impugned order is not supportable in law.

10. First of all, we intend to deal with the applicability of Section 125 CrPC to a Muslim woman who has been divorced. In ***Shamim Bano v. Asraf Khan***[7], this Court after referring to the Constitution Bench decisions in ***Danial Latifi v. Union of India***[8] and ***Khatoon Nisa v. State of U.P.***[9] had opined as follows:-

> *"13. The aforesaid principle clearly lays down that even after an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code. We may note that while taking note of the factual score to the effect that the plea of divorce was not accepted by the Magistrate which was upheld by the High Court, the Constitution Bench opined that as the Magistrate could exercise power under Section 125 of the Code for grant of maintenance in favour of a divorced Muslim woman under the Act, the order did not warrant*

1 1 1991 (2) Crimes 725 (All)
2 1990 Cr.L.J. 1884
3 1999 (2) JIC, 323 (ACC)
4 1999 (2) 763, Allahabad J.I.C
5 1999 (2) JIC 522 All
6 2000 (2) JIC 967 All
7 (2014) 12 SCC 636
8 (2001) 7 SCC 740
9 (2014) 12 SCC 646

any interference. Thus, the emphasis was laid on the retention of the power by the Magistrate under Section 125 of the Code and the effect of ultimate consequence.

14. Slightly recently, in ***Shabana Bano v. Imran Khan***[10]*, a two-Judge Bench, placing reliance on Danial Latifi (supra), has ruled that:-*

"21. The appellant's petition under Section 125 CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 CrPC cannot be restricted for the iddat period only."

Though the aforesaid decision was rendered interpreting Section 7 of the Family Courts Act, 1984, yet the principle stated therein would be applicable, for the same is in consonance with the principle stated by the Constitution Bench inKhatoon Nisa (supra)."

In view of the aforesaid dictum, there can be no shadow of doubt that Section 125 CrPC has been rightly held to be applicable by the learned Family Judge.

11. On a perusal of the order passed by the Family Court, it is manifest that it has taken note of the fact that the salary of the husband was Rs.17,654/- in May, 2009. It had fixed Rs.2,500/- as monthly maintenance from the date of submission of application till the date of order i.e. 17.2.2012 and from the date of order, at the rate of Rs.4,000/- per month till the date of remarriage. The High Court has opined that while granting maintenance from the date of application, judicial discretion has to be appropriately exercised, for the High Court has noted that the grant of maintenance at the rate of Rs.2,500/- per month from the date of application till date of order, did not call for modification.

12. The aforesaid finding of the High Court, affirming the view of the learned Family Judge is absolutely correct. But what is disturbing is that though the application for grant of maintenance was filed in the year 1998, it was not decided till 17.2.2012. It is also shocking to note that there was no order for grant of interim maintenance. It needs no special emphasis to state that when an application for grant of maintenance is filed by the wife the delay in disposal of the application, to say the least, is an unacceptable situation. It is, in fact, a distressing phenomenon. An application for grant of maintenance has to be disposed of at the earliest. The family courts, which have been established to deal with the matrimonial disputes, which include application under Section 125 CrPC, have become absolutely apathetic to the same. The concern and anguish that was expressed by this Court in ***Bhuwan Mohan Singh v. Meena and Ors.***[11], is to the following effect:-

"13. The Family Courts have been established for adopting and facilitating the conciliation procedure and to deal with family disputes in a speedy and expeditious manner. A three-Judge Bench in ***K.A. Abdul Jaleel v. T.A. Shahida***[12]*, while highlighting on the purpose of bringing*

10 (2010) 1 SCC 666
11 AIR 2014 SC 2875
12 (2003) 4 SCC 166

in the Family Courts Act by the legislature, opined thus:-

"The Family Courts Act was enacted 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."

14. The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being alive to the objects and reasons of the Act and the spirit of the provisions Under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc." [emphasis supplied]

13. When the aforesaid anguish was expressed, the predicament was not expected to be removed with any kind of magic. However, the fact remains, these litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. It occurs either due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the Courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the Court. As regards the second facet, it is the duty of the Court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands "still" on some unknown bank of the river. It cannot allow it to sing the song of the brook. "Men may

come and men may go, but I go on for ever." This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a proactive approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. For the present, we say no more.

14. Coming to the reduction of quantum by the High Court, it is noticed that the High Court has shown immense sympathy to the husband by reducing the amount after his retirement. It has come on record that the husband was getting a monthly salary of Rs.17,654/-.

15. The High Court, without indicating any reason, has reduced the monthly maintenance allowance to Rs.2,000/-. In today's world, it is extremely difficult to conceive that a woman of her status would be in a position to manage within Rs.2,000/- per month.

It can never be forgotten that the inherent and fundamental principle behind Section 125 CrPC is for amelioration of the financial state of affairs as well as mental agony and anguish that woman suffers when she is compelled to leave her matrimonial home. The statute commands there has to be some acceptable arrangements so that she can sustain herself. The principle of sustenance gets more heightened when the children are with her. Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125 CrPC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar. There can be no shadow of doubt that an order under Section 125 CrPC can be passed if a person despite having sufficient means neglects or refuses to maintain the wife.

Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right. While determining the quantum of maintenance, this Court in ***Jabsir Kaur Sehgal v. District Judge Dehradun & Ors.***[13] has held as follows:-

> *"The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in*

13 (1997) 7 SCC 7

reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate."

16. Grant of maintenance to wife has been perceived as a measure of social justice by this Court. In ***Chaturbhuj v. Sita Bai***[14], it has been ruled that:-

"Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in ***Captain Ramesh Chander Kaushal v. Veena Kaushal***[15] *falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in* ***Savitaben Somabhai Bhatiya v. State of Gujarat***[16]*."*

This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.

17. In this context, we may profitably quote a passage from the judgment rendered by the High Court of Delhi in ***Chander Prakash Bodhraj v. Shila Rani Chander Prakash***[17] wherein it has been opined thus:-

"An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodies person to show to the Court cogent grounds for holding that he is unable to reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him."

18. From the aforesaid enunciation of law it is limpid that the obligation of the husband is on a higher pedestal when the question of maintenance of wife and children arises.

When the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes the faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm, for she cannot be allowed to resign to destiny. Therefore, the lawful imposition

14 (2008) 2 SCC 316
15 (1978) 4 SCC 70
16 (2005) 3 SCC 636
17 AIR 1968 Delhi 174

for grant of maintenance allowance.

19. In the instant case, as is seen, the High Court has reduced the amount of maintenance from Rs.4,000/- to Rs.2,000/-. As is manifest, the High Court has become oblivious of the fact that she has to stay on her own. Needless to say, the order of the learned Family Judge is not manifestly perverse. There is nothing perceptible which would show that order is a sanctuary of errors. In fact, when the order is based on proper appreciation of evidence on record, no revisional court should have interfered with the reason on the base that it would have arrived at a different or another conclusion.

When substantial justice has been done, there was no reason to interfere. There may be a shelter over her head in the parental house, but other real expenses cannot be ignored. Solely because the husband had retired, there was no justification to reduce the maintenance by 50%. It is not a huge fortune that was showered on the wife that it deserved reduction. It only reflects the non-application of mind and, therefore, we are unable to sustain the said order.

20. Having stated the principle, we would have proceeded to record our consequential conclusion. But, a significant one, we cannot be oblivious of the asseverations made by the appellant. It has been asserted that the respondent had taken voluntary retirement after the judgment dated 17.2.2012 with the purpose of escaping the liability to pay the maintenance amount as directed to the petitioner; that the last drawn salary of respondent taken into account by the learned Family Judge was Rs.17,564/- as per salary slip of May, 2009 and after deduction of AFPP Fund and AGI, the salary of the respondent was Rs.12,564/- and hence, even on the basis of the last basic pay (i.e. Rs.9,830/-) of the respondent the total pension would come to Rs.14,611/- and if 40% of commutation is taken into account then the pension of the respondent amounts to Rs.11,535/-; and that the respondent, in addition to his pension, hand received encashment of commutation to the extent of 40% i.e. Rs.3,84,500/- and other retiral dues i.e. AFPP, AFGI, Gratuity and leave encashment to the tune of Rs.16,01,455/-.

21. The aforesaid aspects have gone uncontroverted as the respondent-husband has not appeared and contested the matter. Therefore, we are disposed to accept the assertions. This exposition of facts further impels us to set aside the order of the High Court.

22. Consequently, the appeals are allowed, the orders passed by the High Court are set aside and that of the Family Court is restored. There shall be no order as to costs.

.....J.

[DIPAK MISRA]

.....J.

[PRAFULLA C. PANT]

NEW DELHI
APRIL 06, 2015.

Reading for Group V

Deoki Panjhiyara vs Shashi Bhushan Narayan Azad & Anr.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELATE JURISDICTION

CRIMINAL APPEAL Nos.2032-2033 of 2012
(Arising out of SLP (Criminal) Nos. 8076-8077 of 2010

Deoki Panjhiyara …Appellant

Versus

Shashi Bhushan Narayan Azad & Anr. …Respondents

JUDGMENT

RANJAN GOGOI, J.

1. Leave granted.

2. The appellant, who was married to the respondent in the year 2006, had filed a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the DV Act') seeking certain reliefs including damages and maintenance. During the pendency of the aforesaid application the appellant filed an application for interim maintenance which was granted by the learned trial court on 13.02.2008 at the rate of Rs.2000/- per month. The order of the learned trial court was affirmed by the learned Sessions Judge on 09.07.2008. As against the aforesaid order, the respondent (husband) filed a Writ Petition before the High Court of Jharkhand.

3. While the Writ Petition was pending, the respondent sought a recall of the order dated 13.02.2008 on the ground that he could subsequently come to know that his marriage with the appellant was void on the ground that at the time of the said marriage the appellant was already married to one Rohit Kumar Mishra. In support, the respondent – husband had placed before the learned trial court the certificate of marriage dated 18.04.2003 between the appellant and the said Rohit Kumar Mishra issued by the competent authority under Section 13 of the Special Marriage Act, 1954 (hereinafter referred to as 'the Act of 1954').

4. The learned trial court by order dated 7.8.2009 rejected the aforesaid application on the ground that notwithstanding the certificate issued under Section 13 of the Act of 1954, proof of existence of the conditions enumerated in Section 15 of the Act would still required to be adduced and only thereafter the certificate issued under Section 13

of the Act can be held to be valid.

5. The aforesaid order dated 07.08.2009 was challenged by the respondent-husband in a revision application before the High Court which was heard alongwith the writ petition filed earlier. Both the cases were disposed of by the impugned common order dated 09.04.2010 holding that the marriage certificate dated 18.04.2003 issued under Section 13 of the Act of 1954 was conclusive proof of the first marriage of the appellant with one Rohit Kumar Mishra which had the effect of rendering the marriage between the appellant and the respondent null and void. Accordingly, it was held that as the appellant was not the legally wedded wife of the respondent she was not entitled to maintenance granted by the learned courts below. It is against the aforesaid order of the High Court that the present appeals have been filed by the appellant – wife.

6. We have heard Shri Gaurav Agarwal, learned counsel for the appellant and Shri Mahesh Tiwari, learned counsel for the respondent.

7. Learned counsel for the appellant has strenuously urged that the allegation of the earlier marriage between the appellant and Rohit Kumar Mishra had been denied by the appellant at all stages and the said fact is not substantiated only by the Marriage Certificate dated 18.04.2003. Even assuming the marriage between the appellant and the respondent to be void, the parties having lived together, a relationship in the nature of marriage had existed which will entitle the appellant to claim and receive maintenance under the DV Act, 2005. Placing the legislative history leading to the aforesaid enactment, it is urged that in the Bill placed before the Parliament i.e. Protection from Domestic Violence Bill, 2002 an "aggrieved person" and "relative" was, initially, defined in the following terms :

"Section 2.....

(a) "aggrieved person" means any woman who is or has been relative of the respondent and who alleges to have been subjected to act of domestic violence by the respondent;

(b)... (c)...

(d)....

(e)....

(f)...

(g)...

(h)....

(i)"relative" includes any person related by blood, marriage or adoption and living with the respondent."

Thereafter, the different clauses of the Bill were considered by a Parliamentary Standing Committee and recommendations were made that having regard to the object sought to be achieved by the proposed legislation, namely, to protect women from domestic violence and exploitation, clause (2)(i) defining "relative" may be suitably amended to include women who have been living in relationship akin to marriages as well as in

marriages considered invalid by law. Pursuant to the aforesaid recommendation made by the Standing Committee, in place of the expression "relative" appearing in clause 2(i) of the Bill, the expression "domestic relationship" came be included in clause (f) of Section 2 of the Act. Learned counsel by referring to the definition of "aggrieved person" and "domestic relationship" as appearing in the DV Act, 2005 has urged that the legislative intent to include women, living in marriages subsequently found to be illegal or even in relationships resembling a marriage, within the protective umbrella of the DV Act is absolutely clear and the same must be given its full effect. It is submitted that having regard to the above even if the marriage of the appellant and the respondent was void on account of the previous marriage of the appellant, the said fact, by itself, will not disentitle the appellant to seek maintenance and other reliefs under the DV Act, 2005.

8. Before proceeding further it will be appropriate to notice, at this stage, the definition of the expressions "aggrieved person" and "domestic relationship" appearing in Section 2(a) and (f) of the DV Act, 2005.

> *"Section 2.…*
>
> *(a) "aggrieved person" means any women who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;*
>
> *(b) .....*
>
> *(c) .....*
>
> *(d) .....*
>
> *(e) .....*
>
> *(f) "domestic relationship" means a 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 marriage, adoption or are family members living together as a joint family."*

9. Learned counsel, in all fairness, has also drawn the attention of the court to a decision rendered by a coordinate Bench in ***D. Velusamy vs. D.Patchaimmal***[1] wherein this court had occasion to consider the provisions of Section 2(f) of the DV Act to come to the conclusion that a "relationship in the nature of marriage" is akin to a common law marriage which requires, in addition to proof of the fact that parties had lived together in a shared household as defined in Section 2(s) of the DV Act, the following conditions to be satisfied:

> *(a) The couple must hold themselves out to society as being akin to spouses.*
>
> *(b) They must be of legal age to marry.*
>
> *(c) They must be otherwise qualified to enter into a legal marriage,*

1 (2010) 10 SCC 469

including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.....”

[Para 33]

10. Learned counsel has, however, pointed out that in **Velusamy (supra)** the issue was with regard to the meaning of expression “wife” as appearing in Section 125 Cr.P.C. and therefore reference to the provisions of Section 2(f) of the DV Act, 2005 and the conclusions recorded were not required for a decision of the issues arising in the case. Additionally, it has been pointed out that while rendering its opinion in the aforesaid case this Court had no occasion to take into account the deliberations of the Parliamentary Standing Committee on the different clauses of Protection of Women from Domestic Violence Bill, 2002. It is also urged that the equation of the expression “relationship in the nature of marriage” with a common law marriage and the stipulation of the four requirements noticed above is not based on any known or acceptable authority or source of law. Accordingly, it is submitted that the scope and expanse of the expression “relationship in the nature of marriage” is open for consideration by us and, at any rate, a reference of the said question to a larger bench would be justified.

11. Opposing the contentions advanced on behalf of the appellant learned counsel for the respondent – husband has submitted that the object behind insertion of the expression “relationship in the nature of marriage” in Section 2(f) of the DV Act is to protect women who have been misled into marriages by the male spouse by concealment of the factum of the earlier marriage of the husband. The Act is a beneficial piece of legislation which confers protection of different kinds to women who have been exploited or misled into a marriage. Learned counsel has pointed out that in the present case the situation is, however, otherwise. From the marriage certificate dated 18.04.2003 it is clear that the appellant was already married to one Rohit Kumar Mishra which fact was known to her but not to the respondent. The second marriage which is void and also gives rise to a bigamous relationship was voluntarily entered into by the appellant without the knowledge of the husband. Therefore, the appellant is not entitled to any of the benefits under the DV Act. In fact, grant of maintenance in the present case would amount to conferment of benefit and protection to the wrong doer which would go against the avowed object of the Act. Learned counsel has also submitted that the conduct of the appellant makes it clear that she had approached the court by suppressing material facts and with unclean hands which disentitles her to any relief either in law or in equity. In this regard the decision of this court in ***S.P. Changalvaraya Naidu vs. Jagannath and others***[2] has been placed before us.

12. Having considered the submissions advanced by the learned counsels for the contesting parties, we are of the view that the questions raised, namely, whether the appellant and the respondent have/had lived together in a shared household after their marriage on 4.12.2006; if the parties have/had lived together whether the same gives rise to relationship in the nature of marriage within the meaning of Section 2(f) of the DV Act, 2005; whether the decision of this Court in ***Velusamy (supra)*** is an authoritative

2 AIR 1994 SC 853

pronouncement on the expression "relationship in the nature of marriage" and if so whether the same would require reference to a larger Bench, may all be premature and the same need not be answered for the present. Instead, in the first instance, the matter may be viewed from the perspective indicated below.

13. The Respondent before us had claimed (before the trial court as well as the High Court) that the marriage between him and the appellant solemnised on 4.12.2006, by performance of rituals in accordance with Hindu Law, was void on account of the previous marriage between the appellant with one Rohit Kumar Mishra. In support thereof, the respondent relied on a marriage certificate dated 18.4.2003 issued under Section 13 of the Special Marriage Act, 1954. Acting solely on the basis of the aforesaid marriage certificate the learned trial court as well as the High Court had proceeded to determine the validity of the marriage between the parties though both the courts were exercising jurisdiction in a proceeding for maintenance. However, till date, the marriage between the parties is yet to be annulled by a competent court. What would be the effect of the above has to be determined first inasmuch as if, under the law, the marriage between the parties still subsists the appellant would continue to be the legally married wife of the respondent so as to be entitled to claim maintenance and other benefits under the DV Act, 2005. Infact, in such a situation there will be no occasion for the Court to consider whether the relationship between the parties is in the nature of a marriage.

14. Admittedly, both the appellant and the respondent are governed by the provisions of the Hindu Marriage Act, 1955. Section 11 of the Hindu Marriage Act makes it clear that a 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 so specified in clauses (i), (iv) and (v) of Section 5."

15. While considering the provisions of Section 11 of the Hindu Marriage Act, 1955 this Court in ***Yamunabai v. Anantrao***[3] has taken the view that a marriage covered by Section 11 is void-ipso-jure, that is, void from the very inception. Such a marriage has to be ignored as not existing in law at all. It was further held by this Court that a formal declaration of the nullity of such a marriage is not a mandatory requirement though such an option is available to either of the parties to a marriage.

    It must, however, be noticed that in ***Yamunabai (supra)*** there was no dispute between the parties either as regards the existence or the validity of the first marriage on the basis of which the second marriage was held to be ipso jure void.

16. A similar view has been expressed by this Court in a later decision in ***M.M. Malhotra v. Union of India***[4] wherein the view expressed in Yamunabai (supra) was also noticed and reiterated.

17. However, the facts in which the decision in ***M.M. Malhotra (supra)*** was rendered would require to be noticed in some detail:

    The appellant M.M. Malhotra was, inter alia, charged in a departmental proceeding

3 AIR 1988 SC 645
4 2005 (8) SCC 351

for contracting a plural marriage. In reply to the charge sheet issued it was pointed out that the allegation of plural marriage was not at all tenable inasmuch as in a suit filed by the appellant (M.M. Malhotra) for a declaration that the respondent (wife) was not his wife on account of her previous marriage to one D.J. Basu the said fact i.e. previous marriage was admitted by the wife leading to a declaration of the invalidity of the marriage between the parties. The opinion of this court in ***M.M. Malhotra (supra)*** was, therefore, once again rendered in the situation where there was no dispute with regard to the factum of the earlier marriage of one of the spouses.

18. In the present case, however, the appellant in her pleadings had clearly, categorically and consistently denied that she was married to any person known as Rohit Kumar Mishra. The legitimacy, authenticity and genuineness of the marriage certificate dated 18.4.2003 has also been questioned by the appellant. Though Section 11 of the aforesaid Act gives an option to either of the parties to a void marriage to seek a declaration of invalidity/nullity of such marriage, the exercise of such option cannot be understood to be in all situations voluntarily. Situations may arise when recourse to a court for a declaration regarding the nullity of a marriage claimed by one of the spouses to be a void marriage, will have to be insisted upon in departure to the normal rule. This, in our view, is the correct ratio of the decision of this Court in ***Yamunabai (supra) and M.M. Malhotra (supra)***. In this regard, we may take note of a recent decision rendered by this Court in ***A. Subash Babu v. State of Andhra Pradesh & Anr.***[5] while dealing with the question whether the wife of a second marriage contracted during the validity of the first marriage of the husband would be a "person aggrieved" under Section 198 (1)(c) of the Code of Criminal Procedure to maintain a complaint alleging commission of offences under section 494 and 495 IPC by the husband. The passage extracted below effectively illuminates the issue:

> *"Though the law specifically does not cast obligation on either party to seek declaration of nullity of marriage and it may be open to the parties even without recourse to the Court to treat the marriage as a nullity, such a course is neither prudent nor intended and a declaration in terms of Section 11 of the Hindu Marriage Act will have to be asked for, for the purpose of precaution and/or record. Therefore, until the declaration contemplated by Section 11 of the Hindu Marriage Act is made by a competent Court, the woman with whom second marriage is solemnized continues to be the wife within the meaning of Section 494 IPC and would be entitled to maintain a complaint against her husband."*

19. In the present case, if according to the respondent, the marriage between him and the appellant was void on account of the previous marriage between the appellant and Rohit Kumar Mishra the respondent ought to have obtained the necessary declaration from the competent court in view of the highly contentious questions raised by the appellant on the aforesaid score. It is only upon a declaration of nullity or annulment of the marriage between the parties by a competent court that any consideration of the question whether the parties had lived in a "relationship in the nature of marriage" would be justified. In the absence of any valid decree of nullity or the necessary declaration the court will have to proceed on the footing that the relationship between

5 2011 (7) SCC 616

the parties is one of marriage and not in the nature of marriage. We would also like to emphasise that any determination of the validity of the marriage between the parties could have been made only by a competent court in an appropriate proceeding by and between the parties and in compliance with all other requirements of law. Mere production of a marriage certificate issued under Section 13 of the Special Marriage Act, 1954 in support of the claimed first marriage of the appellant with Rohit Kumar Mishra was not sufficient for any of the courts, including the High Court, to render a complete and effective decision with regard to the marital status of the parties and that too in a collateral proceeding for maintenance. Consequently, we hold that in the present case until the invalidation of the marriage between the appellant and the respondent is made by a competent court it would only be correct to proceed on the basis that the appellant continues to be the wife of the respondent so as to entitle her to claim all benefits and protection available under the DV Act, 2005.

20. Our above conclusion would render consideration of any of the other issues raised wholly unnecessary and academic. Such an exercise must surely be avoided.

21. We, accordingly, hold that the interference made by the High Court with the grant of maintenance in favour of the appellant was not at all justified. Accordingly, the order dated 09.04.2010 passed by the High Court is set aside and the present appeals, are allowed.

.....J.

[P. SATHASIVAM]

.....J.

[RANJAN GOGOI]

New Delhi,
December 12, 2012

A Short Note

ON

LAW OF MAINTENANCE TO WIFE

- Justice Manju Goel[1]

The provisions of Section 125, Cr.P.C. and those of Section 20 (d) of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the DV Act for short) are secular laws and are extensively used by women to seek orders of maintenance from their estranged husbands. Various other provisions of personal laws make provision for maintenance. But for the purpose of the present note emphasis is placed on these two provisions, as the study of these two provisions clearly brings out the basic concepts behind maintenance orders.

Chapter IX of the Criminal Procedure Code contains provisions for maintenance of wives, children and parents. The primary justification for placing in the Cr.P.C. provisions relating to maintenance of wives and children, which is a civil matter, is that a remedy more speedy and economical than that available in the Civil Court, is provided for them. It may also be said that these provisions are aimed at preventing starvation and vagrancy leading to commission of crime. The section in essence is not punitive but representative rather than remedial and has been enacted with the object of enabling deserted wife, helpless and deserted children and destitute parents to secure the much needed relief, so as to prevent vagrancy. The scheme of the section so far as wives are concerned is self-contained and rests on two primary concepts, viz, (1) that the husband must maintain the wife and (2) the wife must be virtuous and live or be willing to live with her husband. The circumstances which disentitle a wife to obtain an order of maintenance as contemplated under sub-section (4) of Section 125, notwithstanding the existence of the foundation and the condition for the exercise of the jurisdiction are (1) her living in adultery, (2) her refusal to live with her husband without sufficient cause, and (3) the fact that the husband and wife have been living separately by mutual consent.

An order of maintenance passed under Section 125 Cr.P.C. can also be altered on proof of a change in the circumstances of any person receiving under Section 125 Cr.P.C. a monthly allowance or ordered to pay maintenance to wife, child or parents.

Section 125(3) provides the mode of enforcement of the orders passed under Section 125 Cr.P.C.

The Cap of Rs. 500 – removal and its effect

Under Section 488 of the old Cr.P.C, the quantum of the maintenance that could be granted by the magistrate was limited to Rs. 500. This cap was continued in the new Cr.P.C. of 1973. The amount even in 1973 was meager and so the importance of the provision was also minimal. In course of time with the value of money constantly falling, the sum of Rs. 500 became ridiculously low. The Government in introducing the Code of Criminal Procedure

1 Former Judge, High Court of Delhi

(Amendment) Act, 2001 by which the cap was removed said, "This amount of Rs. 500 was fixed in the year 1955, and the cost of living has increased, the income has increased, and the inflation itself has increased. The Law Commission had suggested some years ago that this amount of Rs. 500 be increased and capped at Rs. 5,000. The Government considered the matter and it was felt that when incomes are so variable in the society, rather than having to amend the provision repeatedly, there is no need to have a cap. After all, this is a matter of judicial discretion as to how much amount would be granted taking into consideration of the requirement of the wives, the children or the aged parents, as also the lifestyle and the incomes of the husbands. The upper cap of Rs. 500 is sought to be removed."

The consequence of removal of this cap has proved to be far reaching, perhaps much more than what was anticipated at the time of amendment. Now a realistic amount of maintenance can be given under Section 125 Cr.P.C. The relief on the criminal side comes faster than on the civil side. Accordingly, more applicants approached the criminal courts for maintenance. The number of applications on the civil side drastically fell. Since the amount that could be granted under Section 125 is no more limited to any figure, the applications under Section 125 are now hotly contested matters unlike in the past. An application for maintenance is the initiation of a full-fledged matrimonial litigation. Hence, if we want to use ADR methods for resolving disputes between the parties it is now required that the magistrate is sensitized to lead the parties towards the end.

Entitlement

Social compulsions as a rule require the husband to maintain the wife. Two important aspects to be considered are: (1) the husband has the means to maintain the wife and (2) the wife is unable to maintain herself. The two concepts look similar but are quite distinct in their clinical meaning. In *Dhani Ram vs. Ms. Ram Dei, AIR 1995 All 320; 1954 All. LJ 626*, the word 'means' is interpreted to include earning capacity. Hence when a man is healthy and able bodied, he must be taken to have the means to support his wife. But if the wife is able bodied and capable of earning or even when she is educationally qualified and capable of being employed in some skilled job, she is not taken to be able to maintain herself. Her actual earnings, and not her capacity to earn, is the determining factor. In *Tejaswini vs. Arvind Tejas Chandra, AIR 2010 (noc) Kar 228 (AIR 1999 SC 2374 relied upon)* the Karnataka High Court said that the expression 'unable to maintain herself' is to be interpreted as to mean 'capable of earning' then the very purpose of introducing Section 125 of the Cr.P.C. will be rendered redundant. This is because it is always possible to say in a given case where the wife seeks maintenance that she has potential to earn something or that she is capable of earning for herself and if that interpretation is accepted, then it may be possible to reject almost every petition that is filed under Section 125 of the Cr.P.C. and this is not the intention of the legislature. The Court for this interpretation relied upon a Supreme Court decision reported in AIR 1999 SC 2374.

The term 'wife' has also come up for interpretation on several occasions. 'Wife' means a legally wedded wife. In this restricted sense the validity of the marriage can be called into question by citing deficiencies in the ceremony or some earlier marriage or other factors. The question whether despite long cohabitation a man can refuse to maintain his spouse of some such deficiency has been causing concern. The question is before a larger bench

by means of a reference made by the Supreme Court two-judge bench in *Chanmuniya vs. Virendra Kumar Singh Kushwaha, (2011) 1 SCC 141*. Nonetheless, in the latest judgment on the issue *Badshah vs. Urmila Badshah Godse and another, 2014 (1) SCC 188*, the Supreme Court clearly said that if the man has duped the woman into marriage by not revealing to her the fact of his earlier marriage, he cannot later desert her and deny maintenance to her.

The provisions of the DV Act can be employed to give maintenance to a woman whose husband seeks to challenge the validity of the marriage unless a decree of nullity of marriage is obtained. If the parties are married and lived as husband and wife, there is a 'domestic relationship' and "relationship in the nature of marriage". The Supreme Court said in *Deoki Panjhiara vs. Shashi Bhushan Narayan Azad and another, (2013) 2 SCC 137* that the issue of validity of the marriage (the marriage itself being admitted) cannot be raised in the maintenance proceedings and may be challenged in a formal suit and till a decree of nullity is obtained, their relationship was in the nature of marriage.

Quantum

So far as quantum of maintenance is concerned, it is a settled view that the wife is entitled to live according to the status of the husband and that the income of the husband has to be accordingly apportioned between members of the family dependent on his income. The High Court of Delhi in *Annurita Vohra vs. Sandeep Vohra*, when the husband had no dependents except for the petitioners, viz. the wife and the child, awarded Rs. 15,000/- to the petitioners out of the husband's total income of Rs. 32,000/- per month. The various factors that need to be taken care of have been mentioned in *Jasbir Kaur Sehgal vs. District Judge, Dehradun, JT 1997(7) SC 531* as status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions.

Enforcement

Rule 6(5) of the Protection of Women from Domestic Violence Rules, 2006 provides that applications under Section 12 of the DV Act shall be dealt with and the orders enforced in the same manner as laid down under Section 125 of the Cr.P.C. As such even for the enforcement of the orders under the DV Act, resort has to be made to the provisions of Cr.P.C. relating to maintenance. In addition Section 20 of the Act provides that the Magistrate shall send a copy of the order for monetary relief to the parties to the application and to the in charge of the police station within the local limits of whose jurisdiction the respondent resides. Further, it lays down that upon the failure on the part of the respondent to make payment in terms of the order, the Magistrate may direct the employer or a debtor of the respondent to directly pay to the aggrieved person or to credit of the petitioner, which amount may be adjusted towards the monetary relief payable by the respondent.

As regards maintenance under Section 125 Cr.P.C. sub-section (3) provides remedies for the enforcement of the order for payment of maintenance allowance or the interim maintenance and expenses of proceedings, as the case may be. Two remedies are provided:

i. Issue of warrant for levying the amount due in the manner provided for levying fines, and

ii. Sentence the husband (or the father) for whole or part of each month's allowance or the interim maintenance and expenses of proceeding, as the case may be, to imprisonment for a term which may extend to one month or until payment.

A limitation of one year is provided for application being made to the court for execution of the order from the date of the order.

Before proceeding under sub-section (3), the Magistrate must be satisfied that:

i. The person proceeded against was ordered to pay the maintenance or the interim maintenance and expenses of proceeding, as the case may be,

ii. He failed to comply with the order, and

iii. His failure was without sufficient cause.

Before action may be taken under this sub-section, the husband will be entitled to show 'sufficient reason' for his failure to comply with the order. It has been held that a person who without reasonable cause refuses to comply with the order of the court to maintain his neglected wife or child would not be absolved of his liability merely because he prefers to go to jail. Sentencing a person to jail is a mode of enforcement and not a mode of satisfaction. The liability could be satisfied only by making actual payment of arrears of maintenance. Sending of husband to jail is only a mode of recovery and not a substitute of recovery. An important judgment in this regard is in *Gorakshnath's case, 2005 Cri.LJ 3158.*

Further Section 128 provides that the order of maintenance may be enforced by any magistrate in any place where the person against whom it is made may be, on such magistrate being satisfied as to the identity of the parties and the non-payment of the allowance, or as the case may be, expenses, due.

SESSION IV *Total Time: 90 minutes*

MODULE FOR TRAINING OF LEGAL SERVICES LAWYERS ON

PROFESSIONAL ETHICS FOR LAWYERS

-Justice Manju Goel[1]

SESSION PLAN

Objective

1. To apprise the young lawyers about their role in delivery of justice.
2. To sensitize the participants about the importance of ethical principles in legal profession.

Expected Learning Outcome

1. The participants will become aware of their role as lawyers.
2. They will follow the ethical principles in their personal and professional lives.
3. The decorum and ambience in the court rooms will improve.
4. There will be improvement in overall justice delivery system.

Training Method

1. Lecture
2. Brainstorming and snowballing
3. Group work

Programme

1. Introduction 10 minutes

The Resource Person in his/her introductory lecture will apprise the participants about meaning of ethics and role of lawyer in context of Indian Democracy and Rule of law.

2. Group work 20 minutes

The participants will be divided in groups of 4 or 5 and each group will find answers to the brainstorming questions.

3. Snowballing and group discussion. 20 minutes

The resource person will pool the answers and put them on black board/white board/

1 Former Judge, High Court of Delhi.

computer monitor and identify the points repeated more often. The resource person will supply the points (if any) not covered.

4. **The resource person will continue the lecture to cover all the points in the short note.** 20 minutes

5. **Whole group discussion.** 20 minutes

Tools Required

1. Facility for power point presentation
2. Flip chart
3. Pens
4. Blue tack
5. Whiteboard

Activity for Session

1. Give one reason why ethics is important for members of legal profession.
2. Give 3 duties of the lawyers.

A Short Note
ON
PROFESSIONAL ETHICS FOR LAWYERS

-Justice Manju Goel[1]

Introduction- What is ethics

Life of human beings is inter dependent and therefore there are possibilities of disagreements and conflicts. Yet, in all societies life is generally peaceful and smooth and does not require intervention of the state in conflicting situations every now and then.

This is because human life is run on some universal principles of morality. Right from the ancient days the preachers, social reformers, religious heads and other public figures have handed down various rules of living an honest and useful social life. Though the main aim of any religion is to lay down the path for attaining the Supreme, all religions also lay down the rules of good conduct, and, we call them moral principles of good living. We generally follow these moral principles in a spontaneous way, not because we have educated ourselves about these moral principles from the scriptures, but because we have imbibed these moral principles from the previous generations who have raised us according to these principles. Ethics is also a set of principles of good behaviour and are based on moral principles. However, we refer to ethics rather, than morality, when we speak about the principles of good conduct applicable to a group of persons or situations or to an organised profession like that of lawyers, physicians, teachers etc. Although the ethical principles for all these professions are similar the differences in the context in which they work give rise to different ethical principles. For e.g. the confidence of privileged communication between himself and client which lawyer enjoys and must maintain is not available as a principle for any other profession. The rules of good conduct for a particular profession that have evolved overtime can be called ethics for that profession.

Why teach ethics

A question can arise as to whether any further teaching on ethics is possible or required when the members of the profession have already grown into adulthood imbibing the principles of good moral conduct. The answer surely is 'yes' because to conduct a professional life ethically requires knowledge and information about what is required or demanded of a particular profession in a particular situation. Appropriate conduct to maintain dignity and decorum in court is required not only because the rules may so require but also to maintain the smooth functioning of the court. It may not be immoral for a lawyer to appear before a judge who is related to him by blood, yet it will be highly unethical for him to do so. It is important that the ethical rules are followed by the members of any profession because these rules are required to maintain smooth running of the profession as well as for its progress. Public service is one important element of any profession and therefore it is important for it to maintain public confidence in its work. Roscoe Pound says that there are 3 ideas involved in a profession: organization, learning, and a spirit of public service[2]. He proceeded to say that

1 Former Judge, High Court of Delhi

2 Roscoe Pound, "What is a Profession - The Rise of the Legal Profession in Antiquity", 19 Notre Dame L. Rev 203 (1944), at p. 204

while considering these elements essential, the idea of gaining a livelihood through profession is nothing more than an incidental element. The most important element in a profession is the spirit of public service. In a democracy governed by a written Constitution where the rule of law is very strong, the courts protect the rights of the citizens against the onslaught of any power or authority. Access to courts and justice is provided by the legal profession. The legal profession therefore is a very powerful cog in the entire machinery of the justice delivery system. The lawyers not only bring the case of complainant or petitioner before the court but also assist the court in arriving at the correct decision. An enormous responsibility has been placed on the shoulders of legal profession which needs to be discharged in the best interests of the people of the nation. The profession must command the trust of the people and at the same time imbibe the ability and capacity to handle the responsibilities that have been cast on the profession. Hence, it is most important for the legal profession to adopt a course of ethical behaviour and keep to them as these principles are important to maintain the dignity of the courts. If the legal profession loses the confidence of the people, the courts will also lose the public confidence. If the courts do not survive, the lawyers will also perish.

Role of lawyers and ethics

Equality before law and equal protection of law are two basic principles of rule of law. In a democratic system as ours equality principles go beyond the pale of law. We want economic, social political equality. The courts in India have made their own contribution in securing equality in these spheres. The legal profession is an equal sharer in the credit that one may give to the courts on this account. Rule of law and democracy sustain and flourish on the contribution of legal profession. No wonder, such a profession has been built on the basis of principles of good conduct in court and in personal and public life. They have to show that they uphold the dignity of law and morality. They must themselves live an orderly life and show discipline, grace, magnanimity and strength of character for it is important for them to command the confidence of court on the one hand and of the public on the other. The Supreme Court of India has following to say about the role of legal profession and the need to follow appropriate professional conduct. In *Bar Council of Maharashtra vs. M.V. Dabholkar etc, AIR 1976 SC 242* the Court said that:

> *"Now to the legal issue bearing on canons of professional conduct. The rule of law cannot be built on the ruins of democracy, for where law ends tyranny begins. If such be the keynote thought for the very survival of our Republic, the integral bond between the lawyer and the public is unbreakable. And the vital role of the lawyer depends upon his probity and professional life style. Be it remembered that the central function of the legal profession is to promote the administration of justice. If the practice of law is thus a public utility of great implications and a monopoly is statutorily granted by the nation, it obligates the lawyer to observe scrupulously those norms which make him worthy of the confidence of the community in him as a vehicle of justice-social justice. The Bar cannot behave with doubtful scruples or strive to thrive on litigation. Canons of conduct cannot be crystallised into rigid rules but felt by the collectiveconscience of the practitioners as right. It must be a conscience alive to the proprieties and the improprieties incident to the discharge of a sacred public trust. It must be a conscience governed by the rejection*

of self-interest and selfish ambition. It must be a conscience propelled by a consuming desire to play a leading role in the fair and impartial administration of justice to the end that public confidence may be kept undiminished at all times in the belief that we shall always seek truth and justice in the preservation of the rule of law. It must be a conscience, not shaped by rigid rules of doubtful validity, but answerable only to a moral code which would drive irresponsible judges from the profession. Without such a conscience, there should be no judge and, we may add, no lawyer. Such is the high standard set for professional conduct as expounded by courts in this country and elsewhere."

The members of the legal profession are privileged citizens. Not everyone who wants can join the legal profession. They are fortunate in getting the required educational qualifications. But they also have to be enrolled with the Bar Council. They enjoy an honourable position in the society. Hence the expectation about their personal and professional conduct is naturally high. On this aspect one may recall what Supreme Court said in *In Re: Sanjiv Datta And Others, 1995 3 SCR 450*:

"The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the court. The legal profession is different from other professions in that what the lawyers do, affects not only a individual but the administration of justice which is the foundation of the civilised society. Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expectof him such ideal behaviour. It must not be forgotten that the legal profession has always been held in high esteem and its members have played an enviable role in public life. The regard for the legal and judicial systems in this country is in no small measure due to the tireless role played by the stalwarts in the profession to strengthen them. They took their profession seriously and practised it with dignity, deference and devotion. If the profession is to survive, the judicial system has to be vitalised. No service will be too small in making the system efficient, effective and credible. The casualness and indifference with which some members practise the profession are certainly not calculated to achieve that purpose or to enhance the prestige either of the profession or of the institution they are serving. If people lose confidence in the profession on account of the deviant ways of some of its members, it is not only the profession which will suffer but also the administration of justice as a whole. The present trend unless checked is likely to lead to a stage when the system will be found wrecked from within before it is wrecked from outside. It is for the members of

the profession to introspect and take the corrective steps in time and also spare the courts the unpleasant duty. We say no more."

Some basic principles of ethics for lawyers

An exhaustive enumeration of the cannons of good conduct of an advocate can hardly be given within the few pages of this paper. Nor is it the aim of the present discussion. An attempt to lay down some principles has been made in "Standard of Professional Conduct and Etiquette" made by Bar Council of India under Section 49(1) (c) of the Advocates Act, 1961 which has been annexed to this paper. The present discussion is not meant to elaborate on them. What is intended is to draw the attention of the young advocates to the expectations of the courts, clients and others from the lawyers in the manner in which they conduct their work and life. It will be apt to read the preamble to the "Standard of Professional Conduct and Etiquette" at this juncture:

"An advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for an advocate. Without prejudice to the generality of the foregoing obligation, an advocate shall fearlessly uphold the interests of his client and in his conduct conform to the rules hereinafter mentioned both in letter and in spirit. The rules hereinafter mentioned contain canons of conduct and etiquette adopted as general guides; yet the specific mention thereof shall not be construed as a denial of the existence of others equally imperative though not specifically mentioned."

Ethics for legal services lawyers is doubly important for 2 reasons. Firstly, because they deal with and espouse the cause of the weaker sections of the society. Unless their cases are handled with utmost passion and care, justice will elude them. They are already disheartened with system of governance and justice. Observance of ethical principles has to be clear and visible in order to restore the faith of these clients in the justice delivery system of the country in general and in functioning of the bar in particular.

Secondly, the legal services lawyers are paid out of public funds and so they must ensure that there is optimum use of funds and no avoidable expenses either for the present or for the future. Encouraging settlement by one or other method of ADR, preferably before going to the court, will not only reduce the expense for the case required of the state but will also reduce hardship for his clients. The strength of the beneficiaries of the legal aid to sustain any prolonged litigation despite state funding is low. Hence, the lawyer has to closely examine the cost benefit ratio before embarking upon any new litigation or even pursuing a defense. Prestige litigation for example is not the one which legal services should be asked to fund.

The appropriate conduct required of a lawyer can be linked to the duties that the lawyers owe to different people. First and foremost, a lawyer owes duty to the courts. The next comes the duty towards the clients. A lawyer begins his work when he meets a client. What are the principles of good conduct when a lawyer deals with a client? The first and foremost duty of a lawyer towards his client is to give the correct legal advice even if in a

given situation it may mean a loss of a brief or revenue. A true lawyer can be expected to hear out the client thoroughly with empathy and determine the course appropriate to ameliorate the sufferings of the client. However, it would not be ethical to proceed to seek exaggerated reliefs or to twist the facts of a case in order to mislead the judge in granting some unjustified relief. The lawyer is expected to inform the client of the various alternatives available to him and also the expected costs and consequences of different alternative courses. It is duty of the lawyer to help the client decide the course most suitable to him.

It will not be out of place for lawyer to counsel the client against initiating a litigation if the lawyer by his experience knows that the economic and emotional cost is likely to outweigh the value of the relief that the client may be seeking.

If important documents and funds have been placed in the hands of a lawyer the same must be scrupulously protected. Confidential facts which the lawyer comes to know in course of a particular case should be kept confidential at all times. The media should be kept at bay. It will be unethical to try to grab the limelight by press briefing or otherwise if that harms the interest of the client or hampers a fair trial.

Dignity and self-respect are two principles enunciated in the very first rule given by Standard of Professional Conduct and Etiquette. Apart from maintaining his own dignity the lawyer must also be conscious of dignity of others including that of witnesses, the other side lawyer, the client on the other side and ministerial officers of the court. The questions in the cross examination and the manner in which the same are put to the witness should reveal that the lawyer is a gentleman. In no way should he undermine the dignity of a woman by his language, conduct or gestures. Just as a lawyer is expected to refrain from influencing a decision of a court by any illegal or improper means, he should also refrain from influencing the ministerial officers of the court into any act forbidden by the rules.

The justice delivery system comprises of the judges and lawyers. The behaviour and attitude of the lawyers towards the courts are examples before the public at large and the public accordingly learns how to behave in a court. The smooth functioning of the court largely depends on active assistance of the members of the bar.

As a duty towards the court, the lawyer has to give assistance to it to the best of his ability by a systematic presentation of facts and law. It follows that by way of duty to the court, the lawyer shall not misrepresent the facts of his client. He should take care to draft the pleadings with an eye on clarity, accuracy and brevity. As a duty to his client as well as to the court, he should be ready with the case on the date fixed for the case. Any effort to take adjournment with an intention to frustrate the witnesses on the opposite side, or to prolong the case or to avoid a judge who is likely to be transferred soon will not be an ethical act.

As a member of the group, each lawyer owes a responsibility to abide by the ethos of that group and to conduct himself in such a manner that image and reputation of the group is not tarnished in any manner. The young ones that join the profession need guidance and support. Those members who have established themselves well should offer to take young and new entrants under their wings and train them not only in law but also in court craft. What is the appropriate behaviour is learnt in the early days of one's career and remains with one in the later years. If a lawyer rises to the stature of the leader of the bar, his responsibilities rise manifold and the standards of ethics for him will be much higher for he then holds the public office.

The lawyers have a duty towards development of law. The law is made in the legislature in which the presence of lawyers cannot be denied. However, what is referred to here as the duty of lawyers towards the development of law is not their contribution in legislature but their contribution in court of law. The lawyers assist the court in interpreting the constitution and other laws. For doing so the lawyers themselves must put in their best efforts in understanding the legal provisions in the socio economic context of the country.

They have to burn the mid-night oil for studying not only jurisprudential principles but also subjects from other disciplines like history, medicine, psychology and others.

Each judgment is written on the factual matrix of a case. How the extant legal provision and judicial precedent will apply to the case in hand is for the lawyer to submit before the court. The finer element in the factual situation and in the law that distinguishes a particular case has to be studied in minute details before putting forth a strong case for the client. Such effort eventually leads to newer interpretations and newer applications of the extant legal provisions and the law.

Our country has produced some of the best lawyers who will be remembered for all times to come. Early national leaders like Mahatma Gandhi, Tej Bahadur Sapru, Ashutosh Mukherjee, Jawaharlal Nehru and others were not only fine lawyers but also fine gentlemen of high moral values. While we expect of the lawyers of present time to emulate their example, we cannot lose sight of unethical, unruly and at times criminal activities that have evoked abhorrence against the bar amongst the people and have invited sharp reactions from jurists and judges. Protests are part of democratic culture. Strikes are part of that culture. It has become common for the bar to go on strike on trivial or non-issues. Strikes are weapons of collective bargaining. However, when the lawyers strike, more than the authorities they intend to confront, it is the litigating public who come under hardship. The enormity of the consequences of strike by lawyers is often overlooked when a call for strike is given. It is entirely unethical to make the client suffer for whatever grievances the lawyers may have against the authorities. In several of its judgments the Supreme Court of India has said that lawyers have no right to go on strike and should abide by all discipline. In the case of *In Re: Ajay Kumar Pandey, AIR 1998 SC 3299*, the Supreme Court held:

> *"No one can be permitted to intimidate or terrorize judges by making scandalous unwarranted and baseless imputations against them in the discharge of their judicial functions so as to secure orders which the litigant wants. The liberty of expression cannot be treated as a licence to scandalize the court."*

In the case of *Ex-Capt. Harish Uppal vs Union Of India & Anr, (2003) 2 SCC 45*, the Supreme Court of India quoted the following views of High Court of Delhi with approval:

> *"It is below the dignity, honour and status of themembers of the noble profession of law to organize and participate in strike. It is unprofessional and unethical to do so. In view of the nobility and tradition of the legal profession, the status of the lawyer as an officer of thecourt and the fiduciary character of the relationshipbetween a lawyer and his client and since strike interferes with the administration of justice and infringes the fundamental right of litigants for speedy trial of their cases, strike by lawyers cannot be approved as an acceptable mode of protest,*

irrespective of the gravity of the provocation and the genuineness of the cause. Lawyers should adopt other modes of protest which will not interrupt or disrupt court proceedings or adversely affect the interest of the litigant. Thereby lawyers can also set an example to other sections of the society in the matter of protest and agitations. Every Court has a solemn duty to proceed with the judicial business during Court hours and the Court is not obliged to adjourn a case because of a strike call. The Court is under an obligation to hear and decide cases brought before it and it cannot shirk that obligation on the ground that the advocates are on strike. If the counsel or/ and the party does not appear, the necessary consequences contemplated in law should follow. The Court should not become privy to the strike by adjourning the case on the ground that lawyers are on strike. Even in the Common Cause case the Supreme Court had asked the members of the legal profession to be alive to the possibility of Judges refusing adjournments merely on the ground of there being a strike call and insisting on proceeding with the cases. Strike infringes the litigant's fundamental right for speedy trial and the Court cannot remain a mute spectator or throw up its hands in helplessness on the face of such continued violation of the fundamental right.Either in the name of a strike or otherwise, no lawyer has any right to obstruct or prevent another lawyer from discharging his professional duty of appearing in Court. If anyone does it, he commits a criminal offence and interferes with the administration of justice and commits contempt of Court and he is liable to be proceeded against on all these counts. In the light of the above discussion we are of the view that the present strike by lawyers is illegal and unethical."

In the same case, the Supreme Court further held that lawyers have no right to go on strike or give a call for boycott, not even on a token strike. The Supreme Court said:

"The protest, if any is required, can only be by giving press statements, TV interviews, carrying out of Court premises banners and/or placards, wearing black or white or any colour arm bands, peaceful protest marches outside and away from Court premises, going on dharnas or relay fasts etc. It is held that lawyers holding Vakalats on behalf of their clients cannot attend Courts in pursuance to a call for strike or boycott. All lawyers must boldly refuse to abide by any call for strike or boycott. No lawyer can be visited with any adverse consequences by the Association or the Council and no threat or coercion of any nature including that of expulsion can be held out. It is held that no Bar Council or Bar Association can permit calling of a meeting for purposes of considering a call for strike or boycott and requisition, if any, for such meeting must be ignored. It is held that only in the rarest of rare cases where the dignity, integrity and independence of the Bar and/or the Bench are at stake, Courts may ignore (turn a blind eye) to a protest abstention from work for not more than one day".

The 266th Report of the Law Commission of India submitted pursuant to the direction of the Supreme Court in the case of *Mahipal Singh Rana vs State of UP, AIR 2016 SC 3302* proposes to introduce Section 35(1) in the Advocates Act, 1961 to prohibit advocates from resorting to boycotts and abstention from work and to treat the same as misconduct.

Unbecoming behaviour

Agitation for a personal or collective cause often becomes rowdy or unethical. That is worse than strikes. Dr.Madhava Menon, the well-known jurist and professor, referred to the rising incidents of indiscipline amongst the members of the legal profession in his article 'Reforming the Legal Profession'[3], he said:

> *"Instances may be a few but they cannot be ignored. Occasional stories in the media of lawyers attacking policemen on duty and judges before whom they practise are ignored as aberrations rather than symptoms of a disease causing the malfunctioning of the system itself. It requires no less than a high power committee of lawyers, judges, and public men with a mandate like thatof the Justice S.R. Das Committee appointed in the 1950s to look into the malaise and propose futuristic reforms."*

The acts referred to by Dr.Madhava Menon actually fall in category of crime and do not even call for a discussion on the topic of ethics. There are other instances where the lawyers have committed unlawful acts by surreptitiously usurping the property of an unsuspecting and credulous client. There are instances where a lawyer has induced a client into avoidable litigation thereby making the client part with large sums of money by way of lawyer's fee. There are also instances of lawyers misappropriating the funds provided by the client for purchasing court fees or for payment of any legal dues. Abhorring incident of sexual exploitation of client has also come to notice. The legal profession must rid itself of such conduct.

Case of Mahipal Singh Rana and Report of the Law Commission

When it comes to a lawyer's behaviour towards the court or a presiding officer, the misdemeanour is all the more serious. The Supreme Court of India took a very serious view against such misconduct in the case of *Mahipal Singh Rana vs State of UP (Supra)* decided on 5 July, 2016. Mahipal Singh Rana was an advocate and practicing in Etah District Courts. He tried to threaten and intimidate the learned Civil Judge (Senior Division), Etah. He barged into the court room and used foul language against the judge for not giving an order in his favour. In another incident, he misbehaved with the judge for not hearing his case even though his case was listed for a later time. Thus, the judicial work was hindered and aforesaid act of Mahipal Singh was within the ambit of committing the contempt of Court. The Civil Judge (Senior Division), Etah made a reference to the High Court through the learned District Judge, Etah (U.P.) recording two separate incidents which had taken place in his Court in which the appellant had appeared before him and conducted himself in a manner which constituted "Criminal Contempt". The High Court passed the judgment on 2/12/2005 and found the appellant guilty of Criminal Contempt for intimidating and threatening a Civil Judge (Senior Division), Etah in his Court and sentenced him to simple imprisonment of two months with a fine of Rs. 2,000/- and in default of payment of fine, the appellant was to

3 Dr. N.R. Madhava Menon, Reforming the legal profession, The Hindu, February 20, 2008.

undergo further imprisonment of 2 weeks. The High Court further directed the Bar Council of Uttar Pradesh to consider the facts contained in the complaint of the Civil Judge (Senior Division) Etah and to initiate appropriate proceedings against the appellant for professional misconduct.

The Supreme Court found the conviction of Shri Mahipal Singh Rana quite appropriate. The sentence was modified keeping in the view the old age of the advocate but the license of the contemnor was suspended for further period of 5 years.

The Supreme Court observed with anguish that despite directions from the court neither the Bar Council of UP nor the Bar Council of India had taken any steps to initiate disciplinary proceedings against the advocate. The Supreme Court of India then directed the Law Commission of India to go into all relevant aspects relating to regulation of legal profession in consultation with all concerned at an early date. The Government of India was directed to consider taking further appropriate steps in light of the report of the Law Commission within six months thereafter.

Consequently, the Law Commission of India has made its recommendations for amendments in the Advocates Act, 1961 by its 266th Report dated March 23rd, 2017. In order to strengthen the disciplinary mechanism the Law Commission has recommended various changes in the provisions relating to constitution of disciplinary committee and on other related issues. Section 9(1) of the Advocates Act requires each Bar Council to constitute one or more disciplinary committees, each of which shall consist of three persons, two being members of that council and the third, a non-member to be co-opted by the council. The proposed changes are as under :

> *a) In case of Bar Council of India, the Committee shall comprise of three members comprising a retired High Court Judge who shall be the Chairperson of the Committee, one Member nominated by the Council from amongst its members and one advocate or Senior Advocate to be nominated by the Council.*
>
> *b) In case of State Bar Council, the Committee shall comprise of three members comprising a retired District Judge who shall be the Chairperson of the Committee, one Member nominated by the Council from amongst its members and one advocate or Senior Advocate to be nominated by the Council*
>
> *c) The Bar Council shall constitute one or more disciplinary committees each of which shall consist of 3 persons of whom, in the case of Bar Council of India would be a retired High Court Judge and in the case of State Bar council a retired District Judge. One person shall be nominated by the Council from amongst its member and the third shall be a person nominated by the respective Council from amongst Senior Advocates or an Advocate on the roll of the Council for 25 years.*

Section 35(1) of the Advocates Act, 1961 is proposed to be strengthened by including a mandate that the decision of the State Bar Council to refer a case of professional misconduct of advocate to the Disciplinary Committee be taken within a period of six months from the date of receipt of complaint.

Further amendments are proposed to provide punishments that can be imposed by the

Disciplinary Committee which include fine upto Rs 3 Lacs, compensation upto Rs 5 lacs to the aggrieved person and exemplary cost upto 2 lacs. However if the complaint is found to be false, special and exemplary cost upto a maximum of Rs 2 lacs can be imposed.

The proposed amendments also give power to the Bar Councils to suspend an advocate from practice during pendency of the disciplinary proceedings.

Ethical Dilemma

Now we can deal with certain dilemmas that may arise during a lawyer's work. Some of the dilemmas can be in the following matters. Do personal ethics come in conflict with the collective cause of the colleague advocates? Do ethics come in conflict with success? Are there any limits to the advocate's duties in prosecuting or defending a case of his client? What about self-evolution and personal goals?

Ethics is not opposed to success. Success depends on hard work but in the process the ethics cannot be given a go by. If a young lawyer is prepared to work hard and is known to be honest and efficient, he will soon catch the attention of his own colleagues, the senior lawyers as well as the courts. Once he builds a reputation of being efficient and honest, his clientage will also increase. Many less known lawyers have the reputation of possessing good knowledge in law and they are noticed by judges who often require their services as amicus curiae. If a lawyer adopts unethical practice, sooner or later this fact will come to be publicly known. Such reputation will not help in the progress in the profession. If success, however defined, is achieved at the cost of ethical principles then the same would be hollow.

Sometimes there may be a conflict between personal ethics and the collective cause espoused by the bar association. For e.g. since strikes are not the appropriate course to adopt for a lawyer, the individual lawyer may not be willing to take part in a strike called by local bar association for one reason or other. Should the lawyer join the strike or oppose the same? To say the least, a lawyer who does not want to participate in the strike should make it known to the courts that he is not the one supporting the strike. He should appear in court despite the strike unless, however, there is picketing and physical obstruction in doing so. He can also garnish support for his views opposing the strike and may inf.luence bar association to refrain from going on a strike or to call off an existing strike.

Although pursuing the case of the client to the utmost ability of the lawyer is a sound ethical principle but there can be limits to such efforts. The lawyer must take care to see that he has not become a tool in the hands of the client. Whatever he submits to the court should be legally sound and based on the record. If he doubts any oral instruction of his client, he should make it known to the court that such instruction has come from the client. He should not take responsibility of authenticating it as a statement at the bar. Pursuing a client's case can never be at the cost of other ethical principles of profession.

Finally, everyone must balance work with family and worldly life with spiritual pursuits. Self-evolution and personal goals should not be forgotten. It is for an individual lawyer to strike a balance between the personal and professional life so as not to neglect his duties towards family. It is often seen that by pursuing a profession, a person has lost touch with his hobbies and other interests. Since the number of hours in a day is limited to twenty four only, a man cannot pursue all that he desires to. Hence a conscious and considered decision should be taken as to what extent his other interests can be pursued along with the profession which is undisputedly highly demanding.

(Annexure)

Standards of Professional Conduct and Etiquette to be Observed by Advocates

(Made by the Bar Council of India under Section 49(1)(c) of the Advocates Act, 1961)

An Advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and normal for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for an advocate. Without prejudice to the generality of the foregoing obligation, an advocate shall fearlessly uphold the interests of his client, and in his conduct conform to the rules hereinafter mentioned both in letter and in spirit. The rules hereinafter mentioned contain cannons of conduct and etiquette adopted as general guides; yet specific mention thereof shall not be construed as a denial of the existence of others equally imperative though not specifically mentioned.

Section I—Duty to the Court

1. An advocate shall, during the presentation of his case and while otherwise acting before a Court, conduct himself with dignity and self-respect. He shall not be servile and whenever there is proper ground for serious complaint against a judicial officer, it shall be his right and duty to submit his grievance to proper authorities.

2. An advocate shall maintain towards the Courts a respectful attitude, bearing in mind that the dignity of the judicial office is essential for the survival of a free community.

3. An advocate shall not influence the decision of a Court by any illegal or improper means. Private communications with Judge relating to a pending case are forbidden.

4. An advocate shall use his best efforts to restrain and prevent his client from restoring to sharp or unfair practices or from doing anything in relation to the Court, opposing counsel or parties which the advocate himself ought not to do. An advocate shall refuse to represent the client who persists in such improper conduct. He shall not consider himself a mere mouthpiece of the client, and shall exercise his own judgment in the use of restrained language in correspondence, avoiding scurrilious attacks in pleadings, and using intemperate language during arguments in Court.

5. An advocate shall appear in Court at all times only in the prescribed dress, and his appearance shall always be presentable.

6. An advocate shall not enter appearance, act, plead or practice in any way before a Court, Tribunal or Authority mentioned in Section 30 of the Act, if the sole or any member thereof is related to be Advocate as father, grandfather, son, grandson, uncle, brother, nephew, first cousin, husband, wife, mother, daughter, sister, aunt, niece, father-in-law, daughter-in-law or sister-in-law.

7. An advocate shall not wear bands or gown in public places other than in Courts except on such ceremonial occasions, and at such places as the Bar Council or the Court may prescribe.

8. An Advocate shall not appear in or before any Court or Tribunal or any other authority for or against an organisation or an institution, society or corporation, if he is a

member of the Executive Committee of such organisation or institution or society or corporation. "Executive Committee," by whatever name it may be called, shall include any Committee or body of persons which, for the time being, is vested with the general management of the affairs of the organisation or institution, society or corporation.

Provided that this Rule shall not apply to such a member appearing as amicus curiae or without a fees in a matter affecting the affairs or a Bar Council, Incorporated Law Society or a Bar Association.

9. An Advocate should not act or plead in any matter in which he himself is pecuniarily interested.

Illustration

I. He should not act in a bankruptcy petition when he himself is also a creditor of the bankrupt.

II. He should not accept a brief from a company of which he is a director.

10. An Advocate shall not stand as a surety, or certify the soundness of surety, for his client required for the purpose of any legal proceedings.

Section II—Duty to the Client

11. An Advocate is bound to accept any brief in the Courts or Tribunals or before any authority in or before which he professes to practise at a fee consistent with his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular brief.

12. An Advocate shall not ordinarily withdraw from engagements once accepted, without sufficient cause and unless reasonable and sufficient notice is given, to the client. Upon his withdrawal from a case, he shall refund such part of the fee as has not been earned.

13. An Advocate should not accept a brief or appear in a case in which he has reason to believe that he will be a witness and if being engaged in case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear as an Advocate if he can retire without jeopardising his client's interests.

14. An Advocate shall at the commencement of his engagement and during the continuance thereof, make all such full and frank disclosures to his client relating to his connection with the parties and any interest in or about the controversy as are likely to affect his client's judgment in either engaging him or continuing the engagement.

15. It shall be the duty of an advocate fearlessly to uphold the interests of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other. He shall defend a person accused of a crime regardless of his personal opinion as to the accused, bearing in mind that his loyalty is to the law which requires that no man should be convicted without adequate evidence.

16. An Advocate appearing for the prosecution in a criminal trial shall so conduct the prosecution that it does not lead to conviction of the innocent. The suppression of material capable of establishing the innocence of the accused shall be scrupulously

avoided.

17. An Advocate shall not, directly or indirectly, commit a breach of the obligations imposed by Section 126 of the Indian Evidence Act.

18. An Advocate shall not, at any time, be a party to fomenting of litigation.

19. An Advocate shall not act on the instruction of any person other than his client or his authorised agent.

20. An Advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof.

21. An Advocate shall not buy or traffic in or stipulate for or agree to receive any share or interest in any actionable claim. Nothing in this Rule shall apply to stock, shares debentures or government securities, or to any instruments which are for the time being, by law or custom negotiable, or to any mercantile document or title to goods.

22. An Advocate shall not, directly or indirectly, bid for or purchase, either in his own name or in any other name, for his own benefit or for the benefit of any person, any property sold in the execution of a decree or order in any suit, appeal or other proceeding in which he was in any way professionally engaged. This prohibition, however, does not prevent an Advocate from bidding for or purchasing for his client any property which his client may himself legally bid for or purchase provided the Advocate is expressly authorised in writing in this behalf.

23. An Advocate shall not adjust fees payable to him by his client against his own personal liability to the client, which liability does not arise in the course of his employment as an Advocate.

24. An Advocate shall not do any thing whereby he abuses or takes advantage of the confidence reposed in him by his client.

25. An advocate should keep accounts of the client's money entrusted to him, and the accounts should show the amounts received from the client or on his behalf, the expenses incurred for him and the debits made on account of fees with respective dates and all other necessary particular.

26. Where moneys are received from or on account of a client, the entries in the accounts should contain a reference as to whether the amounts have been received for fees or expenses, and during the course of the proceedings, no Advocate shall, except with the consent in writing of the client concerned, be at liberty to divert any portion of the expenses towards fees.

27. Where any amount is received or given to him on behalf of his client the fact of such receipt must be intimated to the client as early as possible.

28. After the termination of the proceeding the Advocate shall be at liberty to appropriate towards the settled fee due to him any sum remaining unexpended out of the amount paid or sent to him for expenses, or any amount that has come into his hands in that proceeding.

29. Where the fee has been left unsettled, the Advocate shall be entitled to deduct, out of

any moneys of the client remaining in his hands, at the termination of the proceeding for which he had been engaged, the fee payable under the rules of the Courts in force for the time being, or by then settled and the balance, if any, shall be refunded to the client.

30. A copy of the client's account should be furnished to him on demand provided the necessary copying charge is paid.

31. An Advocate shall not enter into arrangements whereby funds in his hands are converted into loans.

32. An Advocate shall not lend money to his client, for the purpose of any action or legal proceedings in which he is engaged by such client.

Explanation—An Advocate shall not be held guilty of a breach of this rule, if in the course of a pending, suit or proceedings, and without any arrangement with the client in respect of the same, the Advocate feels compelled by reason of the rule of the Court to make a payment to the Court on account of the client for the progress of the suit or proceeding.

33. An Advocate who has at any time, advised in connection with the institution of a suit, appeal or other matter or has drawn pleadings or acted for a party, shall not appear or plead for the opposite party.

Section III—Duty to Opponent

34.. An Advocate shall not in any way communicate or negotiate upon the subject matter of controversy with any party represented by an Advocate except through that Advocate.

35. An Advocate shall do his best to carry out all legitimate promises made to the opposite party even though not reduced to writing or enforceable under rules of the Court.

Section IV—Duty to Colleagues

36. An Advocate shall not solicit work or advertise, either directly or indirectly, whether by circulars. Advertisements, touts, personal communica-tions, interview not warranted by personal relations, furnishing or inspiring newspaper comments or procuring his photograph to be published in connection with cases in which he has been engaged or concerned. His sign-board or name-plate should be of a reasonable size. The sign-board or name-plate or stationery should not indicate that he is or has been President or Members of a Bar Council or of any Association or that he has been associated with any person or organisation or with any particular cause or matter or that he specialises in any particular type of work or that he has been a Judge or an Advocate-General.

37. An Advocate shall not permit his professional services or his name to be used in aid of or to make possible, the unauthorised practise of law by any lay agency,

38. An Advocate shall not accept a fee less than the fee taxable under the rules when the client is able to pay the same.

39. An Advocate shall not enter appearance in any case in which there is already a vakalat or memo of appearance filed by an Advocate engaged for a party except with his consent, in case such consent is not produced he shall apply to the Court stating reasons why the said consent could not be produced and he shall appear only after

obtaining the permission of the Court.

Section IVA

40. Every advocate borne on the Rolls of a State Bar Council shall pay to the State Bar Council a sum of Rs. 30 every third year, commencing 1st April, 1980, either at one time or in three equated instalments.

41. The aforesaid sum collected by the State Bar Council shall be credited to a separate fund to be known as 'Advocates Welfare Fund'.

42. All sums so collected by the State Bar Council in accordance with Rule 40 shall be remitted to the Bar Council of India forthwith, which shall be credited by the Bar Council of India to a separate fund to be known as 'Advocates Welfare Fund'.

43. Every advocate borne on the rolls of a State Bar Council shall deliver on or before 1st April every year, commencing from 1st April 1980 a declaration in the form prescribed.

44. Every Advocate borne on the Rolls of a State Bar Council shall entrol himself as member of a Bar Association within the territory over which the said Bar Council exercises, jurisdiction. Every declaration under Rule 43 above, shall be accompanied by a certificate of the Secretary of that Bar Association, certifying that he is a member and that he has paid all the dues of the Bar Association.

45. The name of every Advocate, who fails to pay the aforesaid sums within the prescribed time set out in Rule 40 or fails to file the declaration under Rule 43 or makes any false statement in the declaration under Rule 43 shall be removed from the Rolls of the State Bar Council.

46. Before the name of any Advocate is removed from the Rolls under Rule 45 the Secretary of the State Bar Council shall serve on the Advocate concerned a notice to show cause against the removal of his name and the cause shown, if any, shall be dealt with by the Chairman of the State Bar Council forthwith who, in his discretion, shall pass such orders as he thinks fit.

Section V—Duty in Imparting Training

47. It is improper for an Advocate to demand or accept fees or any premium for any person as a consideration for imparing in law under the rules prescribed by the Bar Council to enable such person to qualify for enrolment under the Advocates Act, 1961.

Section VI—Duty to Render Legal Aid

48. Every Advocate shall in the practice of the profession of law bear in mind that any one genuinely in need of a lawyer is entitled to legal assistance even though he cannot pay for it fully or adequately and that within the limits of an Advocate's economic condition, free legal assistance to the indigent and oppressed is one of the highest obligations an Advocate owes to society.

Section VII—Restrictions on Other Employments

49. An Advocate shall not personally engage in any business but he may be a sleeping

partner in a firm doing business provided that, in the opinion of the Bar Council the nature of the business is not inconsistent with the dignity of the profession.

50. An Advocate may be a Director or Chairman of the Board of Directors of a company with or without any ordinary sitting, fee provided none of his duties are of an executive character. An Advocate shall not be a Managing Director or a Secretary of any company.

51. An Advocate shall not be full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practise and shall, on taking up any such employment, intimate the fact to the Bar Council and shall thereupon cease to practise as an advocate so long as he continues in such employment.

Nothing in this rule shall apply to Law Officer of the Central Government or the Government of a State or of any Public Corporation or body constituted by statute who is entitled to be enrolled under the rules of the Bar Council made under Section 28(2)(d) read with Section 24(1)(c) of the Advocates Act, 1961 despite his being a full-time salaried employee.

52. An Advocate who has inherited, or succeeded by survivorship, to a family business may continue it, but may not personally participate in the management thereof. He may continue to hold a share with others in any business which has descended to him by survivorship or inheritance or by will, provided he does not personally participate in the management thereof.

53. An Advocate may review Parliamentary Bills for a remuneration, edit legal text books at a salary, do 'press-vetting' for newspapers, coach pupils for legal examinations, set and examine question papers; and subject to the rules against advertising and full-time employment, engage in broadcasting, journalism, lecturing and teaching subjects both legal and non-legal.

54. Nothing in these rules shall prevent an Advocate from accepting, after obtaining the consent of the Bar Council part-time employment provided that in the opinion of the Bar Council the nature of the employment does not conflict with his professional work and is not inconsistent with the dignity of the profession.

These rules shall be subject to such directives if any as may be issued by the Bar Council of India from time to time.

CONDITIONS FOR RIGHT TO PRACTICE

1. Every Advocate shall be under an obligation to see that his name appears on the roll of the State Council within whose jurisdiction he ordinarily practices.

2. An Advocate shall not enter into a partnership or any other arrangement for sharing remuneration with any person or legal Practitioner who is not an Advocate.

3. Every Advocate shall keep informed the Bar Council on the roll of which his name stands, of every change of his address.

4. The Council or a State Council can call upon an Advocate to furnish the name of the State Council on the roll of which his name is entered, and call for other particulars.

5. (1) Any Advocate who voluntarily suspends practice for any reason whatsoever shall intimate such suspension to the State Council on the roll of which his name is entered.

(2) A similar intimation shall be given by every Advocate on resumption of practice.

6. (1) An Advocate whose name has been removed by order of the Supreme Court or a High Court or the Bar Council as the case may be, shall not be entitled to practise the profession of law either before the Courts and authorities mentioned under Section 30 of the Advocates Act, 1961 or in chambers, or otherwise.

(2) An Advocate who is under suspension, shall be under same disability during the period of such suspension as an advocate whose name has been removed from the roll.

7. A person, who has held judicial/quasi judicial office in any part of the Union Territory of Delhi at any time within two years immediately preceding his retirement or otherwise ceasing to be in service, shall not practise for a period of two years from the date of his retirement or ceasing to be in service as the case may be in the territory of Delhi.

Provided that nothing in this Rule shall prevent any such person from practising in any Court of Superior jurisdiction to the one in which he held the office.

Explanation—A Court of Sessions, a District Court or the City Civil Court shall be a Court of Superior jurisdiction in relation to a Magistrate's Court or Small Causes Court, even though no appeal may lie from the latter to the former.

8. No Advocate shall be entitled to practise if in the opinion of the Bar Council he is suffering from such contagious disease as makes his practice of law a hazard to the health of others. This qualification shall last for such period as the Bar Council directs from to time.

Session V

Time: 90 minutes

MODULE FOR TRAINING OF LEGAL SERVICES LAWYERS ON

LAW OF PROPERTY

-Justice Manju Goel[1]

SESSION PLAN

Objective

1. To inform the legal services lawyers of the latest issues arising in the law of property.
2. To sensitize the lawyers about the technicalities involved in the law.
3. To give the legal services lawyers a general overview of the law relating to transfer of property.

Expected learning outcome

1. The legal services lawyer will learn the pitfalls which the lawyer should not make in pursuing any litigation in the area of property.
2. The legal services lawyer will be better informed in order to counsel his/her clients.
3. The legal services lawyer with better understanding of law would be of assistance to the Courts.

Programme

1. Introduction by the resource person 15 minutes

Resource person will introduce the subject of various transactions under the Transfer of Property Act and various modes of acquiring property

2. Group Discussion 15 minutes

In group discussion the participants will be divided in groups of 5-6 members and some groups will be given one exercise while other groups will be given other exercise

3. Presentation by each group 20 minutes
(10 minutes for each Group)

4. Whole group discussion guided by the resource person 15 minutes

5. Lecture by resource person 15 minutes

The resource person shall apprise the participants of the points not covered by the group discussion depending upon interest of the participants.

1 Former Judge, Delhi High Court.

6. Concluding remarks 10 minutes

By one of the participants or resource person or visiting dignitary

Training method

1. Lecture
2. Group Discussion

Note: The resource person will pool the points on the ip chart/white board. He/she may prepare a power point for the lecture.

Tools required

1. Facility for power point presentation
2. Flip chart
3. Pens
4. Blue tack
5. Whiteboard
6. The resource person will keep the sheets with exercises for activity

Reading for Group Discussion- I

Your client wants your advice as to whether he should buy a property from one Mr.K, the "owner" of a flat who has offered inspection of the following documents by way of proof of his title:

(a) An unregistered Agreement for sale from the earlier registered owner in favour of K confirming the terms of sale, delivery of possession and payment of full consideration and undertaking to execute any document as and when required in future.

(b) An Irrevocable General Power of Attorney by the earlier registered owner in favour of K or his nominee authorizing him to manage, deal with and dispose of the property without reference to the earlier registered owner.

(c) A Will bequeathing the property to K (as a safeguard against the consequences of death of the registered owner before transfer is effected).

ACTIVITY-I

In group discussion consider the following:

1. Do you think K has a perfect title?
2. In what way acquisition of property with the aid of above documents is different from a usual registered sale deed?
3. What is the purpose behind the law requiring sale to be effected by a registered instrument?
4. What right does such a purchaser have against the vendor?
5. How is a will made?
6. What is the mode of proving a will?

Reading for Group Discussion- II

Company X, owner of suit property, being a 3 storied house, in a commercial locality is in need of a great amount of money as liquidation proceedings are imminent and large number of creditors of the company are pressurising the owner for payment. In view of this situation the company X puts up an advertisement in a newspaper for urgent sale of the property and invites solvent parties with sufficient liquidity to bid for the suit property. Y having seen the property for quite some time offers to buy the same. The parties enter into an agreement under which Y pays the earnest money of Rs. 5 lakhs and an advance of 30 lakhs and agrees to the terms which include a total consideration of Rs. 5 Crore, payment of 50% of this consideration within 1 month, payment of the remaining consideration within 2 months and execution of the sale deed on the date of the final payment.

Y does not fulfil the condition for the payment of 50% of the consideration within 1 month on the ground that the seller must pay off its dues to its banker as the banks have also filed suits against X for recovery of dues. The dues of the banks are comparatively small and X pleads that it intends to pay the dues of the bank from the sale proceeds of the building. X, seller finding Y unwilling to pay the balance consideration puts in another advertisement in the newspaper for sale of the property and issues notice to the buyer terminating the contract and confiscating the earnest money and offering to return the advance. The buyer Y sues the seller X for specific performance of the contract and for restraining X from selling the suit property to any 3rd party. X takes the defence that the buyer Y failed to perform the contract within the stipulated time and thus committed breach of the contract and accordingly he is entitled to confiscate the earnest money and sell the property to any new buyer.

The counsel for buyer Y cites the judgment of Supreme Court, *Chand Rani v. Kamal Rani, 1993 (1) SCC 519,* in which the Supreme Court said:

> *"It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract."*

ACTIVITY -II

In group discussion decide:

1. How is a sale of immovable property effected?
2. What right, if any, does a purchaser have, under an agreement for sale?
3. What remedies does a purchaser have if the vendor illegally terminates the contract?
4. Is time an essence of a contract for sale of immovable property?
5. What arguments will you present to contradict the pleas raised by the buyer's/ plaintiff's counsel regarding time not being an essence of the contract for sale of immovable property?

SHORT NOTE

ON

LAW OF PROPERTY

-Justice Manju Goel[1]

The word 'property' has various meanings. However for the present note, property means immovable property like a plot of land or a house or a flat. Such a property is amenable to various kinds of deals like sale, mortgage, tenancy, gift or succession.

A transaction related to immovable property is a contract and therefore should satisfy all conditions of a valid contract. However, depending upon the nature of transaction, various other laws also get attracted. For example for inter-vivos transfer of property, the transaction has to adhere to Transfer of Property Act. By way of public policy, the State maintains the record of ownership of properties which are available for inspection by any member of the public. For the purpose of raising revenue, Stamp Duty is imposed on the documents relating to the transaction of immovable property. Therefore in a study of law relating to property, so far as it relates to transfer inter-vivos i.e. between living persons, one has to examine not only the Transfer of Property Act but also the Indian Contract Act, Registration Act and the Stamp Act. Sometimes other local laws may also be attracted in real estate deals.

In addition to transfer inter-vivos the property can pass hands from a deceased to a successor by a will or intestacy. Succession by intestacy is governed by the personal laws governing the owner of the property. The power to make a will is available to every community although for the Muslims there are some restrictions on such power. The mode of making a will is available in Sections 57 to 66 of the Indian Succession Act. The Indian

Succession Act provides the mode of succession for Christians and Parsis. Succession of a Hindu is governed by the Hindu Succession Act.

For the purpose of the present session, we will deal with the concept of transfer of property including sale and the corresponding law relating to an agreement to sell, registration and stamp duty. We will also deal with agreement to sell and the consequences of breach of an agreement to sell.

"Transfer of Property" within the meaning of Transfer of Property Act is an act by which a living person conveys a property to one or more other living persons. Sale is one of the modes of transfer of ownership. Sale takes place when ownership is exchanged for a price paid or promised or part-paid and part-promised. A sale of immovable property can be made only by a registered instrument. It is customary to enter into a "contract for sale" sometime before the actual transaction of sale of immovable property. For various reasons there is a time lag between finalisation of bargain and actual transaction as the seller may require clearances from Income Tax department, etc and satisfy the purchaser that the property sought to be sold is free of encumbrances. Similarly, the buyer may need time to mobilise the resources. Hence the general manner in which a sale of immovable property takes place is execution of a contract for sale with payment of earnest money followed by execution of actual sale deed after or when the purchaser pays the consideration money to the seller.

1 Former Judge, High Court of Delhi.

The consideration money may not be paid in full on the day the bargain is struck. On many occasions the payment is done in instalments with the final payment on or before the date of actual execution of the sale deed.

A sale deed is compulsorily registrable under Section 17 of the Registration Act. In case a sale deed is not registered, the transaction will not have the effect of sale on account of the provision of Section 54 of the Transfer of Property Act. Further if such a document is not registered it will not be admissible in evidence in a Court of law except merely for collateral purposes. The document of sale also calls for stamp duty as per the law prevailing in the particular state. The stamp duty is paid before actual registration. However the participants may be reminded that if a document required to be stamped is unstamped the same may invite an order of impounding if produced before the court or any other authority for the purpose of recovery of stamp duty and penalty.

A contract for sale does not give any right to the intending purchaser over the property sought to be sold. It only creates some rights against the vendor. The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963 and in Section 91 of Trusts Act. Section 54 of the Transfer of Property Act describes the obligations created by a contract for sale as a personal obligation not amounting to an interest or easement therein.

Though the agreement for sale does not create any interest in the property involved in the transaction, in case possession has been delivered, Section 53A of the Transfer of Property Act, protects the transferee against the onslaught of a transferor who may intend to disturb the possession of the transferee.

Section 53A is frequently used in Civil Courts and reads as under:

> *"53A. Part performance: Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:*
>
> *PROVIDED that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."*

The above Section shows under what circumstances such a protection is available to a

purchaser. The contract for sale should be for consideration, should be signed by the owner or on his behalf and the transferee should have either taken possession or if he is already in possession, has done some act in furtherance of the contract. Another important element for such protection is that the transferee has already performed or is willing to perform his part of the contract. If these conditions are fulfilled, although transfer may not have been completed in the manner prescribed by law, the transferor will be debarred from enforcing against the transferee any right in respect of the property in question. The proviso to Section 53A makes it clear that a subsequent transferee without notice of the earlier contract or part performance shall not be affected by the right created by Section 53A.

A very important provision which is relevant to the issue of protection of the transferee is that of the registration of the agreement. By an amendment in 2001 the very important words, *"though required to be registered, has not been registered"*, have been omitted from Section 53A of the Transfer of Property Act. Simultaneously, an amendment has been incorporated in Section 17 of the Registration Act including thereby the following provision:

> *"(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A."*

Therefore the agreement for sale, though otherwise valid would not give protection to the purchaser as provided in Section 53A of the Transfer of Property Act unless the same is registered.

Power of attorney

A power of attorney is creation of an agency whereby the granter authorises the grantee to do acts specified therein on behalf of the granter. Thus a power of attorney may grant power to look after the property of the granter and for that purpose make applications to municipal and other authorities for the purpose of improvement and maintenance in the property. A power of attorney may grant power to file a suit on behalf of the granter. Similarly a power of attorney may grant power to execute a sale deed. Even if a power of attorney is given to the intending purchaser, the intending purchaser only has as much power as is granted by the document. Such a document cannot give any right or interest of any kind in the property of the granter. The power granted by a power of attorney is a power to act on behalf of that granter and a power to bind the granter with acts done by the holder of the power of attorney.

A power of attorney is revocable. A power of attorney may describe itself as irrevocable. Yet even an irrevocable power of attorney does not have the effect of transferring the title of the property to the grantee.

Registration

The Registration Act makes certain documents compulsorily registrable. A sale deed is one such document. When a document is presented for registration, the same comes under the scrutiny of the Registrar who has to recover the Stamp Duty payable and may also

question the valuation of the property. In order to avoid high stamp duty and to overcome restrictions on transfers placed by various laws, some people developed the practice of selling properties by executing an agreement for sale only coupled with a power of attorney which did not require registration. The Supreme Court held in *Suraj Lamp & Industries (P) Ltd. (2) v. State of Haryana, (2012) 1 SCC 656* that such transactions did not amount to sale and did not give the purchaser any right over property. The Supreme Court enumerated the benefits of registration in the following words:

> *"The Registration Act, 1908, was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.*
>
> *Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest" whether vested or contingent of the value of Rs. 100 and upwards to or in immovable property.*
>
> *Section 49 of the said Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed. Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person/s presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified".*

Will

Section 2 (h) Indian Succession Act, defines will as, "the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect

after his death".

A will is a document incorporating the will of the testator about how he wishes his property to devolve on his successors. It is not a document by which a property is transferred from one living person to another i.e. to say it is not an inter-vivos document. The will operates only after the testator's demise. The will is a revocable document. The testator during his lifetime can revoke his earlier will. Therefore only the last will of the testator is a document of any effect.

Chapter II of the Indian Succession Act prescribes that a will can be made by a person who has attained majority and is of sound disposing mind. That the testator was a person of sound disposing mind at the time the will was made, is a burden on the propounder of the will to prove.

The mode of execution of will is available in Section 63 of the Indian Succession Act. The testator shall sign the will in presence of two or more witnesses. Each witness should sign the will having seen the testator sign the will or having obtained the confirmation from the testator that he has signed the same. There are provisions how a person who does not have the capacity to sign can make a will. There are special provisions for certain categories of persons like soldiers who can make a privileged will.

The effect of power of attorney, agreement to sell and a will executed by an intending seller to an intending purchaser

From the above discussion it is clear that none of the three documents can effect a transfer of property. Hence even taken together they cannot create a right or interest in favour of the transferee. The practice of avoiding to execute a sale deed and getting it registered and putting the vendee in possession has been decried by the Supreme Court in the case of *Suraj Lamp & Industries (P) Ltd. (2) v. State of Haryana, (2012) 1 SCC 656* (Supra). The Court said:

> *"We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance.*
>
> *Transactions of the nature of `GPA sales' or `SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized as valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property.*
>
> *They cannot be recognized as deeds of title, except to the limited extent of section 53A of the TP Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales."*

Breach of Agreement

A breach of contract falls with the realm of the Contract Act. In case the vendor commits a breach of the contract, the purchaser is entitled to seek compensation as per the provisions of Section 73 and Section 74 of the Indian Contract Act. Section 13(1)(d) of the Specific Relief Act also gives such a purchaser the right to seek specific performance of the contract i.e. to execute a sale deed on receiving the consideration money. Albeit, the vendor is also entitled to seek damages or seek specific performance in case the purchaser commits a breach of contract. The parties are also entitled to terminate the contract as per the terms of the contract and are entitled to consequences thereof.

Failure to perform the contract within the stipulated time may or may not amount to breach of the contract depending upon facts and circumstances of the case. Traditionally it was always held that in respect of a contract for sale, time was not the essential condition of the contract. However, the judicial view in respect of this issue has seen a change in the recent times. The traditional view was based on the experience that value of real estate was stable and therefore even if the stipulated time had passed and the contract was performed within a reasonable time, neither party suffered any damage. This situation does not hold good at the present time when we experience galloping shifts in the price of real estate within a short time. Failure to adhere to time schedule has adverse consequences as during the crucial period prices of real estate may change. In the case of *N. Srinivasa vs M/S. Kuttukaran Machine Tools Ltd, (2009) 5 SCC 182*, the Supreme Court held:

> *"In a contract for sale of immovable property, normally it is presumed that time is not the essence of the contract. Even if there is an express stipulation to that effect, the said presumption can be rebutted. It is well settled that to find out whether time was essence of the contract, it is better to refer to the terms and conditions of the contract itself".*

The opinion of the Supreme Court expressed in *Saradamani Kandappan vs S. Rajalakshmi & Ors, (2011) 12 SCC 18,* is extracted as under:

> *"The intention to make time stipulated for payment of balance consideration will be considered to be essence of the contract where such intention is evident from the express terms or the circumstances necessitating the sale, set out in the agreement. If for example, the vendor discloses in the agreement of sale, the reason for the sale and the reason for stipulating that time prescribed for payment to be the essence of the contract, that is, say, need to repay a particular loan before a particular date, or to meet an urgent time bound need (say medical or educational expenses of a family member) time stipulated for payment will be considered to be the essence. Even if the urgent need for the money within the specified time is not set out, if the words used clearly show an intention of the parties to make time the essence of the contract, with reference to payment, time will be held to be the essence of the contract".*

So far as the example given in the reading for group discussion is concerned, the Court should hold that time was the essence of the contract.

Owner was in urgent need of money as liquidation proceedings were imminent and a

large number of creditors were pressurising the company for payment. The urgent need for money for the vendor was within public domain. The purchaser was expected to know about the urgency for the seller X. Therefore Y should have known at the time the contract was entered into that the payment would have to be made within the stipulated period.

What is not specifically stated in the reading is whether there is any evidence of buyer Y having been told about circumstances in which the seller X had put up the suit property for sale. The efficient lawyers should take care of such grey areas. The seller's lawyers should come up with the pleas showing circumstances from which it can be inferred that time was the essence of the contract. The lawyer for the buyer should find circumstances like the buyer not being informed of the circumstances of the vendor or any default by the vendor in keeping to the time schedule in order to support his client's case that time was not the essence of contract.

****

[The glory of justice and the majesty of law are created not just by the Constitution - nor by the courts - nor by the officers of the law- nor by the lawyers - but by men and women who constitute our society - who are the protectors of the law as they are themselves protected by the law. (Robert Kennedy)]

Session VI

Total Time: 90 minutes

MODULE FOR TRAINING OF LEGAL SERVICES LAWYERS

ON

PROPERTY RIGHTS OF WOMEN UNDER HINDU LAW

––Justice Manju Goel [1]

–With inputs from Mr. Mahesh Thakur[2]

SESSION PLAN

Objectives

1. To apprise the legal services lawyers with the historical background and current development of the law of inheritance of property relating to Hindu women.
2. To inform the legal services lawyers of various issues that have cropped up in the area of law relating to women on account of the amendment in Section 6 of the Hindu Succession Act.

Expected learning outcomes

1. The legal services lawyers will have full understanding of the historical developments in the area of property laws for Hindu women.
2. The legal service lawyers will be sensitised about the need of supporting the Hindu women in realising their rights over property given to them by the law.
3. The legal services lawyers will be better equipped to handle cases for and against women in matters of inheritance of a Hindu dying intestate.

Programme:

1. Introduction by the resource person 10 minutes

2. Activity 25 minutes

The participants will be divided into small groups of 5-6 members. Some will be asked to do one exercise and some the other exercise.

3. Presentation by each group 20 minutes

4. Whole Group Discussion 20 minutes

5. Concluding remarks by one of the participants or the resource person or the visiting dignitary 15 minutes

Training method

1. Lecture

1 Former Judge, High Court of Delhi

2 Advocate

2. Group Discussion
3. Experience sharing –

Note: The resource person will pool the points on the flip chart/white board. He/she may prepare a power point for the lecture.

Tools required

1. Facility for power point presentation
2. Flip chart
3. Pens
4. Blue tack
5. Whiteboard
6. The resource person will keep the sheets with exercises for activity

Reading for Group Discussion - I

Hindu Women's Right to Inheritance

Tulasamma is the widow of Vaddeboyina Tulasamma. Her brother in law V. Sesha Reddy and her husband were coparceners in a joint family property. After the death of her husband in 1931 she filed a suit for maintenance against the brother in law in 1944 and obtained a decree on June 29, 1946. When she put the decree for execution there was a compromise in lieu of maintenance between her and the brother in law V. Sesha Reddy. According to that deed of settlement Tulasamma got a share in the joint family property but the deed described her share as limited and restricted her interest such that Tulasamma was to enjoy the property only during her lifetime and had no right of alienation of any kind. Tulasamma after some time by two deeds sold the property to defendants. The brother in law V. Sesha Reddy sued Tulasamma and the two defendants in 1969 for declaration that Tulasamma had no right to alienate the property and that her interest being limited for her life, on her death the property would revert to him (the plaintiff being a reversioner). By the time the suit was filed, the Hindu Succession Act 1956 had come into force by virtue of Section 14 of which the limited estate of a Hindu woman was converted into full ownership. The provision of Section 14 is as under:

> *"14. (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.*
>
> *Explanation:- In this Sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.*
>
> *(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."*

During the pendency of the suit Tulasamma dies. Her daughters are impleaded in her place.

The arguments put forth by the lawyer for the plaintiff are as under:

The plaintiff averred that the alienations made by Tulasamma were not binding on him and that her interests in the property could be enjoyed only till her lifetime. The plaintiff also contended that Tulasamma had got a restricted estate only under the terms of the compromise and her interest could not be enlarged into an absolute interest by the provisions of the Hindu Succession Act, 1956 in view of Section 14(2).

The plaintiff also pleaded that the facts in question were clearly covered by Section 14(2) of the Hindu Succession Act as the compromise deed was an instrument as contemplated by Section 14(2) of the 1956 Act and so, Tulasamma could not get an absolute interest under

Section 14(1) of the Act.

The plaintiff also contended that by virtue of the compromise Tulasamma got title to the properties for the first time and it was not a question of recognising a pre-existing right which she had none in view of the fact that her husband had died even before the enactment of Hindu Women's Right to Property Act, 1937.

The plaintiff also averred that Hindu widow's right to maintenance is not a right to property and the property allotted to her in lieu of maintenance does not confer on her a right or title to the property and therefore such conferment is protected by Section 14(2) of the 1956 Act and is not covered by Section 14(1).

The arguments put forth on behalf of the defendants including Tulasamma were as under:

It was argued that by virtue of the provisions [Section 14(1) of the 1956 Act] she had become the full owner of the properties with absolute right of alienation and the plaintiff had no locus-standi to file the present suit.

It was further argued that Section 14 (2) had no application to the present case, because the compromise deed between Tulasamma and her brother in law was an instrument in recognition of a pre-existing right.

The defendant also argued that the properties allotted to the Hindu widow even though they conferred a limited interest would fall clearly within the ambit of Section 14(1) of the 1956 Act, by virtue of which the limited interest would be enlarged into an absolute interest on coming into force of the 1956 Act.

It was also argued that under the Hindu Law the husband has got a personal obligation to maintain his wife and if he is possessed of properties then his wife is entitled as of right to be maintained out of such properties. The claim of a Hindu widow to be maintained is not an empty formality which is to be exercised as a matter of concession or indulgence, grace or gratis or generosity but is a valuable spiritual and moral right which flows from the spiritual and temporal relationship of the husband and wife.

Activity-I

In group discussion try to find answers to the following questions:

1. Can the instrument of compromise under which the properties were given to the appellant Tulasamma before the 1956 Act in lieu of maintenance fall within Section 14(1) or is covered by Section 14(2) of the Hindu Succession Act, 1956?
2. Can a Hindu widow have a right to property in lieu of her maintenance, and if such a right is conferred on her subsequently by way of maintenance, would it amount to a mere recognition of a pre-existing right or a conferment of new title so as to fall squarely within Section 14(2) of the Hindu Succession Act, 1956?
3. How can the property of Hindu Female be inherited by her heirs under the Hindu Succession Act, 1956?

Reading for Group Discussion – II

Plaintiff P files a suit for partition. The properties sought to be partitioned were the joint family properties held by her father Y. Y died in 1988. The plaintiff filed a suit in 1990 claiming 1/8th share on the plea that the father was survived by his wife, (plaintiff's mother) and seven children including the plaintiff (daughter) and six sons (defendants). During the course of the suit the mother of the plaintiff died and the plaintiff amended the plaint to claim 1/7th share.

The defence taken is that the plaintiff is not entitled to 1/7th share in the property as the father Y held joint family property of which the plaintiff was not a coparcener, while sons were.

During the pendency of the suit, section 6 of the Hindu Succession Act 1956 was amended giving the daughters equal rights with the sons in the joint Hindu family property. P now pleads that the amendments bring her at par with the other defendants and therefore, she is entitled to a share equal to them.

For ready reference, the effect of section 6 can be seen from the following tabular statement:

Section 6 of the Hindu Succession Act	**Section 6 on and from the commencement of the Hindu Succession (Amendment)Act, 2005**
"6. ***Devolution of interest in coparcenary property*****.**—When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act: Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve testamentary or intestate succession, as the case may be, under this Act and not by survivorship. Explanation I.—For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. Explanation 2.—Nothing contained in the proviso to this section shall be construed as enabling a person who had separated himself	**"6.** ***Devolution of interest in coparcenary property*****.—** (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall— (a) by birth become a coparcener in her own right in the same manner as the son; (b) have the same rights in the coparcenary property as would have had if she had been a son; (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004. (2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of by her by testamentary

from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein. ***7. Devolution of interest in the property of a tarwad....”***	disposition. (3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and— (a) the daughter is allotted the same share as is allotted to a son; (b) the share of the predeceased son or a predeceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pred ceased son or of such predeceased daughter; and (c) the share of the predeceased child of a predeceased son or of a predeceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or a predeceased daughter, as the case may be. *Explanation*.—For the purposes of this sub section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. (4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect— (*a*) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

	(*b*) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted. *Explanation*.—For the purposes of clause (*a*), the expression 'son', 'grandson' or 'great-grandson' shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005. (5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004. *Explanation*.—For the purposes of this section 'partition' means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court."

Activity II: In the group discussion, find arguments–

A- to support the case of the plaintiff

B- to support the case of the defendants

Activity III: Find the impact of the amendment of section 6 on the claim of the plaintiff and the share that the plaintiff is to be awarded.

SHORT NOTE

ON

PROPERTY RIGHTS OF WOMEN UNDER HINDU LAW

––Justice Manju Goel [1]

–With inputs from Mr. Mahesh Thakur[2]

The woman's place in the society has traditionally been that of a home maker, keeping her inside the house and looking after household chores. The means of production and earnings did not fall to her share. The Hindu society was no exception. This led women to a subservient position vis-a-vis the men. The further consequence of this position has not only been the lack of welfare and development of women but also the atrocities perpetrated against them by various means supported by customs, religion and even by law. By now it has come to be accepted that empowering the women is one good way of lifting the status of women and to emancipate them from the traditional roles that restricted their physical, social and economic growth.

Ownership over property is empowering. Therefore, in order to extend support in empowering women it is important to know women's right to property. Women can get property primarily by two methods. One way is acquiring property against consideration i.e. an inter-vivos transaction. The other way is to acquire property by inheriting the same from an ancestor who can be a male or a female. One could also acquire property by receiving the same through a testament or will or by way of gift. When the woman acquires a property by an inter-vivos transaction, her position in law is the same as that of any man acquiring property in any transaction. When a woman acquires property by a will or a gift also her interest is the same and is restricted by the terms of the will or gift. These transactions deal with women under Hindu Law in the same way as they deal with women in other communities like Christians, Muslims or the Parsis.

However in the matter of succession, the personal laws do not treat the women equally. The present note deals with Hindu women's right to property i.e. the property that she could acquire by inheritance.

The traditional set up in the Hindu society was that of a joint family where father, son and grandson lived in common mess, common worship and common property. The concept of coparcenery existed all through the ages of the Hindu society. The woman was not a coparcener. The woman therefore did not own a share in the family property.

Hindu women however had right of maintenance. This right to maintenance could be enforced against the husband. It could also be enforced against the property of husband and against the joint family property in which the husband was a coparcener. This right was recognised by giving women a share in the husband's property in the event there was a partition between the husband and the sons such that the wife got an equal share of the property as that of the son. By the Hindu Women's Right to Property Act, 1937 the Hinduwomen also got a share where a Hindu died intestate. This interest was, however, limited interest known

1 Former Judge, High Court of Delhi
2 Advocate

as Hindu woman's estate. As per the law, wife got a limited interest equal to the share of a son when a Hindu governed by Dayabagha school of Hindu Law died intestate leaving a property or a Hindu governed by any other school of Hindu law died intestate leaving any property. This limited estate of the Hindu wife was converted to full ownership by the Hindu Succession Act, 1956. Section 14 of the Act which provided this right to the women is as under:

> *"14. Property of a female Hindu to be her absolute property.—*
>
> *(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.*
>
> *Explanation.—In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.*
>
> *(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."*

The Courts were divided on the interpretation of Sub-section 2 of Section 14 such that the right created by Sub Section 1 itself was threatened. The facts of the case in reading I have been taken from the case of V. *Tulasamma & Ors vs V. Sesha Reddi (Dead), 1977 AIR 1944, 1977 SCR (3) 261*. The Supreme Court wrote two judgments, both dismissing the suit and ruling that Tulasamma became the absolute owner of the properties in issue by virtue of the provisions of Section 14(1) read with the explanation of the 1956 Act and that Section 14(2) did not apply to the facts at all. The Supreme Court eventually put the legal position right in that case.

Whether limited estate given to a woman in a partition by way of a compromise in execution of a decree of maintenance obtained by a woman against the brother in law was converted into full ownership by virtue of Section 14(1) of the Hindu Succession Act, 1956 or was she left with limited interest by virtue of Section 14(2) of the Hindu Succession Act was the issue in that case. In order to settle this issue, the Supreme Court examined the nature of the Hindu Women's right to maintenance. This led to the Supreme Court also to consider the concept of Hindu marriage. Examining the concept of Hindu marriage the Court said:

> *"In order to determine this factor we have to look to the concept of a Hindu marriage. Under the Shastric Hindu Law, a marriage, unlike a marriage under the Mohammadan Law which is purely contractual in nature, is a sacrament--a religious ceremony which results in a sacred and a holy union of man and wife by virtue of which the wife is completely*

transplanted in the household of her husband and takes a new birth as a partner of her husband becoming a part and parcel of the body of the husband. To a Hindu wife her husband is her God and her life becomes one of selfless service…"

Having said this the Supreme Court observed that the Hindu husband has a corresponding duty to maintain his wife and that the wife was entitled to be maintained out of the properties of the husband. The claim of the Hindu widow to be maintained, said the Supreme Court in that judgment, is not to be exercised as a matter of indulgence or gratis but is a valuable spiritual and temporal right which flows from the spiritual and temporal relationship of the husband and the wife. The Supreme Court went on to say:

"This shows that when a partition is effected, the Hindu Law enjoins that the wife must get an equal share with the sons, thus reinforcing the important character of the right of maintenance which a Hindu wife or widow possesses under the Hindu Law."

The Supreme Court acknowledged that the right to maintenance subsists even after the husband's death and could be enforced against the sons and collaterals.

In the facts of the case of *Tulasamma* (supra) the Supreme Court resolved the issue of the interpretation of Section 14(1) and Section 14(2) of the Hindu Succession Act, 1956 and declared that the right to maintenance was not an empty formality, that it could be enforced against the property of the deceased husband, and that this right was not conferred by the compromise deed between her and her brother in law but was merely a settlement in respect of her pre-existing right. Thus it was a right which was governed by Sub section 1 and not by Sub section 2 of Section 14 of the Hindu Succession Act, 1956. The following concluding part of the judgment can be read in profit:

"(1) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.

(2) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends, sought to be achieved by this long needed legislation.

(3) Sub-section (2) of s. 14 is in the nature of a proviso and has a field of its own without interfering with the operation of s. 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by s. 14(1) or in a way so as to become totally inconsistent with the main provision.

(4) Sub-section (2) of s. 14 applies to instruments, decrees, awards, gifts etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and s. 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of s. 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub- s. (2) and would be governed by s. 14(1) despite any restrictions placed on the powers of the transferee.

(5) The use of express terms like "property acquired by a female Hindu at a partition", "or in lieu of maintenance" "or arrears of maintenance" etc. in the Explanation to s. 14(1) clearly makes sub-s. (2) inapplicable to these categories which have been expressly excepted from the operation of sub-s. (2).

(6) The words "possessed by" used by the Legislature in s. 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of s. 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.

(7) That the words "restricted estate" used in s. 14(2) are wider than limited interest as indicated in s. 14(1) and they include not only limited interest, but also any other kind of limitation that may be placed on the transferee. Applying the principles enunciated above to the facts of the present case, we find—

(i) that the properties in suit were allotted to the appellant Tulasumma on July 30, 1949 under a compromise certified by the Court;

(ii) that the appellant had taken only a life interest in the properties and there was a clear restriction prohibiting her from alienating the properties;

(iii) that despite these restrictions, she continued to be in possession of the properties till 1956 when the Act of 1956 came into force; and

(iv) that the alienations which she had made in 1960 and 1961 were after she had acquired an absolute interest in the properties.

It is, therefore, clear that the compromise by which the properties were allotted to the appellant Tulasamma in lieu of her maintenance were merely in recognition of her right to maintenance which was a pre-existing right and, therefore, the case of the appellant would be taken out of the ambit of s. 14(2) and would fall squarely within s. 14 (1) read with the Explanation thereto. Thus the appellant would acquire an absolute interest in the properties she was in possession of at the time when the 1956 Act came into force and any restrictions placed under the compromise would have to be completely ignored. This being the position, the High Court was in error in holding that the appellant Tulasamma would have only a limited interest in setting aside the alienations made by her. We are satisfied that the High Court decreed the suit of the plaintiffs on an erroneous view of the law.

The result is that the appeal is allowed…"

Although the Hindu Succession Act, 1956 enhanced women's rights to property by converting the limited interest into a full-fledged ownership much was yet to be achieved in obtaining equality between men and women in the matter of succession. The daughter was given right to inheritance as class I heir to the self-acquired property of a Hindu Female. However she did not become coparcener along with the male members of the family. Even when she inherited property of the husband or the father she did not get the right to get possession of her share of property by partition unless one of the male members in the joint family property sought to partition the same. The amendment to the Hindu Succession Act in 2005 broke the final shackles by making daughters coparceners in the joint family property just as the sons had been. In addition the restrictions on her right to seek partition were also taken away. The new provisions in this regard are as under:

"Section 6- Devolution of interest in coparcenary property. —

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

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

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

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara

coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession

(Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—*

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation. —For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect-

the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation.-For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation.- For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.'."

Despite amendment, there remained ambiguity in the date from which such rights were acquired by the daughters. Here again the divergence of opinion between different High Courts was settled by the Supreme Court in recent judgment. In *Prakash & Ors vs Phulavati and Ors, 2016 (2) SCC 36,* the plaintiff/respondent filed a suit for partition and possession of a share that she acquired by inheritance from her late father who died in 1988. The Reading II is drafted to study the effect of the amendment. The facts are taken from the case of Prakash & Ors (Supra). The property of the deceased father included joint family property as well as his self-acquired property. The amendment of 2005 came into effect during the pendency of the suit. The High Court interpreted Section 6 of the 2005 amendment in her favour and held that she could claim share as a coparcener also in the joint family property by virtue of amendment of 2005. The respondent brothers appealed to the Supreme Court. The counsel for the plaintiff raised the following arguments.

Arguments by Plaintiff's Lawyer

The amendment being a piece of social legislation to remove discrimination against women in the light of the 174th Report of the Law Commission, the amendment should be read as being retrospective as interpreted by the High Court in the impugned judgment. A daughter acquired right by birth and even if her father, who was a coparcener, had died prior to coming into force of the amendment, the shares of the parties were required to be redefined. It was submitted that any partition which may have taken place even prior to 20-12-2004 was liable to be ignored unless it was by a registered deed of partition or by a decree of the court. If no registered partition had taken place, share of the daughter will stand enhanced by virtue of the amendment.

The other arguments were:

- Beneficial legislation should receive liberal construction

- Amendment is by way of substitution and therefore, it should relate back to the date of original enactment
- The partition in case of decree is a final partition only after it is done by metes and bounds and since the matter is pending before Supreme Court or High Court, the partition cannot be said to have become final.
- If the provision is accepted as prospective, it will leave the explanation to section 6(5) redundant and such interpretation should not be given which leaves a statutory provision redundant.

Arguments by Defendants' Lawyer

The contention raised on behalf of the appellants and the other learned counsel supporting the said view is that the 2005 Amendment was not applicable to the claim of a daughter when her father who was a coparcener in the joint Hindu family died prior to 09-09-2005. This submission is based on the plain language of the statute and the established principle that in the absence of express provision or implied intention to the contrary, an amendment dealing with a substantive right is prospective and does not affect the vested rights. [*Shyam Sunder v. Ram Kumar*, (2001) 8 SCC 24]. If such a coparcener had died prior to the commencement of the Amendment Act, succession opens out on the date of the death as per the prevailing provisions of the succession law and the rights of the heirs get crystallised even if partition by metes and bounds does not take place. It was pointed out that apparently conflicting provision in the Explanation to Section 6(5) and the said section was required to be given harmonious construction with the main provision. The Explanation could not be read in conflict with the main provision. The main provision of Section 6(1) confers right of a coparcener on a daughter only from commencement of the Act and not for any period prior to that. The proviso to Section 6(1) also applies only where the main provision of Section 6(5) applies. Since Section 6(5) applies to partition effected after 20-12-2004, the said proviso and the Explanation also apply only when Section 6(1) applies. It is also submitted that the Explanation was merely a rule of evidence and not a substantive provision determining the rights of the parties. Date of a daughter becoming coparcener is on and from the commencement of the Act. Partitions effected before 20-12-2004 remain unaffected as expressly provided. The Explanation defines partition, as partition made by a registered deed or effected by decree of a court. Its effect is not to wipe out a legal and valid partition prior to the said date, but to place burden of proof of genuineness of such partition on the party alleging it. In any case, statutory notional partition remains valid and effective.

Finding of the Court on the question of the date of application of the amendment is as extracted below:

> *"The text of the amendment itself clearly provides that the right conferred on a "daughter of a coparcener" is "on and from the commencement of the Hindu Succession (Amendment) Act, 2005". Section 6(3) talks of death after the amendment for its applicability. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective [Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24, paras 22 to 27]. In the present case, there is neither any express*

provision for giving retrospective effect to the amended provision nor necessary intendment to that effect. Requirement of partition being registered can have no application to statutory notional partition on opening of succession as per un-amended provision, having regard to nature of such partition which is by operation of law. The intent and effect of the amendment will be considered a little later. On this finding, the view of the High Court cannot be sustained.

The contention of the respondents that the amendment should be read as retrospective being a piece of social legislation cannot be accepted. Even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature. In the present case, the legislature has expressly made the amendment applicable on and from its commencement and only if death of the coparcener in question is after the amendment. Thus, no other interpretation is possible in view of the express language of the statute. The provision keeping dispositions or alienations or partitions prior to 20-12-2004 unaffected can also not lead to the inference that the daughter could be a coparcener prior to the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent of coparcenary property which may be available when the main provision is applicable. Similarly, Explanation has to be read harmoniously with the substantive provision of Section 6(5) by being limited to a transaction of partition effected after 20-12-2004. Notional partition, by its very nature, is not covered either under the proviso or under sub-section (5) or under the Explanation.

Interpretation of a provision depends on the text and the context. [RBI v. Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424, p. 450, para 33] Normal rule is to read the words of a statute in ordinary sense. In case of ambiguity, rational meaning has to be given. [Kehar Singh v. State (Delhi Admn.), (1988) 3 SCC 609 : 1988 SCC (Cri) 711] In case of apparent conflict, harmonious meaning to advance the object and intention of legislature has to be given. [District Mining Officer v. Tisco, (2001) 7 SCC 358]

There have been number of occasions when a proviso or an explanation came up for interpretation. Depending on the text, context and the purpose, different rules of interpretation have been applied. [S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591]

Normal rule is that a proviso excludes something out of the enactment which would otherwise be within the purview of the enactment but if the text, context or purpose so require a different rule may apply. Similarly, an explanation is to explain the meaning of words of the section but if the language or purpose so require, the explanation can be so interpreted. Rules of interpretation of statutes are useful servants but difficult masters.

[Keshavji Ravji & Co. v. CIT, (1990) 2 SCC 231: 1990 SCC (Tax) 268] Object of interpretation is to discover the intention of legislature.

In this background, we find that the proviso to Section 6(1) and sub-section (5) of

Section 6 clearly intend to exclude the transactions referred to therein which may have taken place prior to 20-12-2004 on which date the Bill was introduced. Explanation cannot permit reopening of partitions which were valid when effected. Object of giving finality to transactions prior to 20-12-2004 is not to make the main provision retrospective in any manner. The object is that by fake transactions available property at the introduction of the Bill is not taken away and remains available as and when right conferred by the statute becomes available and is to be enforced. Main provision of the amendment in Sections 6(1) and (3) is not in any manner intended to be affected but strengthened in this way. Settled principles governing such transactions relied upon by the appellants are not intended to be done away with for period prior to 20-12-2004. In no case statutory notional partition even after 20-12-2004 could be covered by the Explanation or the proviso in question.

Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 09-09-2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20-12-2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation."

Impact of amendment of Section 6 and the share of the plaintiff

The father of the plaintiff died leaving behind wife and seven children, namely plaintiff (daughter) and six sons. According to Section 6, Explanation 1, of the Hindu Succession Act, there being female heirs to the deceased father, for the purpose of identification of the respective shares of coparceners, a notional partition has to be presumed to have taken place immediately before the death of the father. In such a partition the six sons, the mother and the father get 1 share each. Thus the share of the father in the property would be 1/8 (one share to each of the six sons, one share to wife and one to himself). The plaintiff was not a coparcener at the time of her father's death in 1988. However, on account of notional partition 1/8 share of her father, is deemed to be in his hand like a self-acquired property. In this 1/8 share there are eight heirs namely seven children and the widow. Thus the plaintiff can get 1/8 * 1/8 i.e. which is equal to 1/64 of the joint family property.

Section 23 of the Hindu Succession Act being repealed by the amendment of 2005, and the plaintiff, being now entitled to seek partition and exclusive possession of her share, can claim 1/64 share in the joint family property. Mother having died during the pendency of the suit, the share of the plaintiff will rise to 1/64 + 1/56 (as the mother's 1/8th share is inherited by the seven children).

Section 23, before repeal by Act 39 of 2005, stood as under:

"23. Special provision respecting dwelling houses. —Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a

dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

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[Lawyers have their duties as citizens, but they also have special duties as Lawyers. Their obligations go far deeper than earning a living as specialists in corporation or tax law. They have a continuing responsibility to uphold the fundamental principles of justice from which the law cannot depart. (Robert Kennedy)]

Session VII

Total Time: 90 minutes

MODULE FOR TRAINING OF LEGAL SERVICES LAWYERS ON

CONSUMER PROTECTION ACT, 1986

—Justice Manju Goel [1]

(With inputs from Mr. O.P. Gupta)[2]

SESSION PLAN

Objective

1. To inform the participants of the procedural and substantive law governing consumer disputes in the country under the Consumer Protection Act, 1986.
2. To inform the participants of the common issues arising in everyday work in consumer dispute fora.
3. To inform the participants of the various laws governing those issues.

Expected learning outcome

1. The participants would become equipped with the procedure and laws related to consumer disputes under the Consumer Protection Act, 1986.
2. The participants will be able to provide sound legal advice to aggrieved consumers.
3. The participants will be able to draft pleadings and conduct cases under the Consumer Protection Act, 1986.
4. The participants will be able to assist the tribunals in disposal of matters related to consumer disputes.

Programme

1. Introduction 10 minutes

The resource person will introduce the subject of Consumer Protection Act, 1986, by drawing the attention of the participants to the concept of rights of consumers and why a simple procedure is necessary to address the issues.

2. Individual exercise based on the quiz 10 minutes

This is not a competitive quiz. The purpose of the quiz is only to arouse curiosity in the minds of the participants.

The participants will be given the questionnaire for introspection and be asked to write their own answer in brief.

1 Former Judge, High Court of Delhi

2 Member (Judicial), State Consumer Disputes Redressal Commission, Delhi

3. Group discussion based on the questionnaire 10 minutes

The resource person will compile the answers of the participants and discuss the answers wherever necessary adding further information thereto.

4. Whole group discussion 20 minutes

The participants will be divided into groups of 5/6 and will be given the two readings so as to do the activity in the handout. The participants will try to arrive at a consensus but in case consensus is not arrived at they can acknowledge a dissent.

5. Presentation based on the two cases by the groups 20 minutes

6. Lecture by the resource person on the issues not covered 15 minutes

The resource person will give the law relating to the two cases as propounded by the Supreme Court. The resource person will also throw light on the concept of negligence, medical negligence and liability of hospitals in cases of deficiency of service. The resource person will cover all other aspects of the Consumer Protection Act, 1986, which have not been touched so far. The resource person will also inform the participants of the new Act in the offing.

7. Concluding remarks 5 minutes

One of the participants or a visiting dignitary can give the concluding remarks.

Training method

1. Lecture
2. Individual introspection / Quiz
3. Group Discussion and presentation

Tools required

1. Facility for power point presentation
2. Flip chart
3. Pens
4. Blue tack

CONSUMER PROTECTION ACT, 1986

QUESTIONNAIRE FOR INTROSPECTION/GROUP DISCUSSION

1. Find if the following are consumers within the definition of Consumer Protection Act, 1986.

i. A purchaser of a machine to be used by the purchaser himself for manufacturing bricks for earning his livelihood.

ii. A purchaser who buys multiple residential flats from a builder.

iii. A juristic person.

2. Find out whether the following service providers fall within the definition of Section 2(1) (o) of Consumer Protection Act, 1986.

i. The service of the doctor to a patient working in a government hospital.

ii. The service of a lawyer.

iii. The services of a university.

3. i. What is the period of limitation for an application/complaint under the Consumer Protection Act, 1986?

ii. Does Section 5 of the Limitation Act apply to complaints under the Consumer Protection Act?

4. An airline loses a passenger's checked in baggage containing personal effects and valuable papers for a conference. Under what different heads can he claim damages?

Reading- Case Study -I

On 14.06.2000, Lokesh purchased a jar of mango pickle for a price of Rs. 100/- from Mohan Bhandar. The pickle had been manufactured by Mysore pickles. Lokesh filed a complaint with the District Consumer Redressal Forum for deficiency of service against the seller Mohan Bhandar and the manufacturer Mysore pickles. He presented the jar of pickles along with the complaint. Lokesh alleged that the bottle did not have any mark indicating the date of manufacture of the pickle. Lokesh also produced the receipt issued by the shop on payment of the price of the bottle.

Mohan Bhandar contended that it did not refuse to take back the jar of pickle and therefore, Lokesh should have returned the jar if he had any grievance in respect of the product. Mysore pickle took the plea that the complainant Lokesh did not open the jar and did not consume the contents and suffered no injury and hence could not invoke the Consumer Protection Act. The manufacturer also alleged that notification of Prevention of Food Adulteration, Rules, 1955 requiring display of the date of packaging had not come into force on 14.06.2000 when the jar was sold. Mysore pickles also took the plea that the inspector of legal metrology had inspected the goods manufactured by it and had given a clean chit as regards compliance of necessary legal formalities and hence it was not a case of deficiency in service.

Activity-I

Discuss in group whether:

1. Lokesh is a consumer within the meaning of the Consumer Protection Act?
2. Whether there is deficiency in service?
3. Whether the seller Mohan Bhandar is guilty of deficiency in service?
4. Whether Mysore pickles is guilty of deficiency in service?
6. If you were the Presiding Officer of the Forum, what order would you have passed?

Reading-Case Study -II (Medical Negligence)

Patient A got fever with skin rash on which her husband S consulted Dr. M. Dr. M on examining the patient at her residence, prescribed depomedrol injection (a slow active steroid) 80 mg twice daily for 3 days without diagnosing the disease. On her condition deteriorating in the next couple of days, she was admitted to Advanced Medicare Research Institute (AMRI) under the supervision of Dr. M. At the hospital she was examined by Dr. H who diagnosed the disease as Erithima plus blisters. Dr. H prescribed another steroid prednisolone. She was treated there for about 6 days and on her condition deteriorating she was moved to a second hospital where she eventually died after 3 days.

Dr. H and Dr. M are sued by S the husband. S sues Dr. M and Dr. H for medical negligence alleging that the dose of depomedrol injection prescribed by Dr. M was excessive and that he was negligent in prescribing a steroid without even diagnosing the disease. S alleged Dr. H was negligent in prescribing yet another steroid without any consideration for the fact that a large quantity of steroid had already been injected in the body of the patient.

Dr. H and Dr. M take the following pleas:

1. The services provided by the doctors are not covered by the Consumer Protection Act.
2. They did not commit any act of negligence.
3. They are already under the disciplinary jurisdiction of the West Bengal Medical Council so are not amenable to any further supervision and control of the authorities under the Consumer Protection Act.
4. They are not responsible for the death of patient A and so not liable to pay any damages.

Activity -II

Q. In group discussion, find the answers to the following questions:

i. Are patients consumers within the definition of Section 2(1)(d) of the Consumer Protection Act, 1986?

ii. Are the services provided by doctors covered by the phrase “Contract for personal service” under Section 2 (1)(o) and hence excluded from the definition of service?

iii. Assuming that the services of a doctor can be covered by the Consumer Protection Act, 1986, what must S prove in order to make Dr. M and Dr. H liable under the Consumer Protection Act, 1986?

iv. Explain “negligence” and “medical negligence”.

CONSUMER PROTECTION ACT, 1986

SHORT NOTE AND DISCUSSION BASED ON THE QUESTIONNAIRE

1. Find if the following are consumers within the definition of Consumer Protection Act, 1986.

i. A purchaser of a machine to be used by the purchaser himself for manufacturing bricks for earning his livelihood.

Ans. Yes.

The Explanation excludes from the ambit of commercial purpose in sub-clause (i) of section 2(1)(d), any goods purchased by a consumer and used by him exclusively for the purpose of earning his livelihood by means of self-employment. Such purchase of goods is not a commercial purpose. The question, therefore, is, whether the respondent has been using the aforesaid machine for self-employment. The word 'self-employment' is not defined. Therefore, it is a matter of evidence. Unless there is evidence and on consideration thereof it is concluded that the machine was used only for self-employment to earn his livelihood without a sense of commercial purpose by employing on regular basis the employees or workmen for trade in the manufacture and sale of bricks, it would be for self-employment. Manufacture and sale of bricks in a commercial way may also be to earn livelihood, but "merely earning livelihood in commercial business", does not mean that it is not for commercial purpose. Self-employment connotes altogether a different concept, namely, he alone uses the machinery purchased for the purpose of manufacture by employing himself in working out or producing the goods for earning his livelihood. 'He' includes the members of his family. *M/S. Cheema Engineering Services Vs Rajan Singh, (1997) 1 SCC 131.*

ii. A purchaser who buys multiple residential flats from a builder.

Ans. No.

The complainants purchased more than one residential flat at a place quite distant from the place of their present residences. On facts the tribunal found that the complainants purchased those flats with the intent to sell at an appropriate time to make some gains. Accordingly it was held that they fell in the category of investors and were not covered by the term consumer as defined in Section 2 (1) of the Consumer Protection Act. *(TDI Infrastructure Pvt. Ltd. Vs Rajesh Jain, 1 (2016) CPJ 377)*

iii. A juristic person.

Ans: No. The question involved here is not whether a company is a person. The question is whether a machine meant for production of a commodity or meant for commercial use, when purchased by a person for his own livelihood will be covered by the Act. In *Monstera Estate Pvt, Ltd. v/s Ardee Infrastructure Pvt. Ltd., 1 (2010) CPJ 299 (NC)*, the complainant had purchased commercial space, for the purpose of making a showroom. Although anyone purchasing space for his own use could possibly maintain a case in the consumer dispute redressal fora, space purchased for commercial purpose by a company would not be covered by the Act.

2. Find out whether the following service providers fall within the definition of Section 2(1) (o) of Consumer Protection Act, 1986.

i. The service of the doctor to a patient working in a government hospital.

Ans. Yes.

Service rendered by a doctor or a hospital is service under Consumer Protection Act.

The service is given in performance of a contract for personal services and not in performance of a contract of personal service.

If the service is entirely free of charge the definition itself excludes such service from the gamut of the definition of service in the Act [*Indian Medical Association Vs V.P Santha & Ors., (1995) 6 SCC 651*].

If part of the service is paid and part is free, the exclusionary part of the definition is not attracted and such service becomes covered by the definition under Section 2(1) (o) of the Consumer Protection Act.

Accordingly whether a doctor or a hospital can be sued under the Act will depend upon the above considerations which have to be determined on the basis of the evidence on record.

ii. The service of a lawyer.

Ans: Yes. The service rendered by a lawyer is a "service" defined under the Act.

The ambit and scope of Section 2(1)(o) of the Consumer Protection Act, 1986, which defines service is very wide and by this time well established. It covers all services except rendering of services free of charge or a contract of personal service. Indisputably, lawyers are rendering service. They are charging fees. It is not a contract of personal service. Therefore, there is no reason to hold that they are not covered by the provisions of the Consumer Protection Act, 1986.

It is to be stated that a Lawyer may not be responsible for the favourable outcome of a case as the result/outcome does not depend upon only the lawyer's work. But, if there is deficiency in rendering services promised, for which consideration in the form of fee is received by him, the lawyers can be proceeded against under the Consumer Protection Act. [*D.K. Gandhi Vs M. Mathias, III (2007) CPJ 337 (NC)*].

iii. The services of a university.

The Supreme Court in *Maharishi Dayanand University Vs Surjeet Kaur, (2010) 11 SCC 159*, held that the University in holding an examination and issuing degrees performs statutory functions and not 'services' as understood in the Consumer Protection Act, 1986. By the same corollary the candidate who applies for permission to take an examination is not a consumer. The Supreme Court in this case set aside the order of the National Commission and declined to pass a direction to issue a degree of B.Ed.to the complainant who was not entitled to take the examination since she was pursuing another fulltime course. The Supreme Court quoted with approval the following part of the judgment in *Bihar School Examination Board v. Suresh Prasad Sinha, 2009(4) RCR(Civil) 9 : 2009(5) R.A.J. 502 : (2009) 8 SCC 483*:

"11. The Board is a statutory authority established under the Bihar School Examination Board Act, 1952. The function of the Board is to conduct school examinations. This statutory function involves holding periodical examinations, evaluating the answer scripts, declaring the results and issuing certificates. The process of holding examinations, evaluating answer scripts, declaring results and issuing certificates are different stages of a single statutory non-commercial function. It is not possible to divide this function as partly statutory and partly administrative.

12. When the Examination Board conducts an examination in discharge of its statutory function, it does not offer its services to any candidate. Nor does a student who participates in the examination conducted by the Board, hires or avails of any service from the Board for a consideration. On the other hand, a candidate who participates in the examination conducted by the Board, is a person who has undergone a course of study and who requests the Board to test him as to whether he has imbibed sufficient knowledge to be fit to be declared as having successfully completed the said course of education; and if so, determine his position or rank or competence vis-a-vis other examinees. The process is not therefore availing of a service by a student, but participation in a general examination conducted by the Board to ascertain whether he is eligible and fit to be considered as having successfully completed the secondary education course. The examination fee paid by the student is not the consideration for availing of any service, but the charge paid for the privilege of participation in the examination.

13. The object of the Act is to cover in its net, services offered or rendered for a consideration. Any service rendered for a consideration is presumed to be a commercial activity in its broadest sense (including professional activity or quasi-commercial activity). But the Act does not intend to cover discharge of a statutory function of examining whether a candidate is fit to be declared as having successfully completed a course by passing the examination. The fact that in the course of conduct of the examination, or evaluation of answer-scripts, or furnishing of mark-sheets or certificates, there may be some negligence, omission or deficiency, does not convert the Board into a service-provider for a consideration, nor convert the examinee into a consumer who can make a complaint under the Act. We are clearly of the view that the Board is not a 'service provider' and a student who takes an examination is not a 'consumer' and consequently, complaint under the Act will not be maintainable against the Board."

3. i. What is the period of limitation for an application/complaint under the Consumer protection Act, 1986?

Section 24 A (i) of the Consumer Protection Act, 1986 prescribes the period of limitation of 2 years from the date the cause of action arising for filing a complaint.

ii. Does Section 5 of the Limitation Act apply to complaints under the Consumer Protection Act?

Section 24 (2) of the Consumer Protection Act, 1986, says that for sufficient cause to be recorded by the National Commission, State Commission or District Forum, the delay in filing a complaint can be condoned.

4. An airline loses a passenger's checked in baggage containing personal effects and valuable papers for a conference. Under what different heads can he claim damages?

In *Emirates v Dr. Rakesh Chopra, 2013(3) C.P.J. 500*, the National Commission awarded Rs. 2,00,000/- for deficiency in services, harassment, agony, mental tension, and loss of professional face as well as for monetary loss to Dr. Rakesh Chopra whose baggage was mishandled and lost by the Airlines during transit from Delhi to Athens where complainant Dr. Chopra was to address the International Affairs Committee of the American Society of Clinical Oncology. The National Commission said:

> *"The Consumer Protection Act, 1986 has been enacted to give relief to consumers for deficiency in service, unfair trade practice etc. by service providers, traders, manufacturers etc. and the Hon'ble Supreme Court in The Consumer & Citizens Forum v. Karnataka Power Corporation, 1994 (1) CPR 130 has laid down that the provisions of this Act give the consumer an additional remedy besides those that may be available under other existing laws. In the instant case, no doubt the Appellant Airlines had sought to settle the consumer's grievance purely in terms of the notional monetary loss suffered by him as per the relevant provisions of Carriage by Air Act, 1972. However, as discussed earlier, because there was deficiency in service on the part of Appellant Airlines in losing and mishandling the respondent's luggage, which caused him harassment, agony, mental tension and loss of professional face apart from monetary loss, he is entitled to compensation for this deficiency in service on Appellant's part as per the provisions of the Consumer Protection Act, 1986."*

SHORT NOTE

ON

THE CONSUMER PROTECTION ACT, 1986

—Justice Manju Goel [1]

(With inputs from Mr. O.P. Gupta)[2]

Introduction

1. The Consumer Protection Act, 1986 is the culmination of consumer movement that prevailed in India (as also in other countries) around that time. In 1970, the Economic and Social Council of the UN recognised that consumer protection had an important bearing on economic and social development. In 1985, UN Guidelines on consumer protection were passed which gave a fillip to consumer movement in all developing countries including India.

2. Laws for protection of consumers existed in India since the ancient times. Kautilya's Arthasashtra mentions the role of State in regulating trade and prevention of crime against consumers. Standards of weights and measures were regulated by the State. Markets or "PanyaShalas" were common place of business. Punishments were prescribed for cheating. The Muslim rulers during the medieval period also controlled the market and regulated weights and measures.

3. With the British came the common law and more importantly some codified laws that sought to protect interests of the consumers. Important laws which protected and regulated trade and commerce that came in the British era are Indian Contract Act, 1872, Sale of Goods Act, 1930, Indian Penal Code, 1860, Drugs and Cosmetics Act, 1940, Usurious Loans Act, 1918 and the Agriculture Produce (Grading and Marketing) Act, 1937. In the post-independence period, we had the Essential Commodities Act, 1955, Prevention of Food Adulteration Act, 1954 and Standards of Weights and Measures Act, 1976. The Consumer Protection Act, 1986 gives comprehensive cover to the interests of the consumer, not only because of various duties cast upon the sellers and service providers but also because of the hierarchy of Courts created for adjudication and early disposal of disputes in a cost effective manner and by a simple procedure.

Objects and Reasons

4. The objects and reasons of the Consumer Protection Act, as stated at the time of introduction of the Consumer Protection Bill, 1986, run as under:

> *"1. The Consumer Protection Bill, 1986 seeks to provide for better protection of the interests of consumers and for the purpose, to make provision for the establishment of Consumer Councils and other authorities for the settlement of consumer disputes and for matters*

1 Former Judge, High Court of Delhi
2 Member (Judicial), State Consumer Disputes Redressal Commission, Delhi

connected therewith.

2. It seeks, inter alia, to promote and protect the rights of consumers such as-

(a) the right to be protected against marketing of goods which are hazardous to life and property;

(b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;

(c) the right to be assured, wherever possible, access to an authority of goods at competitive prices;

(d) the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums;

(e) the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and

(f) right to consumer education.

3. These objects are sought to be promoted and protected by the Consumer Protection Council to be established at the Central and State level.

4. To provide speedy and simple redressal to consumer disputes, a quasi-judicial machinery is sought to be set up at the district, State and Central level. These quasi-judicial bodies will observe the principles of natural justice and have been empowered to give relief of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance of the orders given by the quasi-judicial bodies have also been provided.

5. The Bill seeks to achieve the above objects."

Salient features of the Act

5. Section 4 of the Act creates a Central Consumer Protection Council, Section 7 the State Consumer Protection Council and Section 8(a) the District Consumer Protection Council with the object of promoting and protecting the rights mentioned above. For redressal of consumer grievances Section 9 of the Act creates the District Consumer Disputes Redressal Forum, the State Commission for Redressal of Consumer Disputes and National Consumer Disputes Redressal Commission. The District Forum exercises jurisdiction for claims upto Rs. 20 Lakhs while the State Commission exercises jurisdiction for claims upto Rs. 1 Crore and the National Commission above Rs. 1 Crore. The National Commission and the State Commission have original as well as appellate jurisdiction. Appeals from District Forum lie in the State Commission and appeals from the State Commission lie to the National Commission. There is no provision for second appeal although National Commission can entertain revisions against appellate orders of the State Commission. The scope of revision is limited and is confined to jurisdictional infirmity only. Rule 9 A of Consumer Protection Rules

1987 prescribes fee of Rs.100/- for complaints upto Rs. 1,00,000/-, Rs. 200/- for complaints upto Rs.5,00,000/-, Rs. 400/- for complaints upto Rs.10,00,000/-, Rs.500/- for complaints upto 20,00,000/-, Rs.2000/- for complaints upto Rs.50,00,000/-, Rs. 4000/- for complaints upto Rs.1,00,00,000/- and Rs.5000/- for complaints above Rs.1,00,00,000/-.

6. The procedure prescribed is simple. No specific form of pleadings is prescribed. The reply to a complaint can be filed within 30 days of the receipt of the complaint. This time can be extended by another period of 15 days. Complaints can be filed by the consumer himself or any recognised consumer association or a consumer who maybe similarly interested as well as by the Central and State Government as representative of the interest of the consumers. There is a provision for examination of samples of commodities in question in laboratories. Evidence can be produced by the parties. The complaints are required to be heard as expeditiously as possible. Section 13(3A) of the Act prescribes a time limit of 3 months from the date of receipt of notice by the opposite party for the disposal of a complaint unless testing by a laboratory is called for in which case the time limit extends to five months. The fora created by this Act can make the following orders under Section 14:

"(a) to remove the defect pointed out by the appropriate laboratory from the goods in question;

(b) to replace the goods with new goods of similar description which shall be free from any defect;

(c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;

(d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party:

[Provided that the District Forum shall have the power to grant punitive damages in such circumstances as it deems fit;]

[(e) to [remove the defects in goods] or deficiencies in the services in question;

(f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;

(g) not to offer the hazardous goods for sale;

(h) to withdraw the hazardous goods from being offered for sale;

[(ha) to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;

(hb) to pay such sum as may be determined by it, if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently:

Provided that the minimum amount of sum so payable shall not be less

than five percent of the value of such defective goods sold or services provided, as the case may be, to such consumers:

Provided further that the amount so obtained shall be credited in favour of such person and utilized in such manner as may be prescribed;

(hc) to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement;

(i) to provide for adequate costs to parties."

Issues that frequently arise before the Commission

Consumer

7. Issues that frequently arise before the Commission include the eligibility of the complainant as a consumer, territorial jurisdiction of the forum, nature of services covered by the Act, nature of disputes that can be settled by the fora created by the Act and the like. Whether the complainant is a consumer of the goods in question has been examined in various cases. The definition of the consumer contained in Section 2(1)(d) of the Act includes a person who purchases the goods for consideration paid or partly paid or partly promised to be paid. However, it does not include a person who obtains such goods for resale or for commercial purpose except as provided in Section 2(1)(d)(ii) of the Act.

8. The explanation to Section 2 (1)(d)(ii) needs to be carefully examined. Commercial purposes do not include use of goods purchased and services availed of by one exclusively for the purpose of earning livelihood by means of self-employment. Self-employment can be of an individual or natural person and not of an artificial or juristic person. A company cannot say that it booked office space for earning livelihood by means of self-employment. *(Monstera State (P) Limited Vs. Aardee Infrastructure Pvt. Ltd., IV (2010) CPJ 299 NC)*.

9. The National Commission held in *M/s. Richa & Company Vs. DLF Universal Limited, IV (2012) CPJ 597* that purchase of space by partnership firm is purchase for commercial purpose. In *Cheema Engineering Services Vs. Rajan Singh, (1997) 1 SCC 131*, the Supreme Court clarified that use for 'self-employment' includes use by members of the family of the consumer.

10. People who buy multiple residential flats cannot intend to live in all of them. Obviously their purpose is to sell the flats at a higher price when rate increases and claim profit. It was held by the National Commission in *TDI Infrastructure Pvt. Ltd. v. Rajesh Jain, 1 (2016) CPJ 377*, that such purchasers of flats are investors and not consumers and hence were not entitled to take advantage of the Consumer Protection Act, 1986.

11. In the *Commissioner of Income-tax (Central), Calcutta v. Standard Vacuum Oil Co., AIR 1966 SC 1393*, while defining shares, the Supreme Court observed:

"A share is not a sum of money; it represents an interest measured by a sum of money and made up of diverse rights contained in the contract evidenced by the articles of association of the company."

12. Following *Commissioner of Income-tax (Central), Calcutta (Supra)*, it was held in *Morgan Stanley Mutual Fund v Kartik Dass, II (1994)* CPJ 7 SC, that shares in a company do not exist as goods till the allotment of shares actually takes place. Accordingly, it was also held that someone who had only applied for allotment of shares and to whom shares had not actually been allotted cannot become a consumer because no sale of goods actually took place, the shares not being goods and the transaction not being sale of goods.

Procedure

13. The procedure prescribed before the various redressal commissions is simple. The Consumer Disputes Redressal Foram are expected to do summary disposal of cases. Complicated issues cannot be tried before the Commissions or the district forum. The question was considered in detail in *Mahesh Kumar v. M.G. Motors, 1 (2016) CPJ 110*. The complainant who purchased a vehicle from the respondent alleged that the respondent was responsible for getting the car registered as a personal vehicle and to get it insured which the respondent had failed to do. The complainant further alleged that the respondent was responsible for the services as the vehicle was purchased on the respondent's assurance that he would get the insurance and registration done as above. The respondent on the other hand denied any such assurance and further alleged that the complainant had not been paying the instalments for the vehicle to the financer and that he had filed this complaint with some ulterior motive. This judgment upheld the decision of the district forum that the case was of complex nature for which elaborate evidence was required to be taken which is not possible in a summary trial.

Jurisdiction

14. Whether the jurisdiction of the fora created by the Act is barred on account of remedies available in other places has also been an issue. In *Secretary, Thirumurugan Agricultural Credit Society v M. Lalitha, AIR 2004 SC 448*, the complainants were members of a co-operative society. A question that arose about the jurisdiction was whether the forum created by the Consumer Protection Act could have jurisdiction to deal with the matter despite Section 90 of the Tamil Nadu Cooperative Societies Act, 1983 which impliedly barred Jurisdiction of all Courts and Tribunals including that of a Civil Court. It was held that Section 3 of the Act provides for a remedy in addition to other remedies and so the complaints before the District Forum were maintainable. However, if consumer files a civil suit he cannot simultaneously seek redressal from the Consumer Disputes Redressal Forum as held in *Damayanti Kantilal Shah v Rashmi Gruha Nirman Ltd. & Others, 1 (2016) CPJ 235*.

Insurance- Deficiency in service

15. In *National Insurance Co. Ltd. v. Balkar Ram and Ors., 1 (2014) ACC 448 SC*, the complainant insured a vehicle with the appellant insurance company and gave a cheque which got dishonoured on 17.04.2000. The insurance company did not intimate the complainant about the dishonour of cheque till 26.04.2000. In the meantime, an accident took place on 19.04.2000. Relying upon an earlier judgment of the Supreme Court reported in 2012 2 (RCR) Civil 834, the Supreme Court held that the Insurance Company was liable for compensation for the damage in those facts.

16. Similarly, in *United India Insurance Co. Ltd. Vs. Laxmana, (2012) 5 SCC 234*, where the accident took place before the insurance company intimated the assured about cancellation of the policy on account of dishonour of cheque, insurance company was held liable under the contract of insurance.

17. In *New India Assurance Co. Ltd. vs. Kishore P. Mastakar, 2003 CCJ 1340*, the National Commission granted relief to the complainant by rejecting the plea of the Insurance Company that there was no concluded contract since the development officer of the insurance company had collected insurance premium as well as the application form duly filled in for money in transit policy but did not deposit the cheque in the bank and accordingly the insurance company did not issue any policy document.

Law of negligence

18. Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do (*Law of Torts, Ratanlal & Dhirajlal, 24th Edn. 2002, at pp.44142*). Negligence is strictly nonfeasance and not malfeasance. It is the omission to do what the law requires, or the failure to do anything in a manner prescribed by law. It is the act which can be treated as negligence without any proof as to the surrounding circumstances, because it is in violation of statute or ordinance or is contrary to the dictates of ordinary prudence.

19. Negligence as defined in *Municipal Corpn. Of Greater Bombay V. Laxman Iyer, AIR 2003 SC 4182*, is as under:

> *"Negligence means either subjectively a careless state of mind, or objectively careless conduct. Negligence is not an absolute term, but is a relative one; it is rather a comparative term. No absolute standard can be fixed and no mathematically exact formula can be laid down by which negligence or lack of it can be infallibly measured in a given case. What constitutes negligence varies under different conditions and in determining whether negligence exists in a particular case, or whether a mere act or course of conduct amounts to negligence, all the attending and surrounding facts and circumstances have to be taken into account. It is absence of care according to circumstances. To determine whether an act would be or would not be negligent, it is relevant to determine if any reasonable man would foresee that the act would cause damage or not."*

Medical Negligence– Deficiency in service

20. Of late the adjudicating authorities under the Consumer Protection Act have been receiving complaints of Medical Negligence. The patients who avail of services of doctors on payment of fee become consumers within the definition of Section 2(1)(d). Whether the services rendered by a doctor in treating the patient are covered by the definition of 'service' under Section 2(1) (o) of the Act has been settled in the case of *Indian Medical Association Vs. V.P. Santha & Ors., (1995) 6 SCC 651*, which is as under:

"(1) Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service' as defined in Section 2(1) (o) of the Act.

(2) The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils constituted under the provisions of the Indian Medical Council Act would not exclude the services rendered by them from the ambit of the Act.

(3) A 'contract of personal service' has to be distinguished from a 'contract for personal services'. In the absence of a relationship of master and servant between the patient and medical practitioner, the service rendered by a medical practitioner to the patient cannot be regarded as service rendered under a 'contract of personal service'. Such service is service rendered under a `contract for personal services' and is not covered by exclusionary clause of the definition of 'service' contained in Section 2(1) (o) of the Act.

(4) The expression 'contract of personal service' in Section 2(1) (o) of the Act cannot be confined to contracts for employment of domestic servants only and the said expression would include the employment of a medical officer for the purpose of rendering medical service to the employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of 'service' as defined in Section 2(1) (o) of the Act.

(5) Service rendered free of charge by a medical practitioner attached to a hospital/Nursing home or a medical officer employed in a hospital/ Nursing home where such services are rendered free of charge to everybody, would not be "service" as defined in Section 2(1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(6) Service rendered at a non-Government hospital/Nursing home where no charge whatsoever is made from any person availing the service and all patients (rich and poor) are given free service - is outside the purview of the expression 'service' as defined in Section 2(1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/ Nursing home would not alter the position.

(7) Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by the persons availing such services falls within the purview of the expression 'service' as defined in Section 2(1) (o) of the Act.

(8) Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by persons who are in a position

to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression 'service' as defined in Section 2(1) (o) of the Act irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services. Free service, would also be "service" and the recipient a "consumer" under the Act.

(9) Service rendered at a Government hospital/health centre/dispensary where no charge whatsoever is made from any person availing the services and all patients (rich and poor) are given free service - is outside the purview of the expression 'service' as defined in Section 2(1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(10) Service rendered at a Government hospital/health centre/dispensary where services are rendered on payment of charges and also rendered free of charge to other persons availing such services would fall within the ambit of the expression 'service' as defined in Section 2(1) (o) of the Act irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. Free service would also be "service" and the recipient a "consumer" under the Act.

(11) Service rendered by a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge, if the person availing the service has taken an insurance policy for medical care whereunder the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service' as defined in Section 2(1) (o) of the Act.

(12) Similarly, where, as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a hospital/nursing home would not be free of charge and would constitute 'service' under Section 2(1) (o) of the Act."

21. In *Malay Ganguly v. Dr.Sukumar Mukherjee, SCC 221*, the Supreme Court explained negligence by referring with approval to Law of Torts, *Ratanlal & Dhirajlal Twenty-fourth Edition 2002, at p.441-442*, Negligence means "either subjectively a careless state of mind, or objectively careless conduct. It is not an absolute term but is a relative one; is rather a comparative term. In determining whether negligence exists in a particular case, all the attending and surrounding facts and circumstances have to be taken into account."

22. Negligence by experts including doctors has been explained in *Bolam v. Friern Hospital Management Committee, (1957) 2 All ER 118*, which is as under:

"Where you get a situation which involves the use of some special skill or competence, then the test…..is the standard of ordinary skilled man exercising and professing to have that special skill. A man need

not possess the highest expert skill; it is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art….

[A doctor] is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art….Putting it the other way round, a [doctor] is not negligent, if he [has acted] in accordance with such a practice, merely because there is a body of opinion which [takes] a contrary view."

23. The Supreme Court in *Malay Ganguly's Case* has made further reference to *Martin F.D' Souza v. Mohd. Ishfaq, (2009) 3 SCC 1* and *Jacob Mathew v. State of Punjab, (2005) 6 SCC 1*. In *Martin F.D' Souza's case* the Supreme Court said the following:

"(a) Current practices, infrastructure, paramedical and other staff, hygiene and sterility should be observed strictly….

(b) No prescription should ordinarily be given without actual examination. The tendency to give prescription over the telephone, except in an acute emergency, should be avoided.

(c) A doctor should not merely go by the version of the patient regarding his symptoms, but should also make his own analysis including tests and investigations where necessary.

(d) A doctor should not experiment unless necessary and even then he should ordinarily get a written consent from the patient.

(e) An expert should be consulted in case of any doubt…."

24. In *Jacob Matthew (Supra)* further clarification came as under:

"(i) Mere deviation from normal professional practice is not necessarily evidence of negligence.

(ii) Mere accident is not evidence of negligence.

(iii) An error of judgment on the part of a professional is not negligence per se.

(iv) Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of res ipsa loquitor."

25. What the complainant must prove is that the treatment offered by the doctor was not only incorrect but that no established protocol for treatment was available to support the treatment given. Further if the complainant is able to establish that the doctor treated the patient for a disease which should have been dealt with in view of the severity of the condition by a specialist in the relevant area, which he is not, it can be a case of negligence. Negligence can also be inferred if the doctor did not adhere to the instructions contained in *Martin F.D' Souza* which is extracted above.

26. The degree of skill and care required by a medical practitioner is so stated in *Halsbury's Laws of England (Fourth Edition, Vol.30, Para 35)*:

> *"The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.*
>
> *Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care."*

Individual liability of the doctors

27. There cannot be, however, any doubt or dispute that for establishing medical negligence or deficiency in service, the court would determine the following:

> *i) No guarantee is given by any doctor or surgeon that the patient would be cured.*
>
> *ii) The doctor, however, must undertake a fair, reasonable and competent degree of skill, which may not be the highest skill.*
>
> *iii) Adoption of one of the modes of treatment, if there are many, and treating the patient with due care and caution would not constitute any negligence.*
>
> *iv) Failure to act in accordance with the standard, reasonable, competent medical means at the time would not constitute a negligence. However, a medical practitioner must exercise the reasonable degree of care and skill and knowledge which he possesses. Failure to use due skill in diagnosis with the result that wrong treatment is given would be negligence.*
>
> *v) In a complicated case, the court would be slow in contributing negligence on the part of the doctor, if he is performing his duties to the best of his ability.*

28. Bearing in mind the aforementioned principles, the individual liability of the doctors and hospital must be judged.

Legitimate expectation from the medical fraternity

29. The standard of duty to care in medical services may also be inferred after factoring in the position and stature of the doctors concerned as also the hospital; the premium stature of services available to the patient certainly raises a legitimate expectation. Patients expect the best treatment from the doctors and hospitals of repute. In the matter of determining the deficiency in medical service if representation is made by a doctor that he is a specialist and ultimately it turns out that he is not, deficiency in medical services would be presumed.

30. Negligence is attributed when existing facilities are not availed of. Medical negligence cannot be attributed for not rendering a facility which was not available. If hospitals knowingly fail to provide some amenities that are fundamental for the patients, it would certainly amount to medical malpractice. As has been held in *Savita Garg V. National Heart Institute, (2004) 8 SCC 56*, a hospital not having basic facilities like oxygen cylinders would not be excusable. Therein it was opined that even the so-called humanitarian approach of the hospital authorities in no way can be considered to be a factor in denying the compensation for mental agony suffered by the parents. The aforementioned principle applies to this case also in so far as it answers the contentions raised before us that the three senior doctors did not charge any professional fees.

31. The Supreme Court in *Savita Garg* (Supra), considered the question whether non-joinder of the treating doctor(s) and nursing staff can result in the dismissal of the complaint. The Supreme Court answered the same in negative. It is understood from this case that if the doctors have been impleaded in their individual capacities, slapped with claim of special damages and were held negligent, still the hospital would be liable for the acts of the negligence of the doctors. The relevant paragraph is quoted below:

> *"Once an allegation is made that the patient was admitted in a particular hospital and evidence is produced to satisfy that he died because of lack of proper care and negligence, then the burden lies on the hospital to justify that there was no negligence on the part of the treating doctor/ or hospital. Therefore, in any case, the hospital is in better position to disclose what care was taken or what medicine was administered to the patient. It is the duty of the hospital to satisfy that there was no lack of care or diligence. The hospitals are institutions, people expect better and efficient service, if the hospital fails to discharge their duties through their doctors being employed on job basis or employed on contract basis, it is the hospital which has to justify and by not impleading a particular doctor will not absolve the hospital of their responsibilities."*

Consumer Protection Bill, 2015

32. A new Act is in the offing. The new Act enlarges the scope of the extant law. Importantly the new law will cover digital transactions. It also makes changes in the composition of the redressal fora. It also makes provision for submission of complaints online.

Salient features of the Bill

33. The salient features of the proposed Bill as culled out by the Institute of Policy Research Studies, New Delhi are:

"(a) the establishment of an executive agency to be known as the Central Consumer Protection Authority (CCPA) to promote, protect and enforce the rights of consumers. This fills an institutional void in the regulatory regime extant. Currently, the task of prevention or acting against unfair trade practices is not vested in any authority. The CCPA will be the executive agency that will make interventions when necessary to prevent consumer detriment arising from unfair trade practices and to initiate class action including enforcing recall, refund and return of products.

(b) The roles of Food Safety Standards Authority of India (FSSAI), Telecom Regulatory Authority of India (TRAI), Central Electricity Regulatory

Commission (CERC) and such other sector regulators as envisaged are different from the role envisaged for the CCPA. While the sector regulators essentially serve as standard setting bodies and seek to ensure an even playing field between

Government and other stakeholders, the CCPA will play the role of an executive agency that is consumer centric and will make class action intervention when necessary to prevent unfair trade practices or consumer detriment at all the three stages of consumers' engagement with the market, i.e., prior to, during and after the purchase of a product or procurement of a service, for which there is no designated authority in the current regulatory framework.

(c) It has also been ensured that the role envisaged for the CCPA complements that of the sector regulators. Care has been taken in delineating the functions and powers of the CCPA to prevent duplication, overlap or potential conflict.

On unfair trade practices relating to sectors having a Sector regulator, a specific provision has been made in Section 16(2) to ensure harmonization and coordinated functioning.

(d) A new chapter with provisions for "Product Liability" action for or on account of personal injury, death, or property damage caused by or resulting from any product has been added. The new chapter provides the bases for product liability action and the liability of a manufacturer to a claimant.

(e) A new chapter providing for "Mediation" as an Alternate Dispute Resolution (ADR) mechanism has been added. This is aimed at giving legislative basis to resolution of consumer disputes through mediation thus making the process less cumbersome, simple and quicker. This will be done under the aegis of the consumer courts.

(f) A new provision on 'unfair contract' has been included to protect the consumers who are placed in an unequal bargaining capacity. The definition of the term "Unfair trade practices" is being widened to make it an inclusive clause to cover various types of unfair trade practices.

(g) Several provisions aimed at simplifying the consumer dispute adjudication process in the consumer fora are envisaged. These include, among others, enhancing the pecuniary jurisdiction of the Consumer Grievance Redressal Agencies, increasing minimum number of Members in the consumer courts to facilitate quick disposal of complaints, power to review their own orders by the State and District Commissions, constitution of 'Circuit Bench' to facilitate quicker disposal of complaints, reforming the process for the appointment of the President and Members of the District Fora, enabling provisions for consumers to file complaints electronically and file complaints in consumer courts that have jurisdiction over the place of residence of the complainant, and deemed admissibility of complaints if the question of admissibility is not decided within the specified period of 21 days."

34. One of the important things that will change is the power of review bestowed on the District Consumer Disputes Redressal Forum. Power is also being granted to set aside ex parte orders. There are express provisions for mediation. However the main concept of the Act remains the same and hence the present study continues to be relevant.

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[I measure the progress of a community by the degree of progress which women have achieved. (B.R.Ambedkar)]

Session VIII

Total Time: 90 minutes

MODULE FOR TRAINING OF LEGAL SERVICES LAWYERS ON

PROPERTY RIGHTS OF WOMEN UNDER MUSLIM LAW

-Dr. Tahir Mahmood[1]

-Dr. Saif Mahmood, Ph.D[2]

-Mr. Mohammad Nasir[3]

SESSION PLAN

Objective

1. To give an overview of rights of Muslim Women in property by way of inheritance and by other means except by acquisition against consideration.
2. Explore background and basic features relating to system of inheritance under Muslim law with special reference to inheritance rights of women.
3. Create awareness about inheritance rights of women under Muslim law.
4. Provide an insight into the rights of Muslim Women in different situations.

Expected Learning Outcome

1. The legal services lawyers will be equipped with the relevant information required to handle the legal cases of Muslim Women.
2. The legal services lawyer will be better equipped to assist the court in disposing of matters related to property rights of Muslim Women.
3. The legal services lawyers will be apprised of application of rules for computation of shares of Muslim women in various situations of inheritance under Muslim law.
4. The legal services lawyers will be better equipped to find law for themselves in assisting the courts in the matters of property disputes involving Muslim Women.

Programme

1. Introduction 10 minutes

The resource person will introduce the subject by narrating how the Prophet brought about historic changes in law relating to all spheres of public, personal and social lives of people and how women for the first time were empowered with right of inheritance.

2. Quiz 1 15 minutes

1 Distinguished Jurist Chair, Professor of Eminence & Chairman, Institute of Advanced Legal Studies, Amity University

2 Advocate, Supreme Court of India.

3 Lecturer, Deptt. of Law, Aligarh Muslim University.

The quiz questionnaire will be distributed amongst the participants who will take 5 minutes to answer. The resource person will lead a whole group discussion on each of the questions.

3. Lecture by resource person 10 minutes

Explaining the concept involved in questionnaire 1.

4. Whole group brain storming/group discussions 20 minutes

The reading and questionnaire for the activity will be distributed by the resource person before beginning the discussion. The group discussion may take 10 minutes followed by whole group discussion. In the alternative there may be a whole group/ brain storming discussion.

5. Quiz 2 15 minutes

Whole group discussion led by resource person

6. Lecture by resource person on topics not already covered 10 minutes

7. Concluding remarks by resource person/one of the participants or by the visiting dignitary 10 minutes

Training Method

1. Lecture
2. Group Discussion

Note: the resource person will pool the points on the flip chart/white board. He/she may prepare a power point for the lecture. The resource person to keep quiz sheet and group discussion handouts ready for every participant.

Tools Required

1. Facility for power point presentation
2. Flip chart
3. Pens
4. Blue tack
5. Whiteboard

QUIZ 1

Write short answers to the following questions.

1. What is dower?

2. Does the marriage become invalid if dower is not paid?

3. Does the wife lose her right to dower if the husband dies without payment of dower? What are the remedies?

4. Does the wife inherit the husband's property?

5. Does the daughter inherit the property of the father in the presence of the son?

QUIZ 2

For group discussion

1. What would be the justification for lower share to a daughter as compared to that of a son?

2. How does Muslim law in matters of inheritance compare with Hindu law on gender parity?

3. How does Muslim law justify lower shares of inheritance to women as compared to men generally?

4. Whether justification offered by Muslim law to Q.3 above would withstand the promise of equality enshrined under Indian Constitution?

Reading for Group Discussion

Saima is a minor who is staying with her mother. Her father had married again and had one son from the second marriage. He was attached to the second wife. He had turned out Saima and her mother Salma from the house. Since then Salma had been making a living by stitching clothes. Her dower was not paid by Mehram. Mehram is now dead. He is survived by his two wives, one son and one daughter.

Activity

In group discussion/whole group brain storming find answers to the following questions:

1. What is the impact of Salma's dues namely unpaid dower on distribution of shares of property left behind by Mehram Khan?
2. Calculate the share of Saima and Salma in the property of deceased Mehram Khan?
3. Will it make any difference if Mehram's father and mother were alive at the time of Mehram's death?

SHORT NOTE

ON

PROPERTY RIGHTS OF WOMEN UNDER MUSLIM LAW

-Dr. Tahir Mahmood[1]

-Dr.Saif Mahmood, Ph.D[2]

-Mr. Mohammad Nasir[3]

INTRODUCTION

1. The law of inheritance in Islam is largely viewed as an arbitrary system founded on whims of Semitic deity. On a finer analysis one finds that this is a specious understanding. The law of inheritance is based on two sources:
   i. Ancient Arabic customs, and
   ii. Principles laid down in the Holy Quran and by Prophet of Islam.

2. The Prophet not only propounded a new religion but also brought about wide spread reforms in the social life of the people of Arab. His reforms, in the 7th Century AD were far ahead of time. Islam prescribes a religious law code covering all walks of life. It deals with legal subjects including human rights, governance, administration of justice, transactions, criminal law and personal status.

3. The law introduced by the Quran was primarily meant to usher in reforms in the tribal customs. It aimed to set right the then existing social, cultural and economic malaise in the pre-Islamic Arabs. Based on this backdrop, scholars view Quranic law as an 'adjustment' project rather than a complete code in itself. In modern times, the law of inheritance is being suitably altered by national jurisdictions to adjust to their distinct societal circumstances and traditions. The sources of Muslim law are the Holy Quran, which contains the divine revelations and Sunnah or the Hadith that contains the sayings of the Prophet and practices believed to be divinely inspired.

4. Quran Reforms: The Holy Quran introduced revolutionary reforms in the law of inheritance of the deceased person's property. Its law on inheritance is found in the verses of Chapter IV titled Al-Nisa (Women), which shows that the focus of its reform was on women who were totally deprived of any inheritance rights in the pre-Islamic custom and usage. For the first time in history, mothers, sisters and daughters of every deceased person, man or woman, were made his or her legal heirs; and widows were given shares in their husband's properties. Full ownership rights, which were till then restricted to men, were conferred on all women.

1 Distinguished Jurist Chair, Professor of Eminence & Chairman, Institute of Advanced Legal Studies, Amity University

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3 Lecturer, Deptt. of Law, Aligarh Muslim University.

5. The number of verses in the Quran speaking of the law of inheritance is just ten- 7 to 14, 33 and 176 of Chapter IV.

6. At a time when the decimal system of calculation was not known, the Quran fixed fractional shares for all the newly introduced female heirs-1/2, 1/3, 1/4, 1/6, 1/8, or 2/3- which jurists of the past could work out with amazing arithmetical accuracy for all possible situations.

7. The Quran lays down that if the woman has wealth, she is not required to spend it for her family. She may save it, if she desires and invest it further if she wants. Any income from her investments or work done is her own and no one can claim a share in it till her death.

8. Right of Dower: Muslim marriage is akin to a contract and dower forms an important element in such a marriage. Non-payment of dower does not invalidate a marriage. But a dower is a legal liability of the husband. Whatever dower may have been agreed upon before or after marriage or in the absence of the agreement, is payable under the law and gets vested in the wife at the time of marriage. The unpaid dower of a widow, whether specified or not in the marriage contract, becomes immediately payable on the husband's death. She is entitled to realise it from his property in addition to her legal share by inheritance in it. The heirs of the deceased husband are not personally liable to pay the unpaid dower of the widow. The liability of each heir is limited to the extent of his or her share in the property if any. Since the widow herself is the heir of the husband, she too will contribute to dower out of her share. Is she at par with the creditor of her husband? To answer this one may have to refer to 'Muslim Law in India and Abroad' by Dr. Tahir Mahmood, wherein he says:

> *"In the light of true Islamic teachings a widow, who spent a lifetime with her deceased husband sharing all his joys and sorrows, cannot be equated with those from whom he may have simply borrowed some money. In Islam the unpaid dower of a woman, whether a divorcee or a widow, has topmost priority in a man's financial liabilities. Its description as "dain" [debt] in old treaties does not mean that it is the same in every respect as any money advanced to the husband by a stranger by way of a loan. In the fitness of things the unpaid dower of a widow should by itself be regarded as a charge on the husband's property."*

The wife has a lien on the property of the deceased husband. If the property of the deceased is in the possession of the wife at the time of his death, she will have the right to detain it unless her unpaid dower is paid out of the properties left by him. This, however, is only a right of possession and does not confer any title. Whether she can transfer it, creating title in the transferee, is a debatable issue although there is no doubt that she can transfer the property as if it was a life estate for her.

9. **Inheritance:** There are two main principle grounds of inheritance; one is marriage and the other is blood relationship. The property which gets divided in inheritance is called the heritable property. It is the property which remains after deducting the loans, expenses etc. of the deceased.

10. **Women's Share in property in inheritance:** The holy Quran awards that the woman will have an equal opportunity of share in the inheritance. There may be instances depending upon the circumstances, that the woman may have equal or half the share as that of the man. In few cases she may have equal share as that of a man. The dark ages had given no such right to the women. These rights were enshrined in the holy book. According to Islam; sons inherit twice that of daughters, brothers inherit twice that of sisters and husbands inherit twice that of their wives. If the father and the mother of the deceased are living at the time of their child's death, then they will each receive an equal one sixth share of the deceased's legacy.

11. **Muslim Personal Law (Shariat) Application Act, 1937:** In India, the inheritance is governed by legislation, The Muslim Personal Law (Shariat) Application Act, 1937. The law baesd on the custom or usage for the purpose of division of all property except agricultural land. Under Shariat, the share of Widow and Daughter cannot be ignored. The custom lays down that the wife will have 1/4th or 1/8th of the share. The share will be 1/4th of the deceased husband's property if there is only one wife. If there are children from the wedlock then the wife will get 1/8th share. In a polygamous union, all the wives will have 1/4thshare if there are no children or 1/8th in case of children. The Daughter too gets a share in her father's estate. The share of the daughter is half that of the son. In case there is only one daughter as the child of the deceased, she will get half of the portion of the estate. In case of two daughters and a son, the son will get the majority share in the estate.

The Gender Equation: Despite all efforts at universal level through Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and all efforts made by different legislatures, equality between sexes has yet not been achieved. The amendment of 2005 of Hindu Succession Act apparently looks very attractive as it makes women coparceners with their brothers and also allows them to seek partition. Sec-23 of Hindu.

Succession Act which did not permit a woman having inheritance in family property to seek partition and separate possession till the male heirs opted to do so stands deleted by the amendment of 2005. However much of the benefit given by this amendment remains illusory because the owner of the property, father/mother has a right to will the entire property to anyone according to their wishes. A common practise amongst Hindus is to write a will in such a manner as to deprive the daughters of any right of inheritance. Thus the law giving equality to men and women in inheritance is largely defeated by the law permitting a Hindu to provide for succession to his property by a will, which overrides the statute prescribing modes of intestate succession.

Compared to this position under Hindu Law, the women in Muslim Law stand on a better footing. An owner of a property in Muslim Law is entitled to make a wasiyat. However no Muslim owner of a property can make a will of more than one-third of the property so that two-third remains available for the heirs as determined by the law. A will made in excess of this limit is not void although enforceability of such a will depends on the consent of the person who would be eligible under law to inherit from the deceased as his or her heir. Thus unlike in the Hindu law a Muslim daughter cannot be disinherited by the father except when she consents to her father making a will disinheriting her.

The difference in the treatment meted out to daughters and sons must have been based on some rationale prevailing at the relevant time. The brothers in a Hindu family may live in a highly integrated system being in common mess and common worship. On marriage the daughter becomes the member of the family of her husband. Giving her right to inherit her father's property was itself a reform in 1956. Yet she was deprived of her right to partition in order to preserve the integrity of the family that survived her father. It was argued that if the daughter was allowed to seek partition that would divide the homestead and deprive the family of its rights to continue living in the same house. The present day concept of equality has been able to override the earlier arguments in favour of Section-23 of Hindu Succession Act which now stands repealed.

The Quranic injunction of daughters inheriting equal to half of the share of the sons was revolutionary keeping in view the customs prevailing at the time Prophet introduced his injunctions. Though revolutionary, the rights given to women were not equal to those of the men. Men were required to take care of all the needs of the women in the family and this secured the women economically and socially. This could possibly justify the unequal shares. Going by the present day concept of equality across the globe, the law calls for a change. When and how the same comes about is for the future to see.

Basic Features

The following are the basic and essential features of the Islamic law of inheritance built by the jurists on the foundations of the Quranic verses referred to above:

1. Female sex is no bar to hold property;
2. No woman is excluded from inheritance only on the basis of gender.
3. There is one and the same scheme of inheritance to be applied to the property of every deceased person, whether it was a man or woman.
4. As long as a man or woman is alive, none of his or her relatives- however close they may be- has any share or legal right in any part of his or her property; the rights of inheritance arise only when the owner of the property dies.
5. There is no concept of joint or undivided family property- all property obtained, acquired or built by every man and every woman, in whatever way, is his or her absolute property and is to be governed by the law of inheritance.

All schools of Islamic law, both Sunni and Shia, fully share these fundamental features of inheritance law.

Nature of Property

According to Indian tradition a Muslim man brings his bride into the family of his father. In course of time the family may become big with the grandfather, father, sons and grandsons living with wives, sisters, aunts etc. as one large family. When the grand old man dies the family may continue to live in the same property that was built or acquired by the grand old man. Does that make the property joint family property as under the Hindu Law? The answer is categorically no. The property may not get partitioned and all the other

heirs may continue to live as one family but their position is that of tenants-in-common in specific share. They do not become common tenants as was the case in traditional Hindu Law of Succession. The incidents of such joint possession have been examined by Dr. Tahir Mahmood in his book mentioned above and the same is extracted below:

> *"In such situations various questions arise relating to the nature of their possession, mutual rights and liabilities, etc. The courts have examined many such cases and have settled the following points:*
>
> *a) The heirs succeed to property of the deceased as tenants-in-common in specific shares.*
>
> *b) While the property is not divided by the heirs who live together, no joint family comes into existence. If any heir acquires additional property there is no presumption that the acquisition is for the benefit of all the heirs.*
>
> *c) Where only some heirs are in possession of the property, it cannot lead to any adverse possession in the absence of evidence of ouster.*
>
> *d) An heir can claim division of only some items of property; he or she need not claim division of the entire estate.*
>
> *e) Where the heirs remain undivided and their affairs are managed by one of them, if latter acquires some property and gives it in joint possession, the acquisition may be presumed to be for the benefit of all the heirs.*
>
> *f) If one of the heirs mortgages his undivided share in the property of the deceased, the security is subject to the rights of the other heirs in the estate. The mortgage can, in the event of a partition, proceed only against the mortgagor-heir.*
>
> *g) Co-heirs doing business jointly do not become a trading family or a partnership firm.*
>
> *h) Where some of the co-heirs carry on the business of the deceased, they stand in a fiduciary relation to the other heirs and are accountable to them for the profits of the business; but no liability can in such a case be imposed on minor co-heirs.*
>
> *i) In those regions of India where Muslim families do joint business the laws of partnership and trust may apply."*

Rules of Inheritance

No distinction is made in Muslim law between movable and immovable property, joint or separate property (as in Hindu Law), and realty or personality (as in English Law).

The doctrine of survivorship is not known to Muslim law; the share of each Muslim heir is definite and known before actual partition. Therefore, rules relating to partial partition as applicable to a Hindu coparcenary are not applicable to Muslims. The concept of property (mal) is simple; it comprises all forms of property and includes both corpus (ain) and usufruct.

In Muslim law there is no such distinction; any property, which was in the ownership of the deceased at the moment of his death, may be the subject-matter of inheritance. But, under the Shia law, a childless widow is entitled to get her share (1/4) in the inheritance only from the movable property left by her deceased husband.

Under Muslim law, for inheritance the heritable property is that property which is available to the legal heirs for inheritance. After the death of a Muslim, his properties are utilised for the payment of funeral expenses, debts and the legacies i.e. wills, if any and then later on, after these payments are made, the remaining property is called heritable property.

Under Muslim law, every kind of property may be a heritable property.

a) Birth-right, spessuccessionis

Islamic law does not recognize a birth-right; nor has a spessuccessionis, which means a mere right of succession of any value. Rights of inheritance arise only on the death of a certain person. Hence, the question of devolution of inheritance rests entirely upon the exact point of time when the person through whom the heirs claimed died-the order of deaths being the sole guide.

b) Relinquishment of share

The relinquishment of a contingent right of inheritance (itself a nullity in law) by a Muslim heir is generally void in Muslim Law; but if it is supported by good but not necessarily valuable consideration and forms part of a valid family settlement, it is perfectly valid.

Classification of Heirs

A. On the basis of importance the heirs of a deceased Muslim may be divided into two categories:

1. Primary Heirs

These relations are supposed to be the closest to the deceased. They are directly related to the deceased, and because of this proximity they always inherit and are never excluded. They are Parents: Father and Mother; Children: Sons and Daughters; Spouses: Husband and Widows.

2. Secondary Heirs

They are not defined in themselves but in relation to primary heirs: All heirs except primary heirs are secondary heirs. They sometimes inherit and at other times are excluded, partially or completely, depending on the presence of other heirs.

B. On the basis of nature of relationship the heirs are divided into following two categories:

1. Relations by blood

All blood relations whether connected through full blood or half blood, and irrespective of their remoteness are included in this category.

2. Relations by affinity (valid marriage)

Only spouses (husband or widow) are recognized as heirs of each other, and only they enjoy the mutual rights of inheritance under this category.

C. On the basis of order of priority to inherit, seven classes of heirs are recognized. Of these first three are principal class and other four are subsidiary class.

I. Principal Class

1. Quranic Heirs (Class I)

They are mentioned in the Holy Quran along with their fixed shares. Due to their specified shares, they are also referred to as Sharers. They are 12 in number.

2. Agnatic[4] Heirs (Class II)

They are known as agnatic heirs. Agnate is a relation, who is related to the deceased wholly through MALES. It means the line of relationship between the sons, Son's son, Son's son's son, son's daughter, father's mother. For the Agnate line, there must be a male in the start of each line of relation.

They are also called residuary because they are entitled to take the residue left after the specific shares have been provided to Quranic heirs (Class I). They are also called as customary heirs because all male agnates comprising this class were heirs according to customary law of Arabia. All male agnates belong to this class. Four female agnates, namely daughter, son's daughter (how low soever), sisters full[5] and sisters consanguine[6] also inherit as members of this class in special circumstances.

3. Uterine[7] Heirs (Class III)

To this class belong all cognates[8] and all female agnates except the 4 who are members of class I and II, i.e., daughter, son's daughter, sister full and sister consanguine. It is because of the cognatic connection of the female sex of the members of this class that this class is known as Uterine Heirs. As they are permitted to inherit only in the absence of class I and class II heirs, therefore, they are distant in claim. So they are known as distant kindred.

II. Subsidiary Class[9]

4. Successor by Contract (Class IV)
5. Acknowledged kinsman (Class V)
6. Universal or sole legatee (Class VI)
7. Government treasury (Class VII)

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4 Agnate means an individual whose relation to the deceased can be traced without the intervention of any female link. e.g. son's son's daughter or son's son's son, father's mother. Sex of the persons concerned is of no effect.

5 Full means through both parents, e.g. real sister.

6 Consanguine means children of the same father but by different mothers.

7 Uterine mean children of the same mother but by different fathers.

8 Cognate means a person related to the deceased through one or more female links. The position does not change if a male link intervenes. E.g., son's daughter's son or father's mother's father or father's sister's son's son. Sex of the person concerned is of no effect.

9 These 4 classes have lost practical significance in present times, and so are not dealt with here.

Order of Inheritance

Property of a deceased Hanafi goes in the first instance to the heirs of class I. If the property is not consumed by them, the remainder goes to the heirs of class II. In the absence of heirs of class I & II, the property devolves on the uterine heirs, i.e. class III.

In the unlikely scenario of absence of an heir of the three Principal classes, the right of inheritance devolves upon heirs of the four subsidiary classes, among whom each excludes the next, i.e. IV excludes V, V excludes VI and VI excludes VII.

Class I Heirs: Quranic Heirs

As shall be clear from the below mentioned, the heirs included in this class are very closely related to the deceased. It is worthwhile to note that out of the 12 heirs constituting Class I (Quranic Heirs), 8 are females. Son, generally most important under all systems does not find position in this privileged class. The embrace of so many females in this class, on one hand, and exclusion of son indicates that Quran added some very close relations who were excluded under customary law, mainly on the basis of sex. Following are twelve heirs of this class:

A. Through Marriage
   1. Husband
   2. Widow

B. Blood Relations
   a) Ascendants
   3. Father
   4. Mother
   5. True Grandfather[10]
   6. True Grandmother[11] (how high so ever)

b) Descendants
   7. Daughter
   8. Son's Daughter (how low so ever)

c) Collaterals
   9. Full Sister
   10. Consanguine Sister
   11. Uterine Sister
   12. Uterine Brother

10 'True Grandfather' is a male ancestor between whom and the deceased no female link intervenes. A 'False Grandfather' is a grandfather between whom and the deceased one or more females intervene.

11 'True Grandmother' is a female ancestor between whom and the deceased no false grandfather intervenes. A female ascendant related exclusively through male or female links. A grandmother except true is referred to as 'false grandmother'.

Class II Heirs: Agnatic Heirs

Their position is subject to the claims of near relations specified as Quranic heirs in class I. They succeed only where there are no Quranic heirs or where there are Quranic heirs but after the shares are given to them, a residue is left. All male agnates belong to this class, and as noted above four female agnates are entitled to inherit as members of this class in special circumstances. They may be classified into following groups:

I. All Male Agnates: Consist of blood relations who are all male agnates. This is the largest and the most important class; it includes son, son's son, father, brother, paternal uncle and their son, and so forth. The Holy Quran and the traditions of the Prophet form the basis and authority for this class and the members comprising it.

II. Four specified female agnates in the right of others: Consists of four female agnates when they co-exist with males of equal grade, namely,

1. Daughter (with son),
2. Son's Daughter, how low so ever; (with equal son's son, how low so ever)
3. Sisters full (with full brother), and
4. Sister Consanguine (with consanguine brother).

Under the above mentioned circumstances these four inherit as residuary and not in their own right (as in case of Quranic heirs) but in the right of their male counterparts, hence they are residuary, in another's right. The Holy Quran lays down the basis of this class and entitlements of its members.

III. Two specified female agnates- with others

Consist of two anomalous cases of sisters, full and consanguine, when they survive with daughter and/or son's daughter (how low so ever) provided there is no other nearer male agnatic heir. Here the sisters inherit as Residuaries with daughters or son's daughter but not in their original and primary right, as they themselves do not possess residuary rights, as they are primarily entitled to inherit as Quranic heirs. In this group they inherit with daughters, and so are called residuaries with others. The basis of inheritance of this class is provided in the traditions of the Prophet.

Among the agnates of different categories priority is determined according to the following rules:

A. Order

The three orders are

i. Descendants
ii. Ascendants
iii. Collaterals

Descendants are preferred over ascendants, and ascendants are preferred over collaterals.

B. Degree

If competing agnatic heirs belong to the same 'Order' the difference in degree will

determine the preference or priority. The rule is: Nearer degree excludes the remoter Hence, exclusion of true grandfather by father, or son's son by son, or brother's son by brother, is premised upon this rule.

C. Blood Tie

If 'Order' and 'Degree' are equal, full blood is preferred over half blood (consanguine). For instance, full brother excludes consanguine brother though both belong to the same order (collateral) and both are of equal degree of nearness but because the full brother has stronger blood relations than brother consanguine. The brother consanguine will exclude full brother's son, collateral of higher blood strength but inferior in degree. This principle is applied only when claimants are equal in 'Order' and/or 'Degree'. So where priority can be determined by applying the rule of 'Order' the 'Degree' and 'Blood Ties' become insignificant; and if priority can be determined by applying the rule of 'Degree' strength of blood tie need not be considered.

Class III Heirs: Distant Kindred

Every blood relation of the deceased who is not included in above two classes is included in this class. Female agnates together with cognates (male and female both) constitute this class. To this there are following two exceptions:

a) Cognatic females who are true grandmothers;

b) Uterine brothers and sisters.

This is because both the abovementioned exceptions are Quranic heirs.

The basis of entitlement of this class are the verses of Holy Quran and traditions of Prophet. They are classified under following four classes:

I. Descendants of deceased
   1. Children of daughters, and their descendants how low so ever
   2. Children of son's daughters, how low so ever and their descendants.

II. Ascendants of deceased
   1. False grandfathers, how high so ever
   2. False grandmothers, how high so ever

III. Descendants of Parents
   1. Full brother's daughters and their descendants, how low so ever
   2. Consanguine brother's daughters and their descendants, how low so ever
   3. Uterine brother's children and their descendants, how low so ever
   4. Daughters of full brother's sons how low so ever and their descendants.
   5. Daughters of consanguine brother's son how low so ever and their descendants.
   6. Sister's (full, consanguine or uterine) children and their descendants how low so ever.

IV. Descendants of immediate grandparents (true or false)
   1. Full paternal uncle's daughters and their descendants how low so ever

2. Consanguine paternal uncle's daughters and their descendants how low so ever
3. Uterine paternal uncles and their children and their descendants how low so ever
4. Daughters of full paternal uncle's sons how low so ever and their descendants
5. Daughters of consanguine paternal uncle's sons how low so ever and their descendants
6. Paternal aunts (full, consanguine or uterine) and their children and their descendants how low so ever, and descendants of remoter ancestors how high so ever (true or false).

This category shows that the abovementioned four classes do not exhaust the long list of heirs of Uterine class and in fact it is not possible. The last mentioned heirs may be further divided into numerous classes which is not relevant to go into detail here.

Distribution of Shares and Illustrations FOR SUNNIS

The Quran assigns fixed shares to Quranic Heirs, which are in fraction. These fractions are six in number: 1/2, 1/4, 1/8, 2/3, 1/3 and 1/6. The distribution of shares, rules applicable along with illustrations are discussed below:

A. Through Marriage

Spouses: Husband (H) & Widow (W)

The surviving spouse is the only heir by affinity (marriage) made primary heir by Quran. Being a primary heir they always inherit. Depending upon the presence or absence of other heirs, the surviving spouse is entitled to either maximum or minimum share as below:

Heir	Maximum	Minimum
Husband	½	¼
Widow	¼	1/8

The surviving spouse gets the maximum share under following circumstances:

Circumstance 1: When survived by no child (son or daughter), and

Circumstance 2: When survived by no agnatic descendant (son's son or son's daughter, how low so ever)

Both the above circumstances have to be met in order to enable the surviving spouse to get the maximum share. In the absence of either or both of the above circumstances, the surviving spouse gets only minimum share.

This distribution scheme may be explained with help of illustration:

Illustration 1

Husband dies and is survived by

i. Father (F)
ii. Widow (W)
iii. Son's daughter (SD)

Question: What is the share of widow?

Answer : W (surviving spouse) is entitled to minimum share 1/8 because of presence of SD, due to which the second circumstance enumerated above is not satisfied. Had there been two widows, they would share this 1/8 equally between them, i.e. 1/16 and 1/16.

Illustration 2

Wife dies and is survived by

i. Mother (M)

ii. Husband (H)

iii. Brother full (Bf)

Question: What is the share of H?

Answer: H (surviving spouse) is entitled to maximum share, 1/2, because both the circumstances enumerated above are satisfied, i.e. the surviving heirs are neither child nor agnatic descendants.

B. Blood Relations

a) Ascendants

Father (F)

Father being a primary heir always inherits. Presence of father excludes all collaterals (brothers and sisters of all description) and all grandfathers and grandmothers claiming through him. The Quran assigns 1/6 share to the father. He enjoys a peculiar position due to the fact that he inherits in the following capacities:

i. As a Quranic heir (sharer) only, or

ii. As an agnatic heir (residuary) only, or

iii. Both as Quranic (sharer) and Agnatic heir (residuary).

The situations in which father inherits in one or more of the above capacities are briefly discussed below:

Situation 1: Father inherits as sharer only when a male agnatic descendant(s) coexists with him. E.g. son, son's son how low so ever.

Illustration 3

Surviving heirs are

i. Father (F)

ii. Widow (W)

iii. Son's son (SS)

Question: What is the share of F?

Answer: Because male agnatic descendant SS is present, F will inherit as a sharer only and will be entitled to 1/6 share.

Situation 2: Father inherits as residuary only when no agnatic (male or female) descendant(s) coexists with him. E.g. son, daughter, son's son, son's daughter howlowsover.

Illustration 4

Surviving heirs are

i. Father (F)

ii. Husband (H)

iii. Brother full (BF)

Question: What is the share of F?

Answer: Because no agnatic descendant is present, F will inherit as a residuary only.

H= 1/2 [maximum share as there is neither any child nor agnatic descendant (see discussion on spouse above)]

F= 1/2 residue left after allotting H's share.

Bf= nil, excluded by F.

Situation 3: Father inherits both as sharer and residuary when only female agnatic descendant(s) coexists with him. E.g. Daughter, Son's daughter how low so ever. Here, he inherits in dual capacities, as sharer and residuary.

Illustration 5

Surviving heirs are

i. Father (F)

ii. Husband (H)

iii. Daughter (D)

Question: What is the share of F?

Answer:

H= 1/4 (minimum share due to presence of child- D)

D= 1/2 (explained later while discussing Daughter's position)

F= 1/4 (presence of female agnatic descendant- D entitles F to inherit in dual capacity, as sharer and residuary, 1/6 + Residue)

Mother (M)

She is a primary heir and therefore always inherits. The Quran allots her maximum and minimum shares as under,

Heir	Maximum	Minimum
Mother	**1/3**	**1/6**

She gets minimum or maximum share depending upon presence of other heirs. She gets maximum share in the following situations:

Situation 1: When deceased is survived by no child

Situation 2: When deceased is survived by no agnatic descendant (SS, SD, SSS, SSD how low so ever)

Situation 3: When deceased is survived by not more than one brother and/or sister of any description (full/consanguine/uterine)

All three of the above situations have to be met in order to enable M to get the maximum share. In the absence of any of the above situations, M gets minimum share- 1/6.

Illustration 6

Surviving heirs are

i. Widow (W)
ii. Mother (M)
iii. Brother full (Bf)
iv. Father (F)

Question: What is the share of M?

Answer:

W= 1/4 (maximum share; see spouse's discussion above)

M= 1/3 (maximum share as all three situations above are fulfilled)

F= 5/12 (Residue, see Father's discussion above)

Bf= nil (excluded by Father)

Illustration 7

Surviving heirs are

i. Widow (W)
ii. Mother (M)
iii. Daughter (D)
iv. Father (F)

Question: What is the share of M?

Answer:

W= 1/8 (minimum share due to presence of child- D; see spouse's discussion above)

M= 1/6 (minimum share due to presence of child- D; first situation not fulfilled) F= 5/24 (Sharer + Residue, see situation 3 on Father's discussion above)

D= 1/2 (discussed later on Daughter)

True Grandfather

True Grandfather is not a primary heir therefore does not always inherit. In essence, he is a substitute for the father, and inherits only in father's absence. Father excludes all grandfathers.

True Grandmother

True Grandmother is not a primary heir therefore does not always inherit. In essence, she is a substitute for the mother, and inherits only in mother's absence. Mother excludes all grandmothers.

a) Descendants

Daughter (D) and Son's Daughter (SD) (how low so ever)

These are the only two categories of descendants included as Quranic heirs. For sake of simplicity and convenience of this module, Daughter and Son's Daughter (how low so ever) are grouped together, and collectively referred as 'daughter class'. Distribution in this group is made according to the following rules:

Rule 1: Maximum and minimum shares according to Quran

Heir	Maximum	Minimum
Daughter class	2/3	½

Rule 2: Minimum share is allotted if there is a single claimant from this group. Maximum share is allotted if there is more than one claimant from this group.

Rule 3: If there are more than one claimants from this group and are of equal degree, they divide the 2/3 share equally among themselves.

Rule 4: If the claimants from this group are not equal in degree (D is superior than SD; SD is superior than SSD) then the superior classes are satisfied first; if anything remains from share of 2/3, then remainder is exhausted on inferior class.

These rules may be explained from following illustrations.

Illustration 8

Surviving heirs are

i. Daughter (D)

ii. Father (F)

Question: What is the share of D?

Answer:

D = 1/2 (minimum share as number is only one)

F = 1/6 (F inherits as sharer and residuary both; see illustration 5 in above discussion on father)

Illustration 9

Surviving heirs are

i. Husband (H)

ii. Two Daughters (2D)

Question: What is the share of 2D?

Answer:

H= 1/4 (minimum share because of presence of children- 2D; see discussion on spouses)

2D= 2/3 collectively (maximum share because claimants from D class are more than one, and equal in degree; see rules 2 and 3 above)

Each D gets 1/3 +1/3= 2/3

Illustration 10

Surviving heirs are

i. Husband (H)
ii. Daughter (D)
iii. Son's Daughter (SD)
iv. Son's Son's Daughter (SSD)

Question: What is the share of D, SD and SSD?

Answer:

H= 1/4 (minimum share because of presence of child- D)

D, SD and SSD = 2/3 collectively (maximum share because claimants from D class are more than one; see rule 2 above)

D's share individually= 1/2 [D is superior in degree than SD, therefore entitled to be satisfied first. She stands satisfied when she gets her share 1/2 (minimum for single claimant); see rule 4]

SD's share individually= 1/6 [SD is inferior in degree and therefore entitled to remainder, if any, from share of 2/3. Here remainder after satisfying D is 1/6 (2/3 - 1/2); see rule 4]

SSD's share individually= nil (excluded because share of 2/3 for this group is already exhausted by superior classes, D and SD)

Co-existence of Daughter with Son

The above rules and illustrations explain the right of daughters (and daughter class) as

Quranic heirs. The Daughters, though primarily Quranic heirs, inherit under certain circumstances as agnatic heirs (residuaries) and not Quranic heirs. The Daughter (and daughter class) become residuary in following situation:

When Daughter coexists with Son: The son drags the daughter from Quranic heir to Residuary heir (class to which son belongs). This is conversion of daughter from Quranic status to residuary status by her male counterpart. In this situation (when son drags daughter to residuary class) daughter gets half of what a son is entitled to. This is based on the rule 'double share to males and single share to females'.

Illustration 11

Surviving heirs are

i. Mother (M)
ii. Daughter (D)
iii. Son (S)

Question: What is the share of D and S?

Answer:

M= 1/6 (minimum share due to presence of children)

D dragged to residuary by son; S is a member of residuary class

S+D collectively= 5/6 in the ratio of 2:1 S:D

D= 5/18 (half share of S)

S= 10/18 (double share of D) b) Collaterals

Brothers and Sisters are not primary heirs and are excluded by:

i. Son

ii. Son's son, how low so ever

iii. Father, or in his absence by true grandfather, how high so ever.

Male agnates in descending and ascending lines exclude sisters. Consanguine brothers/ sisters are excluded by full brothers/sisters. But uterines are not excluded either by full or consanguine brothers and/or sisters. They inherit with them simultaneously.

Only the following collaterals are Quranic heirs: Full Sister, Consanguine Sister, Uterine Sister and Uterine Brother.

Sister's Class: Sister Full (SF) and Sister Consanguine (SC)

SF and SC, like D and SD, are grouped together. Their separate as well as competitive entitlements are discussed in single group. The sister's class is in many ways similar to the daughter class.

Rule 1: Maximum and minimum shares are also 2/3 and 1/2 respectively.

Heir	Maximum	Minimum
Sister class	2/3	½

Rule 2: Minimum share is allotted if there is a single claimant from this group. Maximum share is allotted if there is more than one claimant from this group.

Rule 3: Position of SF viz-a-viz SC is same as that of D viz-a-viz SD. Thus, like D gets preference over SD, SF gets preference over SC.

Rule 4: If there is more than one claimant from this group and they are of equal degree, they divide the 2/3 share equally among themselves.

Rule 5: If the claimants from this group are not equal in degree (SF is superior than SC) then the superior class is satisfied first; if anything remains from share of 2/3, then remainder is exhausted on inferior class.

These rules may be explained from following illustrations.

Illustration 12

Surviving heirs are

i. Mother (M)

ii. Widow (W)

iii. Sister Full (SF)

iv. Sister Consanguine (SC)

Question: What is the share of SF and SC?

Answer:

M= 1/6 (minimum share; see situation 3 in mother's discussion)

W= 1/4 (maximum share; see circumstances 1 and 2 in spouse's discussion)

SF and SC = 2/3 collectively (maximum share because claimants from this class are more than

one; see rule 2 above)

SF share individually= 1/2 [SF is superior in degree than SC, therefore is entitled to be satisfied first. She stands satisfied when she gets her share 1/2 (minimum for single claimant)]

SC share individually= 1/6 [SC is inferior in degree and therefore entitled to remainder, if any from 2/3 share. Here remainder after satisfying SF is 1/6 (2/3 - 1/2); see rule 5]

In the above illustration, if there are 2 SF they will exhaust the share of 2/3 equally among themselves and nothing will be left for SC.

Sisters as Residuaries with Male Counterparts

Sisters, like Daughters, become residuaries in the presence of males of equal degree e.g. SF in the presence of BF and SC in the presence of BC. BF (like son) makes SF (like Daughter) a residuary along with him. BF also completely excludes BC and SC.

Illustration 13

Surviving heirs are

i. Mother (M)

ii. Widow (W)

iii. Sister Full (SF)

iv. Sister Consanguine (SC)

v. Brother Full (BF)

vi. Brother Consanguine (BC)

Question: What is the share of each claimant?

Answer:

M= 1/6 (minimum share; see mother's discussion) W= 1/4 (maximum share; see spouse's discussion)

SF= 7/36 (BF converts her into residuary, and she inherits residue along with BF according to rule of double share to male and single share to female)

BF share= 14/36 [Here residue is 1- (1/4 + 1/6)= 7/12. 1/3 of this residue 7/36 goes to SF and 2/3 of this residue 14/36 (double of SF share) goes to BF.

SC = nil [excluded by BF] BC= nil [excluded by BF]

Coexistence of Daughter class with Sister class

As Quranic heirs, Daughter class gets precedence over sister class. Therefore, SF/SC cannot inherit as sharer when they coexist with D or SD. In such cases of coexistence, members of

Sister class inherit as residuary and not Quranic heirs. This is explained through following illustrations.

Illustration 14

Surviving heirs are

i. Daughter (D)

ii. Sister Full (SF)

Question: What is the share of each claimant?

Answer:

D= 1/2 (as Quranic heir)

SF= 1/2 (as residuary)

Illustration 15

Surviving heirs are

i. 3 Daughters (D)

ii. 2 Sisters Full (SF)

iii. Brother Consanguine (BC)

Question: What is the share of each claimant?

Answer:

3 D= 2/3 (as Quranic heirs taking 2/9 each)

2 SF= 1/3 (as residuary; taking 1/6 each)

BC= nil excluded by SF, who is superior residuary than BC.

Note: For the sake of brevity and relevance, explanation on shares of other categories mentioned in Part I is not being undertaken here. Same may be discussed in class or explained through quiz to be given on the spot. Further, their shares and scheme of distribution will be part of master sheet (that will include distribution of each heir).

Inheritance by Shia Law[12]

Classes of Heirs

There are three Classes of heirs in Shia law – Class I excluding Class II and the latter excluding Class III. In accordance with the Quranic precept that parents and children are one's preferential heirs, the jurists placed them in Class I. Believing that the Quranic word "auladukum" means descendants [not children only], they provided that in the absence of children lower descendants will step in Class I subject to the rule of nearer in degree excludes the remoter.

Next is Class II heirs who comprise of grandparents [both paternal and maternal] and siblings [brothers and sisters] of the deceased. In the absence of grandparents' higher ascendants of the deceased, and in the absence of siblings their descendants, will step in as Class II heirs subject to the rule of nearer in degree excludes the remoter.

12 "Muslim Law in India and abroad" (Second edition).

Finally, there are Class III heirs who can inherit only in the absence of all Class I and Class II heirs and include the deceased person's uncles and aunts [both paternal and maternal] and, failing them, their descendants subject to the rule of nearer excludes the remoter.

Surviving Spouse

As per the dictate of the Quran, the surviving spouse of the deceased, if any, will inherit with all the three Classes of heirs. If the deceased was a married male and his wife has survived him, her share in his estate will be ¼ if he has not left behind a child or lower descendant – and 1/8 if he has. In either case, if the deceased has left behind more than one wife they will jointly get these shares.

If the deceased was a married female and her husband has survived her, his share in her estate will be ½ if she has not left behind a child or lower descendant, and ¼ if she has

Class I Heirs

Among Class I heirs three different situations are possible – (i) parents of the deceased surviving with his or her descendants, (ii) parents alone among the survivors, and (iii) descendants only with no parent of the deceased among the survivors. The sharing of estate in these cases will be as follows:

Parents with Descendants

(a) Mother: 1/6; father: 1/6

(b) Daughters only: ½ for one and 2/3 for two or more

(c) Sons & daughters: to inherit together, males taking double shares

(d) Sons only: to inherit in equal shares

(e) Grandchildren [if no child]: to inherit per stripes, double shares for males

Parents Alone

(a) If the deceased has left behind no, or only one, sibling: mother will inherit 1/3 and the rest will be inherited by the father.

(b) If the deceased has left behind two or more siblings: mother will inherit 1/6; and the father will inherit the rest [since he has to maintain the siblings]

[The traditional rule that in such a case there should be two or more brothers, or a brother and two or more sisters, or four or more sisters, is no more followed].

(c) One parent only: whole estate will be inherited by the surviving parent.

Descendants Alone

(a) Daughters only: ½ for one; 2/3 for two or more

(b) Daughters and sons: to inherit together, sons taking double shares

(c) Sons only: to inherit in equal shares

(d) Grandchildren [if no child]: to inherit per stripes, males taking double shares.

Share Adjustment

If in this Class there are only fractional-share holders, their total may leave a residue or deficit. If there is a residue it will be distributed among all pro rata for which there is an arithmetical technique called aul – increase – [see below under Sunni law]. If there is a deficit

it will be deducted from the daughters' shares.

Class II Heirs

Among Class II heirs also three situations are possible – (i) grandparents of the deceased surviving with his or her siblings, (ii) grandparents alone and no siblings, and (iii) only siblings and no grandparents. The sharing of estate in these various situations will be as follows:

Grandparents with Siblings

(a) All to inherit together, among siblings full blood excluding half-blood but neither of them to exclude uterine blood.

(b) On paternal side grandfather to take a brother's and grandmother a sister's share.

(c) On maternal side grandfather to take a uterine brother's and grandmother a uterine sister's share.

(d) Paternal side 2/3 [to be divided in the ratio of 2:1]; maternal side 1/3 [to be divided equally]

(e) Single grandparent [paternal or maternal]: whole estate

(f) Failing grandparents: great-grandparents to step in, the nearer excluding remoter, taking as per the rules mentioned above

(g) As in situation (e) below

Siblings Alone

(a) Sisters only: ½ for one and 2/3 for two or more

(b) Sisters & brothers: whole estate, males taking a double share

(c) Brothers alone: whole estate in equal shares

(d) Uterine brother/sister: 1/6 for one; 1/3 for two or more

(e) Failing siblings: their descendants to step in: nearer excluding the remoter, distribution per stripes, and males taking a double share.

Share Adjustment

If in this Class there are only fractional-share holders, their total may leave a residue or deficit. If there is a residue the technique mentioned above under Class I will be applied to distribute the shares pro rata. If there is a deficit, it will be deducted from the sisters' shares.

Class III Heirs

Uncles & Aunts

Uncles and aunts of the deceased will inherit his or her property as per the following rules:

(a) Full blood to exclude half-blood but neither of them to exclude uterine blood

(b) Paternal and maternal sides together: paternal 2/3, males taking double shares; maternal 1/3 divided in equal shares

(c) Paternal or maternal side only: estate to be divided as above;

(d) Single claimant on each side: paternal 2/3; maternal 1/3

(e) One claimant only: whole estate

(f) Uterine uncle & aunts: 1/6 for one; 1/3 for two or more

Uncles & Aunts' Descendants

In the absence of uncles and aunts of the deceased, their descendants will inherit as per the following rules:

(a) All descendants of uncles and aunts to step in their respective places – nearer excluding the remoter, distribution to be per stripes, males taking double shares

(b) Full blood to exclude half-blood but neither to exclude uterine blood.

Exception

On the paternal side, between a half-blood uncle and a full-blood uncle's son [they being the only claimants] the latter will exclude the former. This is a history-based exception to accommodate the Shia belief in the superiority of Ali [Prophet's full paternal uncle Abu Talib's son] over Abbas [Prophet's uncle by half-blood].

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[I slept and dreamt that life was joy. I awoke and saw that life was service. I acted and behold, service was joy (Rabindranath Tagore)]

Session IX

Total Time: 90 minutes

MODULE FOR TRAINING OF LEGAL SERVICES LAWYERS

ON

SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989

-Ms. Anuradha Shukla Bhardwaj[1]

SESSION PLAN

Objective:

1. To inform the Legal Services Panel Lawyers about the historic perspective of the caste system in India and its fall out into the practice of untouchability.
2. To inform the Legal Services Panel Lawyers about the main features of the Scheduled Castes and Schedules Tribes Act as well as of the various provisions under the Act.

Expected Learning Outcomes:

1. Participants will be sensitised about the plight of the Scheduled Castes and Scheduled Tribes in India.
2. The participants will become aware of law and procedure for getting relief to a member of the Scheduled Castes and Scheduled Tribes in case any atrocity is committed against him.
3. The participants will be better equipped to assist various courts and tribunals in the disposal of cases under the Act.

Programme:

Introduction: 10 minutes

The resource person shall introduce the subject giving the historical background of the caste system in India and its fall out in the practice of untouchability & other atrocities. At this stage the special features of the Act will also be narrated.

Quiz: 15 minutes

The participants will write the answers on the quiz sheet in five minutes. This will be followed by a discussion by the resource person.

Group Discussion: 15 minutes

Group Presentation and whole group discussion: 20 minutes

Lecture by the Resource Person: 20 minutes

Concluding Remarks: 10 minutes

1 Additional Director, Delhi Judicial Academy

Activity for Session - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

QUIZ

Activity -I

1. Who can file a complaint under the provisions of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act?
   a. A person of SC or ST community against the person of other community.
   b. A person of SC or ST community within the community
   c. A person not of SC/ST community against a person of SC/ST community
   d. All of above.

2. A person against whom allegations under SC/ST Act are levelled can apply for anticipatory bail:
   a. Before the Sessions Court under section 438 Cr.P.C
   b. Before the Hon'ble High Court under section 438 Cr.P.C
   c. Both A & B
   d. Neither A nor B

3. X wants to file a private complaint against Y under the SC/ ST Act, the court of appropriate jurisdiction is:
   a. Chief Judicial Magistrate
   b. District and Sessions Judge
   c. Exclusive Special Court
   d. Magistrate of competent Jurisdiction

4. In a procession of birth anniversary of Dr. Bhima Rao Ambedkar during a community clash one community says words offending the leader 'chamte chamare bhi leader hon lag re'; 'ab to chamaro ke bhi janamdin manayenge' etc, a complaint is sought to be filed seeking an action against the person.
   a. No action lies as the leader was a national leader and the accused has a right to have dislike for a particular leader. His action is protected under freedom of speech.
   b. Action lies against him for insulting a leader of national stature.
   c. Action lies under SC/ST Act for insulting a person held in high esteem by the members of SC/ ST community.
   d. Both b & c

5. X, a woman of SC/ST community, who was travelling in a public conveyance as her private vehicle broke down, alleges that she was touched by a man Y inappropriately on her chest. The man has committed an offence :
   a. Under section 354 IPC
   b. Under section 3 SC/ST Act

c. No offence has been committed

d. Both a & b

6. In question 5 above what would be the offence if X and Y were regular commuters of the public conveyance and knew each other having a past sexual history. Accused opposes the allegations on grounds of their friendly past relation and X having not shown any physical resistance to the act. Y also claims that he had no intention of insulting the complainant because of her caste and refers to his relationship with her as a ground to claim that the physical touch even if it violated the privacy of the complainant in public, there was no intention of outraging her modesty on account of her caste. The man has committed an offence:

a. Under section 354 IPC

b. Under section 3 SC/ST Act

c. No offence has been committed

d. Both a & b

7. Which of the following is an offence under section 3 (1) (s):

a. Calling a person by the caste referring to his occupation e.g. caretaker of leather factory asking the subordinate staff in public and in presence of some persons of chamar caste “Arey Chamar ko bulao malba uthane ke liye”

b. Calling a person of SC/ST community using caste name in a similar situation: “In chamaro ko bulao yahan kya gandagi faila rakhi hai?”

c. Referring to a particular caste in public view, in presence of a person of that caste. e.g. “ kya chudo jaise kapde pehne hue hain”

d. None of above

e. All of above

Reading for Activity- II

A. X lives in Govindpuri Delhi since 1989. Y along with his family shifts in the area on 10-04-2003 in the house adjoining to X. Z, who lives in the locality since long claims to be related to Y. There is history of disputes between X and Z including one previous litigation involving detention of both. In the intervening night of 13-14/04/2003 a sudden quarrel ensued between X and Y over parking, which was joined by family members of either side. X and his father suffered grievous injuries on their head and stomach. Father and brother of Y died. Cross cases have been filed by both sides. Y invokes section 3 (v). X pleads that there was no caste angle involved as it was a quarrel at the spur and also that he was unaware of the caste of Y. He also pleads that Y was aggressor. He relies on previous litigation involving detention of both the parties. In the first complaint no specific allegation of use of caste related words has been made by Y. Y says that X knew his caste and that he picked quarrel with him knowing that he was relative of Z, who is of SC community.

In a group discussion find answers to the following questions

(i) What offences, if any, under the provisions of SC/ST Act are made out?

(ii) What is the effect of non- mentioning of caste related words by the complainant?

(iii) What difference, if any, would it make to the case if Z was also present at the spot?

(iv) Can the court draw presumption under section 8?

Reading for Activity- III

A is pursuing a case of rape against B in the Court alleging that B had made physical relations with her on promise of marriage, however, later he refused to marry her on the pretext of her belonging to a Scheduled Caste. She along with her father visits the court on the hearing of bail. After coming out of the Court while she was moving towards staircase the father of the accused abused her using caste related comments against her and her father within the hearing of public persons including the court officials. She goes running to the IO of the rape case and informs him of the incident. The IO alongwith them came to the spot but the accused had already left by then. The complainant institutes an FIR under Section 3 (1) (s) of the Act. During the evidence the prosecution examined three witnesses the complainant, her father and the IO. The complainant was found to be of a caste considered

Scheduled Caste by a certain State but not by NCT of Delhi. She proved the certificate of her father in support of her caste. Accused pleads that the case is an act of vendetta since the son of the accused was granted bail by the Court on the date of incident. The complainant was not an SC within the State of Delhi. There is no evidence of incident having taken place in public view. How will you argue the case for the complainant/ accused? Quote relevant provisions.

[Two groups will be formed: one for the complainant and the other for the accused

The two groups will find possible arguments for and against their client. The spokesperson of each group will then argue their respective cases]

Reading for Activity- IV

B. In a small village of Bihar, the father of landlord (Zamindar) died. The heads of whole SC community living on the outskirts of the village were tonsured. While some agreed to be tonsured, some were tonsured against their wishes. It was done on the pretext of it being a religious practice. Further since the deceased was the village head and respectable for all the villagers, the tonsuring was done as a mark of respect to the departed soul.

In a group discussion find:

What provisions of the SC/ST (PoA) Act would you mention if you have to file a complaint against the act? Draft the prayer.

Key to the Quiz on Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

1. A. Section 3 (1) says whoever not being a member of Scheduled Caste or Scheduled Tribe commits the offence under the Act against member of SC/ST community.

2. C. Both A & B. Though section 18 of the Act bars grant of anticipatory bail to an accused under the Act; there are, however judgments which say that if prima facie case is not made out under the facts of a given case; application for anticipatory bail can be entertained. So, the application can be filed wherever the accused can show that no prima facie case is made out.

3. B. By the Amendment Act the power of cognizance has been given to the Exclusive Court of Special Jurisdiction, earlier by virtue of Supreme Court judgment complaint was to be filed before CJM and dealt by Ilaqa MM. After the amendment the filing should be before District & Sessions Judge for marking to the Exclusive Special Court.

4. C. As per Section 3 (1) (v)

5. A. The accused in all probabilities does not know the caste of the woman. Hon'ble Supreme Court in *Dhruvendra Singh & Another Vs State of Rajasthan*, 2001(3)WLN 380 held that an accused could not be convicted under the Act, unless the girl was raped knowing that she was a Scheduled Caste girl. Supreme Court further held that besides proving ingredients of respective offence, it must further be proved that target of crime was selected on ground that he/she belonged to Scheduled Caste/ Tribe.

6. D. The accused knows the caste of the complainant. Their previous relation is immaterial under the Act. Section 8 (ii) (c) introduced after amendment says that where the accused has personal knowledge of victim or his family the court has to presume that the accused was aware of the caste identity of the victim. Further proviso to Section 3 (1) (w) (ii) says a woman's sexual history including that with the offender shall not imply consent or mitigate circumstances. As per clause (i) of same section no physical resistance shall also not indicate consent.

7. E. All of the above

Discussion on Activities II, III and IV:

Activity II:

Through the facts of this case the participants will be introduced to very important provisions related to enhanced punishment and presumptions under the Act, Sections 3(2) (v) and 8 :

> *Section 3 (2). Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,—*
>
> *(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property*
>
> *[knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member], shall be punishable with imprisonment for life and with fine;*
>
> *Section 8. Presumption of Offences.—In a prosecution for an offence under this Chapter, if it is proved that—*
>
> *(a) the accused rendered [any financial assistance in relation to the offences committed by a person accused of], or reasonably suspected of, committing, an offence under this Chapter, the Special Court shall presume, unless the contrary is proved, that such person had abetted the offence;*
>
> *(b) a group of persons committed an offence under this Chapter and if it is proved that the offence committed was a sequel to any existing dispute regarding land or any other matter, it shall be presumed that the offence was committed in furtherance of the common intention or in prosecution of the common object;*
>
> *(c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved.*

In the present case the prosecution if it is able to prove that the accused was aware of the caste of Y; the court may raise the presumption under section 8(c) even though the same is not specifically mentioned. The argument of defence, however, shall be that Y had shifted only three days before the incident and, therefore X did not know his caste. It will, therefore, be important for the victim's lawyer to establish the factum of knowledge of caste of complainant for which it may also rely upon the relation of Y with Z.

The presence of Z at the place of incident will help the prosecution in establishing the fact and presumption under section 8(c).

Further if Z is also present at the time of the incident and the prosecution relies upon the previous case between Z & X, the court will raise presumption of common intention & common object with the accused and they being the aggressors in the present case.

If the court is able to raise a presumption under section 8 of the Act, the fact that no

caste related allegations have been specifically pleaded will be of no significance.

The court will have to award enhanced punishment under section 3(2)(v) of the Act to the accused. *In Appeal (Crl) 263 of 2006 Dinesh @ Buddha v State of Rajasthan, (28/02/2006)* the Supreme Court held that to invoke section 3(2)(v) the knowledge of caste of the complainant must be proved.

If in addition to above facts the complainant makes a specific mention of caste related abuses etc made by the accused during the occurrence of incident the offence under Section 3(r) & (s) shall also be made out.

The caste of complainant being in the knowledge of accused either directly or by presumption under section 8 is essential to hold such accused guilty under SC/ST Act. Once this fact is proved or presumed the Act provides for enhanced punishment under specified category of offences.

Activity III

To prove its case Prosecution will have to prove minimum four facts:

(1) The complainant belongs to SC/ST community. [Section 3(1)]. The complainant will have to prove the certificate of her caste by summoning the relevant Sub-Divisional Magistrate or other record keeper of such fact.

[It may be stressed at this stage that for a case under SC/ST Act it is not necessary that the complainant should belong to a caste recognised as SC or ST at the place where the offence is committed. The complainant if he is an SC or ST in the scheduled list of any state in India shall be treated as SC or ST for the purposes of the Act throughout the country. The caste may be proved by the certificate of parents also. The benefit of the Act cannot be extended to a person, who does not belong to SC/ST caste by birth but marries an SC or ST. Similarly a woman would not lose her caste status if she marries a person not belonging to SC or ST caste.] *[Kaliya Peru Mal v State of Madras, 1998 (1) CTC 182].*

(2) The accused belongs to an upper caste. [Section 3(1)]. There being previous litigation between the parties, the fact that accused belongs to upper caste is not a disputed fact.

[There must be an averment in the complaint or a supplementary statement that the accused did not belong to SC/ST Caste. The complainant is not expected prove this averment but a mention of it is important to make out a case under the Act. The accused if he disputes the fact onus will be on him to prove his caste].

(3) The accused made caste related comments and abused her with intent to insult the complainant. [Section 3(1)(r)(s)]. The complainant has made a specific allegation that the accused, in filthy language, abused her thereby causing insult and intimidation to her.

(4) The incident took place in full public view. [Section 3(1)(r)(s)]. There were people around who heard the words spoken by the accused. The court staff were also sitting in the nearby rooms and they witnessed the incident. She felt humiliated and insulted in full public view.

(5) The complainant may also argue that the I.O. of the other case was present near the

spot and was immediately after the incident informed about the incident. He had also come to the spot but the accused ran away.

The defence may argue:

(1) No specific allegations have been pleaded by the complainant. [While discussing this point the importance of mentioning the exact words uttered by the accused at the time of incident, in the complaint may be highlighted. General allegations of abuse, insult and intimidation by use of caste related words is not sufficient for the purposes of section 3(r) & (s)]. The accused may also rely upon *Shyam Singh @ Dhannu and Another v State of MP*. In this case the court held that mere mention of caste would not invoke SC/ST Act. To make a case it needs to be proved that the caste name was mentioned with the intention to humiliate the person because of his community.

(2) There is no evidence of the incident having taken place in public view. Though the complainant says that there were public persons around; no such person was examined as a witness by the prosecution to prove the incident. For the concept of 'public view' reference may be given to *Daya Bhatnagar and Ors. V State, 109(2004) DLT 915*.

(3) The IO of the previous case is not an eyewitness of the case as he arrived at the spot after the incident had taken place.

Activity IV

This Activity relates to one of various offences introduced under Section 3, after the amendment, as offences of atrocities:

> *Section 3. Punishments for offences of atrocities (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,—*
>
> *….(e) forcibly commits on a member of a Scheduled Caste or a Scheduled Tribe any act, such as removing clothes from the person, forcible tonsuring of head, removing moustaches, painting face or body or any other similar act, which is derogatory to human dignity;*

SC/ST Act has several beneficial provisions including provisions of monetary reliefs.

Since this activity involves drafting of prayer, in addition to mentioning the relevant provision of law seeking punitive action against the accused, the participants shall be introduced to the other aspect of rehabilitation i.e. monetary relief and relocation as also victim protection. Apparently in this case the accused persons are very strong and appear to be very influential also. The participants, therefore shall be asked to include in the prayer clause, the relief of relocation of the victims, maintenance etc. Relevant provision is:

> *15A. Rights of victims and witnesses.—*
>
> *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Special Court or the Exclusive Special Court trying a case under this Act shall provide to a victim, his dependent, informant or witnesses––*
>
> *(a) the complete protection to secure the ends of justice;*
>
> *(b) the travelling and maintenance expenses during investigation,*

inquiry and trial;

(c) the social-economic rehabilitation during investigation, inquiry and trial; and

(d) relocation.

The participants may also be introduced to the Government scheme of monetary relief for the victims of atrocities, which are applicable state wise. The monetary relief details are provided on the State Government Websites.

The Prayer Clause, therefore, will be exhaustive and shall include all possible reliefs that a victim of atrocity shall be entitled to under the Act.

SHORT NOTE

ON

SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT 1989

-Ms.Anuradha Shukla Bhardwaj[1]

Introduction

The caste system in India evolved out of the system of varnas in which the society was divided according to their occupation. Initially people could move from one occupation to another but later such movements were restricted thereby creating the caste system. The four major divisions in the society were the Brahamanas, Kshatriyas, Vaishyas and Sudras.

These castes were involved in works like priesthood and learning the Vedas, administration and warfare, agriculture and commercial activities and menial work respectively. The caste system became hierarchical giving rise to the Sudras becoming lowest in the rung and not entitled to being in the company of the other castes.

The lowest of the low doing the works like scavenging, handling dead bodies and dead animals were treated as untouchables and gradually the group of untouchables became larger. The upper castes looked upon them with contempt. The system prevailed in ancient India and runs through the ages and despite all efforts, has not yet been eliminated altogether.

During the period of freedom movement great efforts were made by Mahatma Gandhi and Dr. B.R. Ambedkar. Dr. B.R. Ambedkar himself by way of providing an escape from the caste system of the Hindu Society embraced Buddhism with some 5 lakh followers.

The issue of untouchability was seriously discussed in the Constituent Assembly and provisions were introduced to say that untouchability in any form would be considered an offence. At the same time to uplift the lower castes and to bring them at par with the higher castes they were enlisted as Scheduled Castes and Scheduled Tribes with the intention of giving them reservations in various facilities and jobs provided by the government.

Constitutional Provisions & development: The Hon'ble Supreme Court in the case of *State of Karnataka v. Appa Balu Ingale, AIR 1993 SC 1126: 1992(3)SCALE339* enumerated the constitutional provisions for the benefit of the Scheduled Castes and Scheduled Tribes.

The Constitution provides under Article 15(2) that no citizen shall on grounds of religion, race,caste, sex, place of birth or any of them, be subjected to any disability, liability restriction or condition with regard to – (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, etc;

Article 23(1) prohibits begar and other similar form of forced labour (bonded labour). Article 23 prohibits traffic in women.

Article 29 (2) prohibits denial of admission into an educational institution maintained by the State or receiving aid out of State funds on ground only of caste.

Article 25 guarantees freedom of religion and its exercise is made available to Dalits.

1 Additional Director, Delhi Judicial Academy

Part IV of the Constitution of Directive Principles fastens duty on the State to render socio-economic and political justice and to protect the under privileged from all forms of exploitation and injustice (Article 38 and Article 46).

"Untouchability Offences Act 1955" was the first enacted Act to address the issue which underwent amendment and was renamed in 1976 as **"The Protection of Civil Rights (PCR) Act"**. Under this Act, 'untouchability' as a result of religious and social disabilities was made punishable. The punishments prescribed under the Act, however, being lesser as compared to the offences defined under the Indian Penal Code, the law could not bring about the desired results to protect the communities from exploitation. Additionally the law and order machinery was neither professionally trained nor socially inclined to implement such social legislation. The need of a more comprehensive Act was felt for the protection of the vulnerable castes and tribes from violence committed against them by other communities.

Thus **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989** was thereafter enacted. The Act was amended by the Amendment Act of 2015, which got the Presidential assent on 01-01-2016 under the name of Scheduled Castes and **Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 Statement of objects and reasons.**

The objectives of the Act emphasise the Legislative intent and a clear attempt in delivering justice to Scheduled Castes and Scheduled Tribes through affirmative action in order to enable the community members to live in society with dignity, to protect their self-esteem and to provide them an atmosphere which lets them live without fear, violence or suppression from the dominant castes. The Preamble of the Act also says that the Act is "to prevent the commission of offences of atrocities against the members of Scheduled Castes and Tribes, to provide the exclusive special courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto."

The provisions of SC/ST Act and Rules broadly cover three different aspects under three categories:

1. The first category contains punitive and procedural provisions. It defines criminal liability for a number of specifically defined acts which have been termed as atrocities. The punitive provisions prescribe extended punitive measures for the offences if committed against the SC/ST community members compared to what is provided under IPC.
2. The second category focuses on rehabilitation prescribing also reliefs and compensation for victims of atrocities.
3. The third category speaks of establishing special authorities for the implementation and monitoring of the Act, including an exclusive Special Court.

Salient features of the Act

The Act covers commission of offences only by specified persons: atrocities can be committed only by non-SCs and non-STs on members of the SC or ST communities. Crimes amongst SCs and STs or between STs and SCs do not come under the purview of this Act.

For an offence to be termed as an atrocity under the Act, the offender has to be identified as belonging to a caste other than any Scheduled Caste or Tribe. There are contradicting

judgments on the time of identification of the accused with some Courts having stated that the identification of caste of offender needs to be at the inception in the complaint itself. The settled law is that non-mentioning of the caste of the offender at the inception would not per se be fatal to the prosecution, however it needs to be established during investigation that the offender belonged to a caste other that SC or ST.

The term 'atrocity' was not defined until the Act was passed by the Parliament in 1989. In law, the Act understands the term to mean an offence punishable under section 3 [Definition Section 2(1)(a)]. Atrocity thus is an expression commonly used to refer to crimes against Scheduled Castes (SCs) and Scheduled Tribes (STs). As per dictionary meaning it is

"the quality of being shockingly cruel and inhumane", as against the term 'crime', which only relates to an act punishable by law. It signifies "crimes which have ingredients of infliction of suffering in one form or the other arising out of strong feelings against member of scheduled caste or tribe".

Section 3 (after the Amendment) identifies several offences under the Act, which were not identified earlier.

To cite a few:

a. tonsuring of head, moustache, or similar acts which are derogatory to the dignity of Dalits and Adivasis; [Section3 (1)(e)].
b. garlanding with chappals; [Section3 (1)(d)].
c. denying access to irrigation facilities or forest rights ; [Section3 (1)(g)].
d. compelling to dispose or carry human or animal carcasses, or to dig graves; [Section3 (1)(i)].
e. using or permitting manual scavenging; [Section3 (1)(j)].
f. dedicating Dalit women as devadasi; [Section3 (1)(k)].
g. abusing in caste name; [Section3 (1)(s)].
h. perpetrating witchcraft atrocities; [Section3 (1)(zb)].
i. imposing social or economic boycott; [Section3 (1)(n)].
j. preventing Dalit and Adivasi candidates from filing of nomination to contest elections; [Section3 (1)(l)(A)].
k. forcing to leave house, village or residence; [Section3 (1)(z)].
l. defiling objects sacred to SCs and STs; [Section3 (1)(t)].
m. touching women or using words, acts or gestures of a sexual nature against women. [Section3 (1)(w)].

The protections under Section 3 can broadly be divided into following heads:

Protection from social disabilities viz denial of access to certain places : common place of burial or cremation ground, bathing ghat, water place, any place of worship, participating in religious ceremony, educational institute, hospital, dispensary, primary health centre, shop or place of public entertainment.

It also prohibits preventing member of SC/ST community from practicing any profession or carrying on any occupation, trade or employment, causing physical harm or

mental agony on allegations of practicing witchcraft or being witch, imposing or threatening to impose social, economic boycott. [section 3 (1) (x)(y)(z)(za);(zb); zc)]

Personal atrocities defined as forceful drinking or eating of inedible or obnoxious substance, dumping excreta, sewage etc, garlanding with footwear, against stripping, tonsuring of head, removing moustache, outrage of modesty, sexual exploitation, injury or annoyance, calling names. 3(1)(a-f, r,s,w) [some of these offences are offences only when they are committed in public view for example insulting and intimidating; abusing using caste names]

Atrocities against properties of SC/ST community members defined under Section 3(1)(f),(g)

Malicious Prosecution: Section 3(1)(p),(q)

Political Disabilities: Section 3(1)(l),(m),(n),(o)

Economic Exploitation: Section 3(1) (h) etc.

Exclusive Special Courts

Section 14 of the amended Act provides for creation of an 'Exclusive Special Court' which has to be a Court of Session to try offences under this Act in each district. The Act before the amendment did not specifically provide for the taking of the cognizance by the Special Court and the courts were of the view that the special courts were only courts of trial *(Gangula Ashok & another Vs State of Andhra Pradesh, Appeal Criminal No. 94 0f 2000 decided on 28/01/2000:2000(1) SCR 468)*. The amendment, however has clarified that the 'Exclusive Special Court' is the court of first instance for all practical purposes including remand and bail. The amended law provides that the Exclusive Special Courts established to look into the cases of atrocities under the Act shall have power to directly take the cognizance of offences. [proviso to Section14 (1)]

The prosecution is also to be conducted by Special Public Prosecutor (section 15).

Investigation

According to Rule 7(1) investigation of an offence committed under the SC/ST Act cannot be carried out by an officer below the rank of Deputy Superintendent of Police (DSP) equivalent to an ACP in metropolitan cities.

The Andhra Pradesh High Court, in *D. Ramlinga Reddy v. State of AP, 1999 (2) ALD 572*, took the position that the provisions of Rule 7 are mandatory and held that investigation under the SC/ST (Prevention of Atrocities) Act has to be carried out by only an officer not below the rank of DSP. It laid down that investigation carried out and charge sheet filed by an incompetent officer is to be quashed. It was so held by Hon'ble Supreme Court also in *Manoj Kumar Giri Vs State of Jharkhand, 2004 Cri.LJ 3434.*

Rights of Victims and Witnesses

'Rights of Victims and Witnesses', is an addition to cover essential rights of the victims of atrocities, placing corresponding duty and responsibility upon the State for making arrangements for their protection. Protection is also to be given to the dependents of victims and witnesses against any kind of intimidation, coercion or inducement or violence or threats

of violence. By way of the Amendment Act, the rights of victims and the witnesses have been introduced in the main Act under Chapter IV A.

The amended Act defines clearly the term 'wilful negligence'. It covers responsibility of public servants at all levels, starting from the registration of complaint. It covers all other aspects of dereliction of duty as well. Section 4 of the Act of 1989 before the amendment of 2015 did not clearly define what constituted 'wilful negligence' of public servants. Now, 'wilful negligence' is defined by listing specific transgressions of law: for example, police officers not putting down accurately in writing the victim's complaint; not reading out to the victims what has been recorded prior to getting their signature; not registering FIR under the Act; not registering it under appropriate sections of the Act; etc. [Section 4]

The victims have been provided a right to timely notice of all the court proceedings including the bail hearings and a duty has been cast upon the Prosecution and the State to inform the victim and his dependents. Their right of active representation has been recognised at all the stages including bail, release, parole, conviction, and sentence.

Provision has been made to protect the identity of the victim and the witnesses.

Section 15 speaks specifically about the rights of the victim and a duty is cast upon the authorities concerned to inform the victims about their rights related to their complaints and the FIRs. [Chapter IV A]

Rehabilitation

According to the Preamble of the SC/ST Act, it is an Act to prevent the commission of atrocities against SC/STs, to provide for Exclusive Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences. The Act contains affirmative measures to uproot cause of atrocities. The Act of 1989 widely addressed the problem regarding the dispensation of justice, but did not deal with the issue of 'rehabilitation' of the vulnerable castes and tribes, who were victimised by the dominant castes. There was mention of rehabilitation under Section 21(2)(iii), but there were no provision addressing the same.

The Act mentions the special measures to be taken while appointing the officers and other staff in an area prone to caste atrocities. It says that persons with the right aptitude and understanding of the problems of the SCs and STs should be appointed in the areas and the persons belonging to these communities should get proper representation in such postings. [Rule 13]

The Amendment Act of 2015 has made interim measures vide Section 15A of providing immediate monetary relief; medical assistance; food, clothing, shelter, daily allowances; maintenance to the victims of atrocities. Socio economic support and relocation of the victims of atrocities has been provided to ensure complete rehabilitation of such victims. The order for such reliefs can be passed by the Exclusive Special Court.

Dalits in other religions not covered

This Act is applicable only to those communities that are listed in the government Scheduled Caste or Scheduled Tribe lists. Those who are left out of the government list and suffer from caste based discrimination (CBD) do not come under the purview of the Act.

Effect of Migration

A caste or a tribe is notified with reference to a State or Union territory. A person born in a State gets certificate of SC/ST if his/her father belongs to a specified caste/tribe in that State as SC/ST. On migration to another State, they lose their SC/ST status for beneficiary reliefs viz admission in educational institutes, reservation in government employment etc. However, the protection under the SC/ST Act stays with a person even in the event of his/her migration from the State of origin. Once a person is notified as SC/ST in any State, he gets the protection under the SCs and STs (Prevention of Atrocities) Act, 1989 as amended by the Act of 2015, throughout the country, irrespective of whether the particular caste or tribe is notified in the State/UT where the offence is committed.

Distinct Legal Provisions

Identifying Offender: The criminal liability can only be established if the offence is committed by a person who is not a member of a Scheduled Caste or a Scheduled Tribe against a person who belongs to a Scheduled Caste or a Scheduled Tribe.

Anticipatory Bail: Section 18 of the Act says that provisions of section 438 Cr.P.C. (anticipatory bail) shall not apply to the cases under this Act. The courts, however, have held that there is no blanket bar against the grant of anticipatory bail though the same cannot be brushed aside lightly.

In *Vilas Pandurang Patil Vs State of Maharashtra, (2012) 8 SCC795*, the Hon'ble Supreme Court held that the bar (under section 18) is absolute unless it can be shown that there is no specific averment in the complaint about the uttering of caste name or remark. It was also held that it (bar) cannot be easily brushed aside by elaborate discussion on evidence. The Court, however, also held that a duty is cast upon the court to verify averments made in the complaint and to find out whether any offence under section 3(1) of SC/ST Act has been prima facie made out.

In a judgment pronounced on 20.3.2018, the Supreme Court in *Dr. Subhash Kashinath Mahajan Vs The State of Maharashtra and Anr., (Criminal Appeal No.416 of 2018)* has held as under:

> *"ii) There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide.…*
>
> *iii) In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention.*
>
> *iv) To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.*
>
> *v) Any violation of direction (iii) or (iv) will be actionable by way of*

disciplinary action as well as contempt."

It has been clarified that the said directions are prospective.

The order of bail (refusal or grant) by the Court is appealable under Section 378 of Cr.P.C notwithstanding Section 378(3) Cr.P.C. Impact of amendment is that an appeal against an order shall be entertained by the High Court mandatorily.

Common Intention: Section 34 cannot to be applied in a blanket manner. In *Manjeet Singh & others Vs State of Delhi, Bail application No. 631/2013 it* was held that section 34 cannot be applied to a case under section 3 (1) (x) [equivalent to Section 3(1)(r&s) of amended Act] of the Act and the persons against whom there was no specific allegation of having uttered the caste related words were granted bail even though they were present at the time when the offence was committed by the main accused.

Mens Rea: The provisions of the Act being very stringent regarding bail and presumptions, there is always a need to put a check on misuse of the Act to the prejudice of innocent persons. The courts have to rule out the possibility of vendetta or false prosecution at the hands of a cantankerous complainant. The Hon'ble Supreme Court in *Masumaha Hasanasha Musalman v State of Maharshtra, AIR 2000 SC 1876* held that merely because the victim belongs to Scheduled Caste or Scheduled Tribe, the same cannot be the sole ground for prosecution, for the reason that the offence mentioned under the said Act, 1989 should be committed against him on the basis of the fact that such a person belongs to a Scheduled Caste or Scheduled Tribe. In absence of such ingredient, no offence under section 3 (2) (v) of the Act is made out.

Considering the effect of calling a person by a caste name, the Hon'ble Supreme Court in *Swaran Singh & Ors. Vs. State thr' Standing Counsel & Anr., (2008) 12 SCR 132* observed as under:

> *"Today, the word 'Chamar' is often used by people belonging to the so-called upper castes or even by OBCs as a word of insult, abuse and derision. Calling a person 'Chamar' today is nowadays an abusive language and is highly offensive.*
>
> *In fact, the word 'Chamar' when used today is not normally used to denote a caste but to intentionally insult and humiliate someone.*
>
> *It may be mentioned that when we interpret section 3 (1) (x) of the Act we have to see the purpose for which the Act was enacted. It was obviously made to prevent indignities, humiliation and harassment to the members of SC/ST community, as is evident from the Statement of Objects & Reasons of the Act. Hence, while interpreting section 3 (1) (x) of the Act, we have to take into account the popular meaning of the word 'Chamar' which it has acquired by usage, and not the etymological meaning. If we go by the etymological meaning, we may frustrate the very object of the Act, and hence that would not be a correct manner of interpretation.*
>
> *This is the age of democracy and equality. No people or community should be today insulted or looked down upon, and nobody's feelings should be hurt. This is also the spirit of our Constitution and is part of*

its basic features. Hence, in our opinion, the so-called upper castes and OBCs should not use the word 'Chamar' when addressing a member of the Scheduled Caste, even if that person in fact belongs to the 'Chamar' caste, because use of such a word will hurt his feelings. In such a country like ours with so much diversity – so many religions, castes, ethnic and lingual groups, etc. – all communities and groups must be treated with respect, and no one should be looked down upon as an inferior. That is the only way we can keep our country united.

In our opinion, calling a member of the Scheduled Caste 'Chamar' with intent to insult or humiliate him in a place within public view is certainly an offence under section 3 (1) (x) of the Act. Whether there was intent to insult or humiliate by using the word 'Chamar' will of course depend on the context in which it was used.''

The Supreme Court thus held that the use of caste name in today's world is generally more as a mark of intending insult on somebody of that caste yet the prosecution cannot do away with the responsibility of establishing the intent on part of the accused while he uses the word against a member of the SC/ST community.

No benefit of Probation of Offenders Act is available on conviction. (Section 19).

There were provisions for presumption of abetment. After the amendment of the Act there has been addition to presumption of the offences.

Section 8 (ii) (c) as amended says: "(where) the accused was having personal knowledge of the victim or his family, the court shall presume that the accused was aware of the caste or tribal identity of the victim unless the contrary is proved".

Legal aid: Role of Legal Aid Lawyers in the cases under the Act

Legal aid is available for all victims belonging to the SC/ST community under Section 12 of the Legal Services Authorities Act, 1987 regardless of financial status against the general rule where legal aid depends on the financial status of the person. The Supreme Court in its judgment dated 15.12.2016 in *National Campaign on Dalit Human Rights & Ors. v. Union of India and others, Writ Petition (Civil) No.140 of 2006* called upon National Legal Services Authority to formulate appropriate schemes to spread awareness and provide free legal aid to members of the Scheduled Castes and Scheduled Tribes.

The lawyers will be required on either side- to assist the victims as also to defend the accused under the Act. The cases primarily will be State cases but complaint cases can also be filed under the Act. The lawyers will be required to assist the victims under the Act who are not acquainted with the special provisions of the Act.

The Amendment Act has introduced a wide range of protection rights for the victims. The Legal Aid Lawyers, therefore, will have to:

1. assist the victims at the stage of:
   a) bail
   b) Charge
   c) throughout the trial

2. apply to the court to summon parties for production of any documents or material, witnesses or to examine any witness present in the court;

3. argue the matter and file written arguments at every stage;

4. apply to the court for protection of victim, his dependents and witnesses;

5. apply to the court for travelling and maintenance expenses of the victim during the trial, inquiry and investigation;

6. apply to the court for socio-economic rehabilitation during investigation, inquiry and trial;

7. apply to the court for relocation of the victims, his dependents and witnesses as per the requirement.

8. assist the complainant to file a complaint before SC/ST Commission or before the court, if the police refuses to register the complaint.

For an accused under the SC/ST Act the legal aid lawyer shall provide assistance like to any other accused defending the case keeping view in the special provisions and judgments referred herein above.

A COMPARATIVE CHART OF THE OFFENCES UNDER IPC AND CORRESPONDING PROVISIONS UNDER SC/ST ACT.

Offences under IPC	Corresponding offences under SC/ST Act
Preventing Public servant from discharge of his duties (section 186)	Forces, intimidates or obstructs a member of a Scheduled Caste or Scheduled Tribe, who is a member or a Chairperson or a holder of any other office of a Panchayat under Part IX of the Constitution or a Municipality under Part IX A of the Constitution, from performing their normal duties and functions [Section 1 (i)]
Forgery (section 463 IPC)	Any person, who wrongfully occupies or cultivates any land, owned by, or in the possession of or allotted to, or notified by any competent authority to be allotted to a member of SC/ST community or gets such land transferred by fabricating records of such land [section 3 (1) (g) Explanation (D)]
False information, with intent to cause public servant to use his lawful power to the injury of another person. (section 182 IPC)	Giving of false or frivolous information to the public servant and thereby causing such public servant to use his lawful power to the injury or annoyance of a member of a Scheduled Caste or a Scheduled Tribe [Section 3 (1) (q)]
Sexual harassment: physical contact and advances involving unwelcome and explicit sexual overtures [section 354 A (i)]	Intentional touching of a woman belonging to SC/ST community when such act of touching is of a sexual nature [Section 3 (1) (w) (i)]

Sexual harassment: making sexually coloured remarks (section 354A (iv) & section 509 IPC	Uses words, acts or gestures of a sexual nature [Section 3 (1) (w) (ii)]
Public nuisance: illegal omission which causes common injury, danger or annoyance against the public right (section 268 IPC)	Dumping of excreta, sewage, carcasses or any other obnoxious substance in premises or entrance of premise occupied by a person of SC/ST community [Section 3 (1) (b)] or in the neighbourhood of a person of SC/ST community. [Section 3 (1) (c)]
Unlawful Compulsory Labour: [Section 374 IPC]	Making a member of SC/ST community to do begar or other form of forced or bonded labour other than compulsory service for public purposes imposed by the Government [Section 3 (1)(H)]
Undue influence at Elections Voluntary interference with the free exercise of any electoral rights including threatening any candidate or voter [Section 171C IPC]	Forcing or intimidating or preventing a member of SC/ST community to vote or not to vote for a particular candidate or to vote in a manner other than provided under the law [Section 3 (1) (l) (A)] Not to file nomination as a candidate or withdraw such nomination [Section 3 (1) (l) (B)]
Fouling water of public spring or reservoir. [section 277 IPC]	Corrupting or fouling the water of any spring, reservoir or any other source used by persons of SC/ST community, so as to render it less fit for the purpose for which it is ordinarily used. [Section 3 (1) (x)]
Injuring or defiling place of worship: whoever destroys, damages, or defiles any place of worship or object held sacred by any class of persons. [Section 295 IPC]	Destroys, damages or defiles any object generally known to be held sacred or in high esteem by members of SC/ST community [Section 3 (1) (t),(u),(v)]
Dishonestly making false case in the court. [Section 209 IPC] Instituting false criminal proceeding against anyone. [Section 211 IPC]	Instituting false, malicious or vexatious suit or criminal or other legal proceeding against a member of SC/ST community. [Section 3 (1) (p)]

In addition to the above, there are several offences under IPC which are not defined under the SC/ST Act. The offences under the Act are in addition to and not in suppression of the offences provided under IPC or other laws. Required provisions of IPC are, therefore, to be invoked alongwith the specific provisions under the Act, wherever necessary.

NATIONAL LEGAL SERVICES AUTHORITY

12/11, JAM NAGAR HOUSE, SHAHJAHAN ROAD, NEW DELHI - 110 011
TEL.: 011-23382778, FAX: 011-23382121
E-mail: nalsa-dla@nic.in, Website: www.nalsa.gov.in