

## CONTENTS

### PART -I

#### **Hindu Law**

1.	Introduction	1
2.	Sources of Hindu Law	2
3.	Salient Features of the Hindu Marriage Act,1955	6
4.	Essentials of a Valid Hindu Marriage	10
5.	Restitution of Conjugal Rights	20
6.	Judicial Separation	23
7.	Nullity of Marriage	24
8.	Divorce	27
9.	Divorce by Mutual Consent	37
10.	Maintenance Pendente Lite and Permanent Alimony	39
11.	Adoption	41
12.	Wife's Right of Maintenance and Separate Residence	48
13.	Widow's Claim for Maintenance from Father -in-law	49
14.	Maintenance of Children and Aged Parents	50
15.	Guardians and their Powers	50

### PART -II

#### **Christian Law**

1.	Law of Christian Marriage	54
2.	Law of Matrimonial Reliefs	56

### PART -III

#### **Muslim Law**

1.	Introduction	68
2.	Essentials of Valid Marriage	73
3.	Kinds of Marriage	81
4.	Iddat	82
5.	Khilwat -us- sahiha	84
6.	Muta Marriage	85
7.	Presumption of Marriage	86
8.	Restitution of Conjugal Rights	88
9.	Jactitation of Marriage	90
10.	Dower or Mahar	90
11.	Talaq	97
12.	The Dissolution of Muslim Marriage Act,1939	102
13.	Apostasy	104
14.	Parentage	105
15.	Acknowledgment of Paternity <small>(A Division of Law Books Centre)</small>	106
16.	Custody of Child	108
17.	Maintenance	112

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**PART - IV**  
**The Special Marriage Act, 1954**

1.	Essentials of a Valid Marriage	117
2.	Matrimonial Reliefs	119

**PART - V**  
**The Family Courts Act, 1984**

1.	Introduction	121
2.	Establishment of Family Courts	121
	<b>Solved Problems</b>	<b>125 - 129</b>

Notes On

# Family Law - I

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## PART I HINDU LAW

### Topic - I Introduction

Hindu law is considered to be one of the most ancient systems of law known to the world. It is believed that the Hindu law is of divine origin. Hindu law is a personal law. It is not a *lex - loci* (law of the land). The laws which are applicable in a territory to all persons irrespective of their caste, creed or race and religion are *lex loci*. The Indian Contract Act, the Partnership Act, the Sale of Goods Act etc. are examples of *lex loci*. The Laws which are applicable only to persons of a particular religion and not to all are personal laws. The Hindu Law, the Muslim Law, the Christian Law etc. are examples of personal laws. The Hindu law is not applicable to all persons living in India. It is applicable only to Hindus. Thus it is a personal law.

Hindu law is applicable to the personal and family matters of Hindus

such as marriage, divorce, maintenance, adoption, minority and guardianship, rights of a member of joint family, rights and duties of a Karta of a Joint Family, pious obligation of sons for the debts of the father, alienation of family property, partition of joint family property and succession.

## **Topic - II**

### **What are the sources of Hindu Law ?**

The sources of law refer to the materials from which a person can ascertain law applicable to a particular situation. The following are the sources of Hindu law.

#### **1. Vedas ( Sruti)**

The Vedas are the primary and paramount source of Hindu law. There are four Vedas. Rigveda, Yajurveda, Samaveda and Atharvaveda are the four vedas. It is believed that the vedas contain the very words of God. Vedas are also known as Sruti.

#### **2. Smritis ( Dharma Sutras and Dharma Sastras)**

The word 'Smriti' means that which is remembered. Smritis constitute the foundation of Hindu law. Smritis are considered to be of divine origin though they are recorded in the language of inspired men. Smritis are divisible into two classes. They are (1) Dharma Sutras and (2) Dharma Sastras.

##### **Dharma Sutras**

Dharmasutras are written in prose. The main Dharma Sutrakars are Gautama, Baudhayana, Vāshishtha and Vishnu. Dharma Sutras deal with duties of men in their various relations. Sutras are anterior to Sastras. Dharma Sutras supplied the ground work for the later Dharma Sastras.

##### **Dharma Sastras**

Dharma Sastras are written in verse. The most eminent authors of Dharma Sastras are Manu, Yajnavalkya and Narada.

Manusmriti was compiled in about 200 BC. Manusmriti was always treated as of "paramount authority". Manusmriti is divided into twelve chapters. In the eighth Chapter rules of law on eighteen subjects such as recovery of debts, deposits and pledge, disputes between master and servant, defamation, theft etc., are stated. Manu Smriti dealt with both Civil and Criminal law.

Yajnavalkya Smriti might have been compiled in about the first century after Christ. Yajnavalkia Smriti dealt with civil and criminal law and rules of procedure to be followed in civil disputes.

Narada Smriti was compiled in about A.D.200. Narada Smriti dealt only with Vyavahara. An outstanding feature of Narada smriti is that it lays down a series of rules relating to pleadings, evidence and procedure. Narada Smriti recognised that the King made laws could override any rule of law laid down in the Smritis.

### (3) Nibandhas ( Mitakshara and Dayabhaka)

The rules of law enunciated in the Smritis were not agreed with one another in all respects. This resulted in conflict and ultimately led to several interpretations upon them. This in turn gave rise to commentaries and digests called Nibandhas. Nibandhas are nothing but the interpretations put on the smritis by various commentators. The most important Nibandhas are: (1) Mitakshara and (2) Dayabhaka.

The Mitakshara is a running commentary on the Yajnavalkia Smriti. It has been written in the Eleventh Century by Vijnaneswara. The Mitakshara is considered as a standard treatise having the highest authority on all topics under Hindu law. The Mitakshara is followed throughout India except Bengal.

The Dhayabaga is written by Jimutavahana who lived in the Twelfth Century. The Dhayabaga is not a commentary on any particular Smriti. It

is a digest of all the Smritis. The Dhayabhaga was applicable only in the province of Bengal.

The principles of Mitakshara and Dhayabhaga are still applicable on those areas where there is no legislative enactment.

#### (4) Custom and Usage

Custom or usage is a very important source of Hindu Law. Custom may be defined as a habitual course of conduct generally followed in a community. According to Austin, Custom is a rule of conduct which the people observe spontaneously and not in pursuance of law settled by a political superior. Custom is a particular usage which has existed from time immemorial and has obtained the force of law in a particular locality.

Custom modifies and supplements the written law. If there is conflict between the text of the smritis and a custom, the custom will override the text.

In **Collector of Madura v. Mootoo Ramalinga** (1868 12 MIA 397), the Privy Council held that clear proof of usage or custom will outweigh the written texts of law.

Section 3 (a) of the Hindu Marriage Act, 1955 defines the expression "custom" and "usage" as follows.

"The expression custom and usage signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable to a family it has not been discontinued by the family."

An analysis of the above stated definition bring to light the following

points:

- (a) Custom or Usage is a rule which has been continuously and uniformly observed for a long time among the Hindus in any local area, tribe , community, group or family.
- (b) The rule should be certain.
- (c) The rule should not be unreasonable.
- (d) The rule should not be opposed to public policy.
- (e) If the rule is applicable only to a family, it should not be discontinued by the family.

In **Baluswamy Reddiar v. Balakrishna** ( AIR 1957 Mad. 9), the Court held that a custom which was prevalent among the Reddiar of Thinnaveli District of Madras State permitting one to marry his daughter's daughter was unreasonable and opposed to public policy.

In **Surajmani Stella Kujur v. Durga Charan Hansdah** (2001) 3 SCC 13, the Supreme Court held that for custom to have the colour of a rule of law, it is necessary to prove that such custom is ancient, certain and reasonable.

#### **(5) Judicial Precedents**

Judicial Precedents or previous decisions of superior courts become source of law for future cases. The decisions of Supreme Court of India is binding on all courts in India including the High Courts. The decisions of High Courts are binding on the subordinate courts.

#### **(6) Legislations**

Legislations is the most important modern source of Hindu Law. Several enactments have been passed by the Parliament to regulate marriage, adoption, maintenance and the like among Hindus. The Hindu marriage Act, 1955, the Hindu Succession Act,1956, the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoption and Maintenance Act, 1956 are examples of such legislations.

### **Topic -III**

## **What are the saient features of the Hindu Marriage Act,1955 ?**

The Hindu Marriage Act, 1955 is enacted to amend and codify the law relating to marriage among Hindus. The following are the salient features of the Hindu Marriage Act, 1955

1. The Hindu Marriage Act,1955 was enacted by the Parliament.
2. The Act received the assent of the President of India on 18-05-1955.
3. The Act came into force on 18-05-1955.
4. The Act extends to the whole of India except the State of Jammu and Kashmir.
5. The Act applies to the following persons:
  - (a) To any person who is a Hindu by religion.
  - (b) To a Virashaiva, a Lingayat or a follower of the Brahmo Samaj or Arya Samaj.
  - (c) To any person who is a Buddhist, Jaina or Sikh by religion.
  - (d) To any other person domiciled in the territories to which the Act extends and who is not a Muslim, Christian, Parsi or Jew by religion.

The following persons are Hindus, Buddhists, Jains or Sikhs by religion, and the Hindu Marriage Act,1955 is applicable to them.

- (i) Any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jain or Sikhs by religion.
- (ii) Any child, legitimate or illegitimate, one of whose parents is a

Hindu, Buddhist, Jain or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged.

(iii) Any person who is a convert or re-convert to the Hindu, Buddhist or Jaina or Sikh religion.

In **Perumal v. Ponnu Swami** (AIR 1971 SC 2352), the Supreme Court held that a person may also become Hindu if, after expressing an intention, he lives as a Hindu and the community accepts him as a Hindu.

In **Mohan Das v. Devaswom Board** (1975 KLT 55), Yesudas, a catholic Christian by birth and a famous play back singer, used to give devotional music in a Hindu Temple and worshiped there like a Hindu. He had also filed a declaration, "I declare that I am a follower of Hindu faith". On these facts, the court held that, Yesudas was a Hindu and could not be prevented from entering the temple.

In **Prabhakaran Nair v. Preethy P. Nair** (2001 (3) KLT 244), the Kerala High Court held that according to Explanation (b) to section 2(1) of the Hindu Succession Act, 1956, the Hindu Adoption and Maintenance Act, 1956 and the Hindu Marriage Act, 1955 and also according to Explanation (ii) to Section 3(1) of the Hindu Minority and Guardianship Act, 1956, any child legitimate or illegitimate, one of whose parents is a Hindu by religion and who is brought up as a Hindu is a Hindu. The position that emerges as a result of the qualifications of the Hindu laws is that a person is a Hindu, even though one of his parents may not be a Hindu.

In **M.Chandra v. M. Thangamuthu** ( 2010 ) 9 SCC 712, the Supreme Court observed as follows:

Hinduism is not a religion with one God or one Holy scripture. The practices of Hindus vary from region to region, place to place. Hinduism does not have a single founder, a single book, a single church or even a single way of life. Hinduism is not the caste system and its hierarchies, though the system is a part of its social arrangement, based on the division

of labour. Hinduism does not preach or uphold untouchability, though Hindu society has practised it, firstly due to reasons of public health and later, due to prejudices. *The determination of the religious acceptance of a person must not be made on the basis of his name or his birth. When a person intends to profess Hinduism, and he does all that is required by the practices of Hinduism in the religion or by the caste to which he belongs, and he is accepted as a Hindu by all persons around him, he is said to be a Hindu.*

6. ~~The Act will also apply to a Hindu who is outside the territory of India, if he or she is a Hindu domiciled in India. The word "domicile" means 'permanent residence'.~~

~~In Ramesh Kumar v. Kannapuram Grama Panchayat ( 1997 (2) KLT 134), the petitioner, a Hindu domiciled in India, married a Japanese lady who is a Buddhist. The petitioner applied to the Kannapuram Grama Panchayat for registering their marriage under section 8 of the Hindu Marriage Act, 1955. The Panchayat refused to register the marriage. The petitioner challenged the decision of the Panchayat before the High Court of Kerala. The Court held that the Act will apply to a Hindu who is outside the territory of India only if he or she is a Hindu domiciled in India. Only those Hindus having permanent residence in India will be covered by the Act. The petitioner's wife who is domiciled in Japan is not covered by the Act and their marriage is not registerable under the Act.~~

In Soudur Gopal v. Sondur Rajini (2013) 7 SCC 426, the Supreme Court held that the Hindu Marriage Act, 1955 applies to Hindus domiciled in India even if they reside outside India. The extra-territorial application of is saved not because of the nexus with Hindus but Hindus domiciled in India. The Hindu Marriage Act will apply to a Hindu who is residing outside the territory of India only if such a Hindu is **domiciled** in the territory of India.

7. ~~The Act provides for essential conditions for the validity of a Hindu marriage. ( Sections 5 and 7).~~

8. The Act provides for registration of Hindu Marriages (Section 8)
9. The Act provides for Restitution of Conjugal Rights ( Section 9)
10. The Act provides the grounds for Judicial separation ( Section 10)
11. The Act provides for annulment of a void or voidable marriage by a decree of nullity ( Sections 11 and 12)
12. The Act provides for the grounds of divorce ( Section 13)
13. The Act provides for divorce by mutual consent ( Section 13 B)
14. The Act confers legitimacy to children born in void and voidable marriage ( Section 16)
15. The Act prescribes punishment for violation of essential conditions of a Hindu Marriage ( Section 18)
16. The Act provides for maintenance *pendente lit* and permanent alimony ( Sections 24 and 25)

## **Topic - IV**

**"Hindu Marriage is a Sacrament" Discuss the correctness of this Statement**

**or**

**What are the Essentials of a Valid Hindu Marriage ?**

The law relating to marriage among Hindus has been codified and enacted in 1955. The Parliament enacted the Hindu Marriage Act, 1955 which contains the law relating to marriage among Hindus, restitution of conjugal rights, judicial separation, divorce, annulment of marriage, permanent alimony, and maintenance *pendente lit.*

Before the Hindu Marriage Act, 1955 was enacted, the law relating to marriage was contained in the *dharma sastra* works, commentaries and digests, custom, statutes, and decisions of courts of law. The Hindu Marriage Act, 1955 superceded the previous laws relating to Hindu marriage. However, the Hindu Marriage Act itself has recognised certain customary principles to regulate the marriage.

### **Nature of Hindu Marriage**

Hindus consider marriage as a *samskara* of high sacrament. There are 64 *samskaras* prescribed by the *Sastras* beginning from '*garbhadhana*', ending with "*anthyeshtha*".

***Vivaha*** or Marriage is one of the *samskaras*. Hindu religion considered marriage as a duty for the purpose of purifying the body from inherited taint. According to the Vedas, a marriage is a union of flesh with flesh and bone with bone.

Under the old Hindu law, marriage was considered to be an indissoluble union and thus divorce was not recognised. It was considered to be a permanent and eternal union. It was also considered to be a holy union.

After the passing of the Hindu Marriage Act, 1955, there can be a di-

orce of Hindu marriage and thus a Hindu marriage, at present, is not a permanent and indissoluble union. In 1856, the Hindu Widows Remarriage Act was passed and that destroyed the characteristic of eternal union of the Hindu Marriage. It recognised widow re-marriage. Even now a Hindu Marriage is considered to be a holy union. A Hindu Marriage will be valid only if it is solemnized in accordance with the customary ceremony. Thus it is a holy union. At present, Hindu Marriage is not only a sacrament but also a civil contract.

### Objects of Marriage

According to Hindus, there are three objects of marriage. They are -

- I) *Dharma Sampathi*
- II) *Praja Sampathi*
- III) *Rathi Sukham*

#### I) *Dharma Sampathi*

Vedas considered performance of "Yajnas" or sacrifices as one of the highest act of 'dharma'. A Hindu could not perform a Yajna without the concurrence of his wife. An unmarried Hindu could not perform any sacrifice. Hence marriage became absolutely essential.

#### II) *Praja Sampathi*

According to Hindu concept a person who dies without a son has no salvation and he would be suffering in the hell called 'put'. The son saves the father from going to the hell called 'put'. The son is called *putra* which means the savior from the hell called 'put'. Thus marriage has an important object of having a son.

#### III) *Rathi Sukham*

The ordinary pleasure of sexual intercourse is considered to be the last object of marriage.

### Forms of Marriage

There were eight forms of marriage under the old Hindu law. They are the following:

- |             |                 |
|-------------|-----------------|
| 1) Brahma   | 2) Daiva        |
| 3) Arsha    | 4) Praja patrya |
| 5) Asura    | 6) Gandharva    |
| 7) Rakshasa | 8) Paisachika   |

#### 1) Brahma

In this form of marriage, the father gives the bride in marriage without receiving any consideration from the bridegroom who is learned in the vedas and of good character.

#### 2) Daiva

In this form, the bride is gifted to the bridegroom, who officiates as the priest in the sacrifice. The girl is given to the priest in lieu of 'dakshina'.

#### 3) Arsha

In this form the bride groom gives a pair of bull or cow to the bride's father and takes the girl as wife.

#### 4) Praja Patrya

In this form of marriage, the father gave the girl in marriage saying, "You both live in the path of Dharma".

#### 5) Asura

In this form the father of girl receives consideration called "Shulka" or "Bride's price" from the bridegroom for giving his daughter in marriage.

#### 6) Gandharva

It is a love marriage. In this form of marriage the bride and bridegroom mutually consent and marry each other.

7) Rakshasa

In this form, the girl is abducted without considering the resistance offered by her or her relatives. The marriage is effected by force.

8) Paisachika

It is a form of marriage between a girl and a man who has committed rape while she was sleeping.

The Hindu Marriage Act has not specifically recognised any of the eight forms of ancient marriage.

Essentials of a Valid Marriage under the old Hindu Law

Under the old Hindu law, for a marriage to be valid, the following three conditions were required to be fulfilled.

1. The parties to the marriage should belong to the same caste. By virtue of the Hindu Marriage Validity Act, 1949 and Hindu Marriage Act, 1955, no marriage will be invalid only for the reason that the parties belonged to different castes.

2. Under the old Hindu law, performance of marriage ceremony was most essential. *Vivaha homa* and *saptapati* were the most essential ceremonies of a valid Hindu marriage. By virtue of Section 7 of Hindu Marriage Act, 1955, the marriage is to be solemnized in accordance with customary ceremony for its validity.

3. The parties to the marriage should not come within the degrees of prohibited relationship. Under the Old Hindu law and Hindu Marriage Act, 1955, the parties to the marriage should not be sapindas or they should not come within the degrees of prohibited relationship.

## Essentials of a Valid Marriage under the Hindu Marriage Act, 1955

Sections 5 and 7 of the Hindu Marriage Act, 1955 deal with the essentials of a valid Hindu Marriage. The following are the essential conditions for the validity of a marriage.

### **1) Both the Parties to the Marriage should be Hindus**

By virtue of section 5 of the Hindu Marriage Act, a marriage will be valid only if both the parties to the marriage are Hindus. If one of the parties to the marriage is a Christian or Muslim, the marriage will not be a valid Hindu marriage, under the Hindu Marriage Act. In other words, if both the parties to the marriage are not Hindus, a valid marriage cannot be solemnized under the Hindu Marriage Act, 1955.

In **Yamunabai Anantrao Adhav v. Anantrao Shivaram Adhav** ( AIR 1988 SC 644), the Apex Court pointed out that under section 5 of the Hindu Marriage Act a marriage can be solemnized only between two Hindus.

In **Sangeeta v. Preston Gomes** (2011 (1) KHC 120 ) it was held that mere fact that the parties had solemnised marriage as per the Hindu rites and ceremonies will not enable them to apply for divorce under the Hindu Marriage Act. The mandate of law is that marriage has to take place between two Hindus.

### **2) The Marriage should be Monogamous**

By virtue of section 5(i) of the Act, a party to the marriage should not have a living spouse at the time of Marriage.

By section 17 of the Act, any marriage between two Hindus is void if at the date of such marriage either party had a husband or wife living. Further the person who solemnizes a second marriage during the subsistence of first marriage is liable to be prosecuted and punished as per the provisions of sections 494 and 495 of the Indian Penal Code, 1860.

If at the time of marriage either party has a living spouse, the marriage is void. Thus a bigamous marriage is null and void.

After the dissolution of the first marriage by death or divorce, one can validly marry second time.

Under the Hindu Law a person can validly marry if he or she is either unmarried or divorced or a widow or a widower.

3) **The parties to the marriage should not suffer from unsoundness of mind, mental disorder or insanity**

By virtue of section 5(ii) (a), a party to the marriage should be of capable of giving valid consent to the marriage. If a party is incapable of giving valid consent to the marriage in consequence of unsoundness of mind, the marriage is **voidable** at the option of the other party.

By virtue of section 5 (ii) (b), if a party, though capable of giving valid consent, has been suffering from mental disorder of such a kind as to be unfit for marriage and procreation of children, the marriage is **voidable** at the option of the other party.

By virtue of section 5 (ii) (c) if a party has been subject to recurrent attacks of insanity, the marriage is **voidable** at the option of the other party.

It is to be noted that section 5(ii) (c) of the Hindu Marriage Act, 1955 has been amended by the Marriage Laws (Amendment) Act, 1999 and the word 'epilepsy' is omitted. The result is that at present even if a party to the marriage is subject to recurrent attacks of epilepsy, the marriage is valid and the other party cannot seek for nullity of marriage.

**Alka Sharma v Chandra Sharma (AIR 1991 MP 205)**

On the very first night of marriage the wife was so cold, frigid and nervous. She could not co-operate in performing the sexual act. She was

unable to properly handle domestic appliances in the kitchen. She was unresponsive to the needs of family members and could not explain her conduct of urinating in the varandah in the presence of all the family members. The husband filed a petition for a decree of nullity of Marriage. The court passed a decree nullifying the marriage.

4) **The Parties to the marriage should have attained the prescribed age**

By virtue of section 5(iii) of the Act, at the time of marriage, the bridegroom must have completed the age of 21 years and the bride 18 years. A marriage solemnized in violation of this condition is neither void nor voidable. However, by virtue of section 18 of the Act, every person who procures such a marriage is liable to be punished with rigorous imprisonment which may extend to two years or with fine which may extend up to one lakh rupees or with both.

**P. Venkata Ramana v State ( AIR 1977 AP 43)**

The court held that a marriage solemnized in violation of the requirement as to age is neither void nor voidable. But the contravention of the condition is punishable under section 18 of the Act.

If a girl is given in marriage before attaining the age of 15 years, she has a *right of repudiation* of such marriage. She should exercise her right before attaining the age of eighteen years. Thereafter she can file a petition for divorce under Section 13 (1A) (iv) of the Act.

4) **The parties should not come within the degrees of prohibited relationship**

By virtue of section 5(iv) of the Act, the parties to the marriage should not come within the degrees of prohibited relationship.

Two persons are said to be within the degrees of prohibited relationship-

- i) If one is a lineal ascendant of the other.
- ii) If one was the wife or husband of a lineal ascendants or

descendant of the other.

- III) If one was the wife of the brother or of the father's or mother's brother or of the grand father's or grand mother's brother of the other.
- IV) If the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of sisters.

A Marriage between two persons who come within the degrees of prohibited relationship shall be void. However, if there is a valid custom or usage governing both the parties allows they can marry even though they come within the degrees of prohibited relationship. All over India, there are such custom which validate marriage between persons who come within the degrees of prohibited relationship.

#### Examples

- 1) Marriage between children of brother and sister is common among the Marumakathayem of Kerala.
- 2) In some parts of Tamil Nadu, Marriage between a person and his eldest sister's daughter is common.

Here the parties though come within the degrees of prohibited relationship, they can validly marry by virtue of custom or usage. It is essential that the custom or usage should be certain, reasonable and not opposed to public policy.

#### Balu Swami Reddiar v Balakrishna (AIR 1957 Mad 9)

In this case the court held that a custom which was prevalent among the Reddiar of Thinnalveli district of Madras State permitting one to marry his daughter's daughter was unreasonable and opposed to public policy.

A marriage solemnized between the parties who come within the degrees of prohibited relationship is null and void and, by virtue of section 18, the parties of such marriage are liable to be punished with simple imprisonment for a period of one month or fine of Rs. 1000/- or with both.

**5. The parties to the marriage should not be related to each other as Sapindas**

By virtue of section 5(v) of the Act, a marriage shall be void if it is solemnized between parties who are related to each other as 'Sapindas'. The term 'pinda' has two meanings. The popular meaning is the 'ball of rice' offered to the deceased ancestor in a *sradha*. The other meaning of pinda is 'particle of body'. A man is prohibited from marrying a girl who has got the same particle in her body. In other words the husband and wife should not have the same blood in them.

Though a marriage between sapindas is void, if there is a valid custom or usage allowing such marriage, there can be a valid marriage.

A marriage between persons who are sapindas shall be null and void unless custom allows such marriage and, by virtue of section 18, the parties to the marriage are liable to be punished with simple imprisonment for a term of one month or with fine of Rs. 1000/- or with both.

**6. The Marriage should be solemnized in accordance with the customary rites and ceremonies**

By virtue of section 7 of the Act, in order to be a valid Hindu marriage, it should be solemnized in accordance with the customary rites and ceremonies of either party to the marriage. If such rites and ceremonies include *saptapadi*, the marriage becomes complete and binding when the seventh step is taken.

**Bibba v Ramkali (AIR 1982 All 248)**

The Court held that merely going through certain ceremonies with the intention that the parties to be taken as married will not make them ceremonies prescribed by law.

Ceremonies vary according to custom. The presentation of a pair of cloth by the bridegroom to the bride (*pudava koda*) is an important custom-

ary rite among the Nair caste in Kerala. Tying of a sacred thread around the neck of the bride (Mangalya Sutra or tali) is another rite.

### **Garja Singh v Surjith Kaur (AIR 1991P&H 177)**

The Court held that a marriage will be valid only if the ceremony through which it is solemnized is sanctioned by the religion of either party as customary ceremony.

Merely going through some ceremonies like distribution of sweets to the persons assembled and making a declaration that they have married each other will not be a valid Hindu marriage.

### **Doctrine of Factum Valet**

The maxim "*quod fieri non debuit*" means what ought not have been done is valid when done. This maxim has been applied under Hindu Law.

The doctrine of *factum valet* enable to cure the violation of a directory provision. It does not cure the violation of fundamental or mandatory provision. It is only applicable in relative prohibitions and not applicable to absolute prohibition.

A Hindu marriage can be solemnised only by following the ceremonial rites. There are many ceremonies connected with the marriage. Some of them are obligatory and some are non-obligatory. If a non-obligatory ceremony is not followed in a marriage, the defect will be cured by applying the doctrine of *factum valet*.

The doctrine of *factum valet* is applicable in the case of marriage and adoption.

### **Problem**

H , a boy of 20 years , marries W , a girl of 17 years, after coming into force of the Hindu Marriage Act,1955 in violation of section 5(iii) of the Act . Is the marriage valid ?

The marriage is valid according to the doctrine of Factum Valet. The doctrine of 'factum valet' enables to cure the violation of a directory provision or a mere matter of form, but does not cure the violation of the fundamental principles or the essence of the transaction. Therefore , in this instant problem, non-compliance of section 5(iii) of the Act is cured by the doctrine and so the non-compliance does not invalidate this Hindu Marriage. The marriage, in the given problem, is valid according to the doctrine of factum valet.

Ancient Hindu law reveals that the Hindu sages were in favour of early marriages of the girls : During British rule, the Child Marriage Restraint Act , 1929 prescribed the minimum age of girl and boy as 15 and 18 years , respectively . The Hindu Marriage Act., 1955 raised the minimum age of marriage by three years, in each case. The marriage performed in violation of this condition , provided in section 5 (iii) of the Act , is valid according to the doctrine factum valet, it is neither *voidable* nor *void*.

## **Topic - V**

### **Restitution of Conjugal Rights**

Section 9 of the Hindu Marriage Act 1955 provides for restitution of conjugal rights. The fundamental purpose of a marriage is that the spouses must live together. One spouse is entitled to the society and comfort (*consortium*) of the other.

If one spouse leaves the other spouse without any just cause or excuse, the latter can approach the court praying for a decree for restitution of conjugal rights.

Thus if the husband or the wife deserts his or her spouse, the aggrieved person can file a petition under section 9 of the Hindu Marriage Act for a decree of restitution of conjugal rights. The person who has deserted the spouse can defend the petition, if there is sufficient cause for his or her

withdrawal.

**Kanthimathi v. S. Parameswara Iyer (1974 KLT 889)**

The wife deserted her husband with whom his age old parents were living. The husband filed a petition for restitution of conjugal rights. She contented that she is ready and willing to live with her husband only if the husband is prepared to arrange a separate house for them alone.

The court held that the claim is an ideal condition. But it is not always feasible and very often impossible. If the husband is not financially well off and has to look after his aged parents the wife cannot insist for a separate house and on that ground she cannot desert her husband. The court ordered restitution of conjugal rights.

**Mirchumal v. Devi Bai (AIR 1977 Raj 113)**

The wife has got an employment in a far off place. The husband insisted that she should resign the job and come back to the matrimonial home. The wife was not ready and willing to resign the job. Husband filed a petition for restitution of conjugal rights. The court held that the wife cannot be compelled to resign her job and join with husband. The petition for restitution of conjugal rights was dismissed.

**Jagadish v. Syama (AIR 1960 All 150)**

The husband's failure to have sex with his wife was held to be a reasonable excuse for the wife's refusal to live with her husband.

**Shamala v. Saraswathi Bai (AIR 1967 MP 704)**

The wife left her husband on the ground that he failed to give her proper medical care. The court found that the husband had provided her medical care which could reasonably be expected from him. Therefore there was no just cause for desertion.

**Saritha v. Venkita Subbaya (AIR 1982 AP 191)**

In this case Andhra Pradesh High Court held that Section 9 of the Hindu

Marriage Act 1955, was unconstitutional as it was a savage and barbarous remedy, violating the privacy and human dignity guaranteed by Art. 21 of the Constitution.

**Saroja Rani v. Sudarsan Kumar (AIR 1984 SC 1562)**

The Supreme Court held that Section 9 of the Hindu Marriage Act is not unconstitutional.

**S.Jaya Kumari v. S. Krishnan Nair (1994 (2) KLJ 762)**

The respondent (husband) filed a petition for restitution of conjugal rights alleging that without reasonable excuse appellant (wife) had withdrawn from his society. The appellant contended that her husband is an alcohol addict and he used to return from his place of work very late in the night inebriate (habitually drunk) and used to torture her taunting that she is not having sufficient properties to be worthy of his wife. The lower court granted decree of restitution of conjugal rights on the ground that the wife has failed to prove physical assault. The Division Bench of the Kerala High Court set aside the judgement of the lower court and held that mental pain caused to the wife by husband cannot be lightly brushed aside.

In **Pallavi Bhardwaj v. Pratap Chauhan (2011) 15 SCC 531**, the respondent (Pratap Chauhan) alleged that he is the husband of the appellant (Pallavi Bhardwaj) and filed a petition for restitution of conjugal rights. The appellant(alleged wife) contended that she was not married to the respondent and the respondent was black-mailing her. The appellant (alleged wife) could establish that the respondent had married to another lady, and a child is born in that marriage. The family court dismissed the petition for conjugal rights on the ground that there is no marriage between the appellant and respondent, and ordered two lakh rupees as cost. The Supreme Court confirmed the decision of the Family Court.

## **Topic VI**

### **Judicial Separation**

Section 10 of the Hindu Marriage Act provides for judicial separation. By virtue of section 10, either the husband or the wife can file a petition for a decree of judicial separation. When such a petition is filed, if the court finds that there is sufficient ground for granting such a decree, the court may direct the petitioner to live separately from his or her spouse. If a decree for judicial separation is passed by the court, the petitioner is not bound to co-habit with the respondent. On the application of either party, the decree for judicial separation may be cancelled by the court if it is satisfied that there is no necessity for living separately.

The following are the grounds available to both husband and wife for obtaining a decree of Judicial Separation

- 1. Adultery
- 2. Cruelty
- 3. Desertion
- 4. Conversion
- 5. Insanity
- 6. Leprosy
- 7. Venereal disease
- 8. Renunciation of the World
- 9. Not being heard for seven years

(It is to be noted that the above stated grounds are equally available for obtaining a decree of divorce. Thus students are directed to read Topic VIII - *infra*- for details)

The following grounds are available for the wife over and above the 9 grounds stated above.

- 1. Husband is having more than one wife.

2. Husband is guilty of sodomy, bestiality or rape.

If the parties do not cohabit for a period of one year or upwards after a decree for judicial separation was passed, either party to the marriage can claim dissolution of the marriage.

## **Topic -VII**

### **Nullity of Marriage**

**or**

### **Valid, Void and Voidable Marriages under the Hindu Marriage Act**

A marriage solemnized under the Hindu Marriage Act can be classified into three heads.

#### **1. Valid Marriage**

It is a marriage which is not in violation of Sections 5 and 7 of the Act (for details - read - Essentials of Valid Marriage ).

#### **2. Void Marriage**

By section 11 of the Act, a marriage which is in violation of the following three principles shall be *ab initio* void.

- I) A party to the marriage should not have a spouse living at the time of marriage.
- II) The parties should not come within the degrees of prohibited relationship. However, if the custom allows a marriage in violation of this principle, it is valid.
- III) The parties should not be 'sapindas.' However, if the custom allows such a marriage in violation of this principle, it is valid.

A marriage which does not fulfill these three conditions is, in the eye

of law, no marriage at all. It is void *ipso jure*. Either party to a void marriage can file a petition for decree of nullity.

Under general law, the children born of a marriage void *ab initio* would be illegitimate. But section 16 of the Hindu Marriage Act, 1955 says that the children born in a void marriage are deemed to be their legitimate children.

In **R. K. Acharya v. J. R. Tripathy**, (AIR 2014 Ori.21), at the time of marriage of "J" with "S", she had a living spouse. "S" filed petition for annulment of the marriage with 'J' on the ground that the marriage is in violation of section 5(i) of the Act, and void under section 11 of the Act. The court declared the marriage as null and void from the very inception. However the child born in the said marriage was declared legitimate.

### 3. Voidable Marriage

Section 12 of the Act deals with voidable marriages. A marriage solemnized shall be *voidable* and may be annulled by a decree of nullity on the following grounds.

#### 1. Impotence of the Respondent

A marriage solemnized whether before or after the commencement of the Act will be voidable at the instance of either party on the ground that the marriage has not been consummated owing to the impotence of the respondent. The petitioner's own infirmity does not make the marriage voidable.

The expression consummation means ordinary and complete intercourse. In order to constitute consummation full and complete penetration is an essential ingredient.

#### **Monnia Khosala v. Amar Deep Khosala ( AIR 1968 Del 399)**

The court held that the possibility of imperfect coitus is not enough to establish consummation. But if complete coitus is established discharge of semen in the wife's body is not a necessary condition of consummation.

**Samar Son v. Sadhana Son (AIR 1975 Cal 413)**

The court held that the mere fact that the uterus of the wife had been removed by an operation does not amount to impotence.

**Rajendra Prasad v. Shanti Devi ( 1977 ILR 514)**

The court held that inspite of the small size of her vagina a wife can be capable of intercourse and of giving birth to children and cannot be held to be impotent.

**2. Mental Incapacity**

By virtue of section 5 (ii) (a), a party to the marriage should be capable of giving valid consent to the marriage. If a party is incapable of giving valid consent to the marriage in consequence of unsoundness of mind, the marriage is *voidable* at the option of the other party.

By virtue of section 5 (ii) (b), if a party, though capable of giving valid consent, has been suffering from mental disorder of such a kind as to be unfit for marriage and procreation of children, the marriage is *voidable* at the option of the other party.

**Alka Sharma v Chandra Sharma (AIR 1991 MP 205)**

On the very first night of marriage the wife was so cold, frigid and nervous. She could not co-operate in performing the sexual act. She was unable to properly handle domestic appliances in the kitchen. She was unresponsive to the needs of family members and could not explain her conduct of urinating in the varandah in the presence of all the family members. The husband filed a petition for a decree of nullity of Marriage. The court passed a decree nullifying the marriage.

By virtue of section 5 (ii) (c) if a party has been subject to recurrent attacks of insanity, the marriage is *voidable* at the option of the other party.

**3. Consent obtained by Fraud or Force**

If the marriage was solemnized due to the fraud or force, the marriage

will become voidable at the instance of the party whose consent was obtained by fraud or force. The petition should be presented within one year from the date when fraud is discovered. After the discovery of fraud they should not have lived as husband and wife.

#### 4. Pregnancy per alium

A husband can file a petition for annulment of marriage if the wife was pregnant at the time of marriage by some person other than the petitioner husband. The husband should be unaware of the pregnancy at the time of marriage. The husband should not have had marital intercourse after the discovery of pregnancy *per alium*.

#### Legitimacy of Children of Void and Voidable Marriages

By section 16 of the Act, any child of a marriage which is void or voidable shall be treated as legitimate and the child is entitled to claim inheritance from the parents whose marriage is void or voidable. However such a child cannot claim inheritance from other relations.

### **Topic -VIII**

### **Divorce**

or

### **The Grounds for Divorce under the Hindu Marriage Act, 1955**

Under the Old Hindu Law, divorce was not recognised. Marriage was considered to be an indissoluble tie between the husband and wife.

The Hindu Marriage Act, 1955, recognised the matrimonial relief of divorce. Sections 13, 13-A, and 13-B of the Act provide for divorce.

Section 13 states the grounds for divorce available to both the parties and some grounds available in favour of wives.

Section 13-A permits the granting of alternative relief of judicial separation for most of the grounds for divorce.

Section 13-B deals with divorce by mutual consent.

### GROUNDs AVAILABLE TO BOTH THE PARTIES

#### 1. Adultery

If either party to the marriage had voluntary sexual intercourse with any person other than his or her spouse, a petition for divorce can be filed by the aggrieved person. If after the solemnization of marriage husband had sexual intercourse with a woman other than his wife, a petition for divorce can be filed by the wife. Similarly, a husband can file a petition for divorce on the ground that his wife had sexual intercourse with a man other than the husband. A single act of adultery, if it is proved, is sufficient to dissolve the marriage. Every petition for divorce on the ground of adultery or extra marital intercourse shall make the adulterer or adulteress a co-respondent.

Adultery can be proved by circumstantial evidence. In a divorce case adultery need not be proved beyond any shadow of doubt. In a divorce case adultery can be proved by preponderance of probabilities.

#### **Pattayer Ammal v. Manickam (AIR 1967 Mad 254)**

The court held that direct proof of adultery is not required in a divorce case.

#### **Thimmappa v. Thimmavva (AIR 1972 Mys 234)**

The husband proved that his wife was absent herself from his house for a long time and she was seen in the company of a total stranger to the family without sufficient explanation. The court held that the adultery can be inferred from the circumstances:

**Subbarama Reddiar v. Saraswathi (AIR 1967 Mad 8)**

When the husband returned home, late after midnight, the wife was found in the company of another stranger in the bedroom. The Court held that adultery can be inferred from the circumstances.

**Adlaide v. William (AIR 1968 Cal 133)**

The Court held that when a man and woman are found under suspicious circumstances it is not likely that they are together for the saying of the Lord's Prayer. Under such a circumstance adultery can be presumed.

**2. Cruelty**

Cruelty is a ground available to obtain a decree of divorce. If the husband or wife treats the other with cruelty, the aggrieved person can file a petition for divorce. If the pattern of behaviour of one party causes apprehension in the mind of the other party that it would be harmful or injurious to live with that party, there is cruelty. Cruelty may be committed by husband or wife. It need not always be causing physical injury. Causing mental agony is also constituting cruelty.

**Suseela v. Mohan Das Prabhu (1975 KLT 72)**

In this case the Kerala High Court held that in order to grant divorce on the ground of cruelty it is necessary to show that the treatment is such as to cause reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party. It is not necessary to show that such injury would be to health, life or limb, bodily or mental. Injury or harm may include cases other than that of injury and harm to one's body, limb or health. Harm to reputation and social position can also be treated as cruelty.

**Dastine v. Dastine (AIR 1975 SC 1536)**

The husband filed a petition for divorce on the ground of wife's cruelty. She had done some acts intentionally to insult the husband. One day she went out of the house and cried out "I want to see the ruination of the whole Dastine family, I will burn your fathers books and apply the ashes to you forehead".

**She put chilly powder on the tongue of a child.** The Supreme Court held that the acts of the wife constituted cruelty and the husband is entitled to a decree of divorce.

**Somasekharan Nair v. Thankamma (1987 (2) KLT 892)**

The court held that making false allegations about the character of the husband and his family members so as to injure the reputation of the husband amounts to cruelty.

**Sobha Rani v. Mathukar Reddi (AIR 1988 SC 121)**

The Supreme Court held that the cruelty may be mental or physical, intentional or unintentional. Cruelty is a course of conduct of one which is adversely affecting the other. If the parents of husband with the support of the husband demanded dowry, it amounts to cruelty.

**Gangadharan v. Thankam (1988 (1) KLT 352)**

It was held that mental cruelty is also a ground for divorce. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party. A solitary instance of an emotional outburst or violent behaviour cannot be considered as cruelty.

**Rajani v. Subramonian (1989 (1) KLT 234)**

It was held that the demand for dowry prohibited by law is bad enough to constitute cruelty entitling the wife to get a decree for dissolution of marriage.

**Ashok Kumar v. Vijay Lekshmi (AIR 1992 Del 182)**

The husband filed a petition for divorce on the ground of cruelty. The wife made a false allegation that the husband had attempted to kill her by setting ablaze (fire) after dousing on her kerosine oil. The Court held that the false allegation by the wife amounted to cruelty and the husband is entitled to divorce.

**Padmini v. Sivananda Babu (2000 (2) KLT SN 35 P.31)**

The wife wrote a letter to the brother of the husband complaining about impotency of her husband. The court held that the act of the wife constitutes mental cruelty to husband and he is entitled to divorce.

**Savitri Pandey v. Prem Chandra Pandey (AIR 2002 SC 591)**

The Supreme Court held "treating the petitioner with cruelty is a ground for divorce under section 13 (1) (1a) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of the other spouse which causes mental suffering or fear to the matrimonial life of the other. Cruelty, therefore, postulates a treatment of the petitioner 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. Cruelty, however, has to be distinguished from ordinary wear and tear of family life.

**Jayachandra v. Aneel Kaur ( 2005 (1) KLT 26 (SC)**

The Supreme Court held that the expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. Cruelty includes mental cruelty. Cruelty need not be physical. In physical cruelty, there can be tangible and direct evidence. In the case of mental cruelty there may not be direct evidence. To constitute cruelty the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear

and tear of married life". Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

### 3. Desertion

A petition for divorce can be filed by a party to the marriage if the other party has **deserted** the petitioner for a continues period of not less than two years immediately before the presentation of the petition. In order to constitute desertion two elements are essential. They are -

- i. Actual separation or withdrawal from cohabitation(*factum of separation*)
- ii. The withdrawal from cohabitation should be with intent to put an end to cohabitation permanently (*animus desertendi*)

#### **Narayanan v. Sreedevi (1989 (1) KLT 509)**

It was held that in order to constitute 'desertion' there should be withdrawal from cohabitation with intention to bring the cohabitation to an end permanently. In other words there should be actual separation with *animus desertandi* (intention to bring cohabitation to an end permanently).

#### **Butti v. Gulab Chand Pandey ( AIR 2002 MP 123)**

The parties were married about 15 years prior to the filing of the divorce petition by the husband. The husband filed the petition for divorce on the grounds of desertion and cruelty. The husband alleged that the wife deserted him five years back to pressurise him to secure his share in the family property and to shift to the village in which her father resides. Further he contended that the wife has lodged a false report against him in the Police Station and thereupon the police registered a crime case invoking section 498 A of the Indian Penal Code and arrested him and his family members. This, according to him, is cruelty on the part of the wife.

The wife/ appellant denied the above allegations. She explained the circumstances which forced her to leave the matrimonial home and to lodge

the report to police. According to her, the respondent / husband and his parents on account of her dark complexion used to taunt ( provoke) her and called her "Kaluti". They used to misbehave with her and torture her. They also used to demand gold ornaments. Since the father of the appellant had no means to fulfil their demand, the respondent and his parents used to maltreat and beat the appellant. On account of maltreatment she was left with no option but to leave her matrimonial home and to go with her father. The husband married another lady after the appellant left the matrimonial home. On learning about the second marriage of the respondent, the appellant went to her matrimonial home. Then her husband and his family members maltreated and manhandled the appellant and forced her to go back with her father. The appellant thereupon lodged the report of the incident at the Police Station. The appellant prayed that the divorce petition being founded on false grounds, it is to be dismissed.

After considering the evidence, the Court held that the husband who maltreated the wife and forced her to leave the matrimonial home cannot claim divorce on the ground of desertion. The wife who has lodged the report at Police Station was not guilty of cruelty also. In such a case the husband is not entitled to a decree of divorce only for the reason that there is no chance of improvement in the strained relations of the partents.

#### **Savitri Pandey v. Prem Chandra Pandey (AIR 2002 SC 591)**

The Supreme Court held, "desertion" for the purpose of seeking divorce under the Act means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. If a spouse abandons the other in a state of temporary passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion. In order to constitute desertion, there must be two essential conditions:

- (1) the factum of separation, and
- (2) the intention to bring cohabitation permanently to an end (*animus desertandi*).

#### 4. Conversion

If one of the spouses converts to another religion, a petition for divorce can be filed by the spouse who has not converted to another religion. Conversion by a Hindu spouse to Muslim, Christian, Jewish, or Parsi's faith would be treated as conversion to another religion and divorce can be granted.

A Hindu by religion, if accepts the faith of Budhism, Jainism, or Sikh would not be treated as conversion to another religion.

In **Sarala Mudgal v. Union of India** ( 1995 (2) KLT 45), the Supreme Court held that a marriage solemnised under the Hindu Marriage Act cannot be dissolved except on the grounds available under section 13 of the Act. Parties who have solemnised the marriage under the Act remain married even when the husband embraces Islam and marries a Muslim wife. The second marriage of the convert will be void.

#### 5. Unsoundness of Mind

A petition for divorce can be filed by a party to the marriage, if the other party is incurably of unsound mind.

In **Lissy v. Jaison** ( 2000 (1) KLT 589 FB) the Kerala High Court held that a spouse is "incurably of unsound mind" if he or she is of such mental incapacity as to make normal married life impossible and there is no prospect of any improvement in mental health, which would make this possible in future.

#### 6. Incurable and virulent leprosy

A petition for divorce can be filed by a party to the marriage on the ground that the other party has been suffering from a virulent and incurable leprosy.

**Swarajya Laxmi v G.G. Patma Rao** ( AIR 1974 SC 165)

The husband was a medical practitioner. He filed a petition for divorce against his wife on the ground that she was suffering from Lepromatous

form of leprosy. The Supreme Court held that the husband is entitled to decree of divorce on the ground that Lepromatous leprosy is virulent and incurable.

7. Venerial disease

A petition for divorce can be filed by a party to the marriage on the ground that the other party has been suffering from venereal disease in a communicable form. If the respondent is suffering from venereal disease which is communicated to him or her by the petitioner, the decree of divorce will not be granted. (Person who approaches the court for a relief should come with clean hands. The maxim is: "ex turpi causa non oritur actio")

8. Adoption of Religious Order

There are four-orders or stages of life prescribed by Sastras. They are (1) Brahmachari, (2) Grihastha, (3) Vanaprastha, and (4) Sanyasi. When a person enters into Vanaprastha or Sanyasi, he renounces all the worldly affairs. It amounts to civil death under the Hindu Law. If a party to the marriage has renounced the world, by entering into vanaprastha or sanyasi, the other party can file a petition for divorce.

9. Presumption of Death

If the whereabouts of a party to the marriage is not heard for seven years or more, the presumption is that he or she has been dead. The other party can, then, file a petition for divorce on this ground.

10. Non-resumption of Co-habitation

If there is non-resumption of co-habitation between the parties to a marriage for a period of one year or upwards after passing a decree of judicial separation or restitution of conjugal rights, either party to the marriage can file a petition for decree of divorce.

## GROUND IN FAVOUR OF WIFE

### 1. Polygamous Marriage

If the husband had solemnized polygamous marriage before the enactment of Hindu Marriage Act, 1955, a wife can file a petition for divorce on the ground that her husband has another wife alive.

### 2. Sexual Perversion

A wife can present a petition for divorce on the ground that the husband is guilty of rape, sodomy or bestiality.

#### **Ganesh v Maya Sundari (1970 KLT 253)**

The court granted divorce on the ground that husband is guilty of bestiality. The term bestiality means the sexual union by a human being with an animal against the order of nature.

### 3. Non-resumption of co-habitation

A wife who is getting maintenance under section 18 of the Hindu Adoption and Maintenance Act can file a petition for decree of divorce on the ground that there is non-resumption of co-habitation for a period of 1 year or more.

### 4. Repudiation

If the marriage of a girl is solemnized before she attained 15 years, she can exercise the right of repudiation before attaining the age of 18 years. A petition for divorce on this ground can be filed after attaining 18 years.

## **Topic - IX**

### **Divorce by Mutual Consent**

Section 13-B of the Hindu Marriage Act deals with divorce by mutual consent.

A petition for divorce by mutual consent can be presented to the family court.

The petition for divorce by mutual consent must be presented to the court jointly by both the parties to the marriage.

The parties must be living separately for a period of one year or more and they must not be able to live together as husband and wife. They should mutually agree that their marriage should be dissolved.

In **Saju S. Nair v. Bindu** ( 2000 (3) KLT 462) the Kerala High Court held that if the husband and wife live together in the same house but did not live as husband and wife, then also it can be described that they were living separately.

If a petition for divorce by mutual consent is presented to the court by the parties to the marriage the court will pass a decree of divorce after a period of 6 months. Before granting the decree of divorce, the court will hear the parties.

In **Sureshta Devi v. Om Prakash** (1991)2 SCC 25, the husband and wife jointly filed a petition for divorce by mutual consent. Before the expiry of six months from the date of petition the wife filed an application in the court stating that she consented under pressure and threat of the husband.

The District Court (Family Court) dismissed the petition for divorce by

mutual consent. Husband preferred an appeal to the High Court. The High Court held that consent once given cannot be withdrawn and divorce was granted. On appeal to the Supreme Court it was held that *either party to a divorce by mutual consent can withdraw his or her consent before the decree of divorce is granted by the court.*

In **Dr. P.B. Prasad v. Deepthi and another** ( 1999 (2) KLJ 520) the Kerala High Court held that if the spouses have already agreed for a divorce and if there is no possibility of revival of a marriage, the period of six months after application for granting decree of divorce can be waived. But in **Manish Goel v. Rohini Goel** (2010) 4 SCC393, the Supreme Court held that the statutory period of six months has been prescribed for giving opportunity to parties to reconcile and withdraw petition for dissolution of marriage, and the waiver of statutory period of six months can **only be granted by the Supreme Court** in exercise of its jurisdiction under Article 142 of the Constitution. Thus no other courts (including High courts) can waive statutory period of six months.

#### **Doctrine of Irretrievable Breakdown of Marriage**

"Irretrievable Breakdown of Marriage" is not a ground available under section 13 of the Hindu Marriage Act,1955 to grant a decree of divorce. However the Supreme Court of India can grant a decree of divorce on the ground of irretrievable breakdown of marriage invoking its extra-ordinary powers under Article 142 of the Constitution.

In **Anil Kumar Jain v. Maya Jain** (2009)10 SCC 415, the Supreme Court of India considered the possibility of awarding decree of divorce by applying the doctrine of irretrievable breakdown of marriage. In this case the parties to the marriage were living separately for more than seven years. They filed a petition for divorce on mutual consent under section 13B of the Act. As per the terms of agreement husband transferred valuable property rights in favour of the wife and after registration of transfer of property in her name, she withdrew her consent for mutual divorce. The wife had made it clear that she would not live with the petitioner, but she is not agreeable to a

divorce by mutual consent. Under these circumstances the Supreme Court invoked its jurisdiction under Article 142 of the Constitution and granted decree dissolving marriage of the appellant with the respondent.

While deciding this case the Supreme Court observed as follows:

The consent given by the parties to the filing of a petition for mutual divorce has to subsist till a decree is passed on the petition and in the event of the parties withdraw the consent before passing of the decree, the petition under s.13B would not survive and would have to be dismissed.

Although irretrievable breakdown of marriage is not a ground under s.13 or s.13B for granting divorce, when proceedings under either section 13 or 13B are before Supreme Court, it can invoke the said doctrine and grant relief to the parties in exercise of its extraordinary power under Article 142 of the Constitution in order to do complete justice to the parties when faced with a situation where the marriage ties had completely broken down and there is no possibility of a re-union. *The other courts including the High Courts do not have power to grant relief by invoking doctrine of irretrievable breakdown of marriage.*

## **Topic - X**

### **Maintenance Pending Litigation and Permanent Alimony**

#### **Maintenance pendente lite and expenses of proceedings**

Section 24 of the Hindu Marriage Act, 1955 deals with maintenance pending litigation and expenses of proceedings.

By virtue of section 24, either the husband or the wife in a proceeding for restitution of conjugal right, judicial separation, annulment of marriage or divorce can claim expenses of the litigation from the other spouse, if the applicant has no independent income necessary for meeting the expenses of the proceedings. So also an application can be filed, for his or her sup-

port and maintenance during the pendency of the litigation.

In **Kachan v. Kamalendra** (AIR 1993 Bom. 493), it was held that section 24 entitles not only the wife but also the husband to claim maintenance *pendente lite* on showing that he has no independent source of income. However, the husband will have to satisfy the court that either due to physical or mental disability he is handicapped to earn and support his livelihood. In this case the husband who was able bodied and was not mentally ill claimed maintenance *pendente lite* on the ground that he has no source of income as his business had closed down. The claim of the husband was rejected.

In **Padmavathi v. C. Lakshminarayana** (AIR 2002 Kant. 424), it was held that the court has to take into consideration the income of the parties before deciding the quantum of the interim maintenance. The court has to keep in view the need of the applicant and paying capacity of the non-applicant.

#### **Permanent Alimony and Maintenance**

By virtue of S. 25, the court can, at the time of passing any decree or subsequently, order payment of a gross sum or monthly allowance to the applicant by the respondent if the applicant is unable to maintain himself or herself and the respondent is having sufficient fund. Both the husband and wife can file an application for permanent alimony and maintenance from the other party to the proceedings.

The court has to take into view the respondent's income and other property, the income and other property of the applicant, the conduct of the parties and other circumstances of the case in ordering permanent alimony and maintenance.

If there is a change in the circumstances of either party at any time after an order is passed, the court can vary, modify or rescind its earlier order.

If the party in whose favour an order for monthly maintenance is ordered has re-married or if such party is the wife, that she has not remained chaste, or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, the court may vary, modify or rescind its earlier order.

## Topic -XI Adoption

Adoption is the admission of a stranger by birth to the privileges of a child by a legally recognised form of affiliation.

According to the Hindu Law, a person who dies without a male issue (son) will have to suffer in the hell called 'PUT'. If a Hindu dies without a male issue, there will be no salvation to his soul. When a son is born, it is believed that, the father wins the world. The father's soul will get salvation. Since a male issue(son) can save the father's soul from the sufferings in the hell called 'Put', the son is known as 'putra'. The Hindu Law recognised adoption of a male (son) as a means of salvation in the case of a Hindu who has no male issue.

In 1956 the Hindu Adoption and Maintenance Act was enacted by the Parliament. Before the passing of this enactment only a male Hindu had the right to adopt a son. He must not have a son, grand son, or great grand son, whether natural or adopted, living at the time of adoption. A wife could not adopt a son during her husband's life time. After his death she could adopt a son for the deceased husband, if he had expressly authorised her to do so. A woman could not adopt a son to herself. A daughter could not be adopted by a male or female Hindu. Adoption was done by following ceremonies of 'Dattahoma'. Now Dattahoma is not essential for the validity of adoption.

Sections 5 to 17 of the Hindu Adoption and Maintenance Act, 1956 deal with adoption of a Hindu child by a Hindu male or female.

By section 5 of the Act, no adoption shall be made after the commencement of the Act by a Hindu except in accordance with the provisions of the Act, and any adoption made in contravention of the said provisions shall be void.

#### Essentials of a valid Adoption by a Male Hindu under the Hindu Adoption and Maintenance Act 1956

The following are the rules regarding the adoption by a male Hindu

1. A male Hindu, who is of sound mind and is not a minor has the capacity to take the son or daughter in adoption.
2. If he has a wife living at the time of adoption, he shall not adopt without the consent of his wife.
3. If the wife has completely renounced the world or has ceased to be a Hindu or has been declared to be of unsound mind by a court of competent jurisdiction, the consent of the wife is not required for adoption.
4. If he wants to adopt a son, he should not have a Hindu son, son's son or son's son's son. (whether by legitimate relationship or by adoption) living at the time of adoption.
5. If he wants to adopt a daughter, he should not have a Hindu daughter or son's daughter, whether by legitimate blood relationship or by adoption, living at the time of adoption.
6. If he wants to adopt a daughter, he should be at least 21 years older than the girl to be adopted .

7. The boy or girl to be adopted must not have been previously adopted.
8. The boy or girl to be adopted should not have attained the age of 15 years. However if the custom applicable to the parties permits a boy or girl who has completed 15 years of age can be adopted.
9. The boy or girl to be adopted should not be a married boy or girl. However, if the custom applicable to the parties permits, a valid adoption can be made of a married boy or girl.
10. The boy or girl to be adopted should be a Hindu.
11. The child should be given in adoption by the father or mother or the guardian.
12. The father or mother , if alive, shall have equal right to give a son or daughter in adoption. Such right shall not be exercised by either of them without the consent of the other. The consent can be avoided if the other spouse has renounced the world or ceased to be a Hindu or has been declared to be of unsound mind by a competent court.
13. The mother of the child can give it in adoption without the consent of the father, if he has renounced the world or has ceased to be a Hindu or declared to be of unsound mind by a competent court. If the father of the child is dead then the mother can give the child in adoption.
14. After the death of father and mother a child can be given in adoption by the guardian with the consent of the court.
15. In the case of foundlings an adoption can be made only with the consent of the court.

**Guramma v Mallappa (AIR 1964 SC 510)**

The court held that an adoption during the wife's pregnancy is valid.

Such adoption will not be affected by the subsequent birth of a son or a daughter. The subsequently born child and the adopted child remain as brothers or sisters or brother and sister with equal rights over property of the adopted father and mother.

**Thathakutty v. Kittamuthu ( 1983 KLT 160)**

The Court held that the adoptive father is not competent to adopt a daughter if a Hindu daughter or son's daughter ( whether by legitimate blood relationship or by adoption) was living at the time of adoption.

**Kashibai v. Parvathibai ( 1996 (1) KLT SN 8 P. 6)**

In this case a male Hindu adopted a son without consent of his wife. The court held that the adoption is not valid.

**Essentials of a Valid Adoption by a Female Hindu under the Hindu Adoption and Maintenance Act,1956**

The following are the principles which govern adoption by a Hindu female:

1. A female Hindu who is of sound mind and is not a minor can adopt a son or a daughter.
2. An unmarried female (spinster), a widow or a divorced wife can adopt a son or a daughter.
3. A married woman can adopt a son or daughter with the consent of the husband. In the case of a married woman husband can adopt with the consent of the wife.
4. A married woman can adopt a son / daughter without consent of the husband if the husband has completely and finally renounced the world, or has ceased to be a Hindu or has been declared by a competent court to be of unsound mind.

5. If a female adopts a son, she should not have a Hindu son, son's son or sons' son's son, whether by blood relationship, or by adoption, living at the time of adoption.
6. If a female adopts a son, the adoptive mother should be at least 21 years older than the person to be adopted.
7. If a female adopts a daughter, the adoptive mother should not have a Hindu daughter or son's daughter living at the time of adoption.
8. The boy or girl to be adopted must not have been previously adopted.
9. The boy or girl to be adopted should not have attained the age of 15 years. However if the custom applicable to the parties permits, a boy or girl who has completed 15 years of age can be adopted.
10. The boy or girl to be adopted should not be a married boy or girl. However, if the custom applicable to the parties permits, a valid adoption can be made of a married boy or girl.
11. The boy or girl to be adopted should be a Hindu.
12. The Child should be given in adoption by the father or mother or the guardian.
13. The primary right to give a son or daughter in adoption is vested in the natural father. If the mother of the child is alive the father can give the child in adoption only with the consent of mother. If the mother had died or renounced the world or declared to be of unsound mind by a competent court, the father can give the child in adoption without consent of the mother.
14. The mother of the child can give it in adoption without the consent of the father, if he has renounced the world or has ceased to be a Hindu or

declared to be of unsound mind by a competent court. If the father of the child is dead then the mother can give the child in adoption.

15. After the death of father and mother a child can be given in adoption by the guardian with the consent of the District Court.

16. In the case of foundlings an adoption can be made only with the consent of the District Court.

In **D.R. Patil v. S.R. Patil** (AIR 1992 Bom. 189), the adoptive mother was not twenty one years older than the adopted son. The adoption was declared to be not valid.

In **Jai Singh v. Shakunthala** (2002) 3 SCC 634, the Supreme Court held that the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned with intent to transfer the child from the family of its birth to the family of its adoption. The give in adoption and take in adoption is an essential requirement for a valid adoption.

### **Effect of Adoption**

or

### **Applicability of "Doctrine of Relation Back" in Adoption**

When a son or daughter is adopted, the following consequences would arise.

1. The property vested in the child from his original family will not be divested because of the adoption.

2. The adopted child cannot marry any relation of his original family who comes within the degrees of prohibited relationship.

3. The child who is adopted cannot marry any relation who comes within the degrees of prohibited relationship in the adopted family.

4. Under the old Hindu law, a widow could adopt a son for the deceased husband. When a widow adopts a son, he could claim a share of property of the deceased adoptive father. Any property vested in any person on the death of the adoptive father was divested by the adoption and the adopted son could claim a share of property along with other heirs of the deceased as if he was alive on the death of the deceased adoptive father. Here the presumption is that the adoption was effected by the deceased husband before his death. This principle is known as "doctrine of relation back".

After the passing of Hindu Adoption and Maintenance Act a widow could adopt for herself and the adopted son cannot claim share of property of his or her deceased adoptive father. Thus adoption of a son by a widow will not result in divesting of property vested in the members of the adopted family. The doctrine of relation back is not applicable now.

#### Presumption of Adoption

Section 16 of the Act envisages a statutory presumption of adoption. By virtue of section 16 of the Act, if a registered document pertaining to adoption made and is signed by the person giving and the person taking the child in adoption is produced before the court, the Court shall presume that the adoption has been made in compliance with the provisions of the Act unless and until it is disproved.

The presumption under section 16 is only a rebuttable presumption. By adducing positive evidence to show that there was no transfer of child from the family of its birth to the family of its adoption, the presumption can be rebutted.

#### **Jai Singh v. Shakuntala ( AIR 2002 SC 1428)**

The Supreme Court held that the presumption under section 16 of the Act is a presumption which can be rebutted by adducing evidence. In this case a deed pertaining to adoption of appellant was registered in the year 1973. The appellant himself described as son of his natural father in a reply

filed in the maintenance proceedings instituted by his wife. He also so described in voters list prepared in the year 1984. Because of these positive evidence, the court held that there was no valid adoption.

## **Topic -XII**

### **When can a Hindu Wife Claim Maintenance from Her Husband with a Right to Reside Separately?**

Section 18 of the Hindu Adoption and Maintenance Act, 1956 deals with the right of a Hindu Wife to separate residence and maintenance from her husband.

Under the following circumstances, a Hindu Wife can live separately from her husband and claim maintenance.

1. If he is guilty of desertion. The husband is said to be guilty of desertion if he has abandoned her without reasonable cause and without her consent or against her wish or if he has wilfully neglected her.
2. If he has treated her with such cruelty, so as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband.
3. If he is suffering from a virulent form of leprosy.
4. If he has any other wife living.
5. If he keeps a concubine.
6. If he has ceased to be a Hindu by conversion to another religion.
7. If there is any other cause justifying her living separately.

A Hindu wife shall not be entitled to separate residence and mainte-

nance from her husband. If she is unchaste or ceased to be a Hindu by conversion to another religion.

In *Sivankutty v. Komalakumari* (1988 (1) KLT 601), the Kerala High Court held that though there is no explicit provision in section 18 or any other section in the Act empowering the court to grant *interim maintenance* during the pendency of the proceedings, the court can order *interim maintenance*. If a court is empowered to grant a substantive relief it can grant it on interim basis also, though there is no express provision in the Statute.

## **Topic - XIII When a Widow Can Claim Maintenance from her Father-in-Law ?**

A Hindu widow can claim maintenance from her father-in-law, if the following conditions are satisfied:

1. She should be unable to maintain herself out of her own earnings or other property.
2. She should be unable to obtain maintenance from the estate of her husband or her father or mother.
3. She should be unable to obtain maintenance from her son or daughter.

If the above three conditions are satisfied, the father-in-law is liable to pay maintenance to her out of the income from the coparcenary property or joint family property. If the share of her deceased husband in the joint family property is already shared and allotted to her, the father-in-law is not liable to pay maintenance.

## **Topic - XIV**

### **Maintenance of Children and Aged Parents**

By section 20 of the Adoption and Maintenance Act a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor. Under this section an **unmarried daughter** can claim maintenance from her father or mother even after attaining majority if she is unable to maintain herself out of her own earnings or other property.

Under this section the aged or infirm parents can claim maintenance from their son or daughter if they are unable to maintain themselves out of their own earnings or other property. The word "parent" includes a childless step-mother. A Hindu who has been converted to another religion is not entitled to claim maintenance from his or her son or daughter.

## **Topic - XV**

### **Guardians and Their Powers**

**or**

### **Who are the Natural Guardian of Hindu Minor ? What are the Powers of a Natural Guardian?**

The law relating to minority and guardianship applicable to Hindus is contained in the Hindu Minority and Guardianship Act, 1956.

A Hindu who has not attained the age of 18 years is a minor. A guardian is a person who has the care of the person of a minor or of his property or of both. Under Hindu Law, guardians can be classified under four heads. They are:

1. Natural guardian
2. Testamentary
3. Guardian appointed by court.
4. *De facto* guardian.

### **Natural Guardian and Their Powers**

By section 6 of the Hindu Minority and Guardianship Act, 1956, the natural guardian of a Hindu minor shall be father. After the father's death the mother shall be the guardian of minor's person and property.

A minor boy or girl shall be in the custody of mother until the age of 5 years. Even though the custody will be with the mother, the guardian will be the father so long as he is alive.

In the case of an illegitimate girl or boy mother will be the natural guardian for the minor's person and property. After the mother's death, father will be the natural guardian.

In the case of a married girl who is a minor the natural guardian for the person and property shall be husband.

A natural guardian will cease to be a guardian if he has converted to another religion or has completely and finally renounced the world.

#### **Vijaya Lekshmi v. The Inspector of Police (AIR 1991 Mad. 243)**

The father of the child converted to Islam. The mother of the child claimed custody of the child from the father. The court held that, the father converted to Islam and thus disqualified to be a natural guardian. The court held that the wife is entitled to the custody.

By section 7 of the Act the natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

By section 8 of the Act, the Natural guardian has power to do all acts which are necessary for the benefit of the minor. He has power to protect the minor's property. He has no power to bind the minor by a personal covenant.

The Natural guardian shall not mortgage, sell, gift or exchange the immovable property of the minor without previous permission of the court.

The court shall not grant permission to transfer the property unless there is necessity.

In **Ramdas Menon v. Sreedevi** ( 2004 (1) KLT 323 (FB)), the Kerala High Court held that an alienation of immovable property of a minor by natural guardian without obtaining permission of the Court is only voidable. Thus the quondam minor (ex-minor) has to challenge the validity of the alienation within three years after attaining majority. If there is no such challenge, and the alienation is not set aside by a competent court, the transferee will get good title.

### **Testamentary Guardian and His or Her Powers**

Testamentary guardian is a guardian appointed by a will. By section 9 of the Hindu Minority and Guardianship Act, the father and mother of a minor child can appoint a guardian for the minor's person as well as property by will. If the father has appointed a guardian by will, such an appointment will not take effect immediately after the death of the father, if the mother is alive. During the life time of the mother, she will act as natural guardian. She can also appoint a testamentary guardian by her own will. If she appoints a person as testamentary guardian, who is not the guardian appointed by the father, the guardian appointed by the mother will becomes the testamentary guardian after her death. Fathers appointment will become inoperative. A testamentary guardian shall have all the rights of a natural guardian.

### De -facto Guardian

A de-facto guardian is one who is in fact a guardian without legal right. After the death of the father and mother, if the minor children live with the grand-father and grand-mother, they are the *de facto* guardian of the minor children.

Under the old Hindu Law, a de-facto guardian could alienate (transfer) a minor's property for *necessity* or for the *benefit of the estate*.

By section 11 of the Hindu Minority and Guardianship Act, a de-facto guardian is prohibited from alienating the property of the minor. Thus if a transfer is effected by a de facto guardian it would be *ab initio void*. Thus the minor need not challenge the alienation and the alienation need not be set aside by the court.

### Court Appointed Guardian

A court can appoint a guardian for the Hindu minor's person and property. By section 13 of the Act when the court appoints a guardian, , the paramount consideration shall be the welfare of the minor.

## PART - II CHRISTIAN LAW

### Topic - I Law of Christian Marriage

A Christian is one who professes the Christian religion. Indian Christian includes native converts to Christianity and their descendants.

Under Christian Law, a marriage is considered to be a permanent union of one man and one woman to the exclusion of all others for life.

Roman Catholic Church regarded marriage as one of the sacraments. The Anglican and other protestant churches consider marriage as an institution approved and sanctioned by God.

In India, Marriages between Christians are governed by the provisions of Indian Christian Marriage Act, 1872. It extends to the whole of India except the territories which, immediately before the 1 st November, 1956, were comprised in the States of Travancore - Cochin, Manipur and Jammu & Kashmir. Thus in Malabar area the Indian Christian Marriage Act, 1872 is applicable. In the territories which were comprised in the former Travancore - Cochin State, the Indian Christian Marriage Act, 1872 is not applicable.

In former Cochin area, the Cochin Christian Civil Marriage Act, 1095 M.E ( Malayalam Era) (1920) is still in force. The provisions of this enactment are same as that of the Christian Marriage Act 1872. In the former Travancore area, Canon Law (personal law of Christian)is applicable since there is no statutory law.

## Essentials of a Valid Marriage under the Indian Christian Marriage Act, 1872

A marriage to be valid under the Christian Marriage Act, 1872, the following conditions should be satisfied.

1. When one of the parties or when both the parties are Christians, the marriage shall be solemnized by any one of the following five persons authorised to solemnize marriages.
  - a) A Minister of Religion
  - b) Marriage Registrar appointed under the Act.
  - c) A person licenced to grant certificates of marriage between Indian Christians.
  - d) A person who has received episcopal ordination
  - e) Clergy man of church of Scotland.
2. A marriage should be solemnized between six in the morning and seven in the evening.
3. The parties to the marriage should not come within the degrees of prohibited relationship.

The Act does not contain any table prescribing prohibited degrees of relationship. But the common prayer book contains a table of relations and a marriage between persons in the table is void.

4. In the case of marriage between Indian Christians, one of the parties should not have a living spouse. The bride groom should have completed the age of 21 years and the bride 18 years.
5. Either of the parties to the marriage should issue a notice to the Minis-

ter of religion of the intended marriage. The notice should contain name, address and age of the parties. The notice so issued shall be affixed on the notice board.

6. After the issue of notice, the parties should appear before the Minister and make a solemn affirmation that the marriage is not barred by any impediment like prohibited degrees etc.

7. When the affirmation is made the Minister can issue a certificate that the notice has been issued and that the declaration has been made.

8. Thereafter, the Minister can solemnize the marriage in any form in the presence of two witnesses. The marriage should be solemnized within two months from the date of certificate.

## **Topic - II** **Law Relating to Matrimonial Reliefs**

The Christian Marriage Act 1872, does not contain any provision dealing with nullity of marriage, judicial separation, restitution of conjugal rights or divorce. Matrimonial reliefs like, judicial separation, divorce, etc., among the Christians are governed by the Divorce Act, 1869. The Divorce Act, 1869 is applicable in the former Travancore-Cochin state area also. The Act is not applicable in the State of Jammu and Kashmir. This Act has been amended by the Indian Divorce (Amendment) Act, 2001 and the Marriage Laws (Amendment) Act, 2001. Before the Amendment in 2001 the name of the Divorce Act, 1869 was Indian Divorce Act, 1869. By the amendment the word "Indian" has been omitted. Further the amendment has made drastic changes in the field of divorce and divorce by mutual consent is recognised. Several new grounds for divorce have also been recognised.

### **I. Dissolution of Marriage by DIVORCE**

Section 10 of the Divorce Act, 1869 deals with the grounds available to

Christian husband or wife to present a petition for divorce. Drastic amendments were made to section 10 by the 2001 amendment.

Before the amendment in 2001 the husband was entitled to present a petition for divorce only on the ground of wife's adultery. A wife could present a petition for divorce on the following grounds:

- a) After the marriage the husband has converted to another religion and, gone through a form of marriage with another woman.
- b) The husband is guilty of adultery.
- c) The husband is guilty of bigamy with adultery.
- d) The husband is guilty of rape, sodomy or bestiality.
- e) Husband is guilty of adultery coupled with cruelty.
- g) Husband is guilty of adultery coupled with desertion for a period of two years or more.

The petition for divorce could be filed either in the District Court (Family Court) or High Court.

After the Amendment in 2001, the grounds for divorce are made common to both the Husband and Wife. The petition for divorce is to be filed in the District Court ( Family Court) and not in the High Court. Earlier the petition could be filed either in the District Court or in High Court. The amendment has come into force on 03-10-2001.

Now the following are the Grounds for Divorce available to the husband and wife.

1. The respondent has committed adultery after the solemnization of the marriage.
2. The respondent has ceased to be Christian by conversion to another religion after the solemnization of the marriage.
3. The respondent has been incurably of unsound mind for a con-

tinuous period of not less than two years immediately preceding the presentation of the petition.

4. The respondent has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from virulent and incurable form of leprosy.

5. The respondent has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form.

6. 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.

7. The respondent has wilfully refused to consummate the marriage and the marriage has not therefore been consummated.

**In Shaju P.L. v. Anitha** ( 2014 (4) KHC 873 (DB)), a Division Bench of the Kerala High Court held that the word consummation means the act of making marital relationship complete by having sex.

8. The respondent has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after passing the decree against the respondent.

9. The respondent has deserted the petitioner for at least two years immediately preceding the presentation of the petition.

**In Princy v. Varkey** (2000 (1) KLT 756 (FB)), the court held that desertion is the deliberate withdrawal from cohabitation and abandonment of one's spouse without reason. For the act of desertion, there must be the factum of physical separation and the animus disertendi or the intention to bring cohabitation permanently to an end. Both the essential ingredients

should continue during the entire statutory period of two years before commencement of proceeding of divorce.

10. The respondent has treated the petitioner with such cruelty as to cause reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.

In **Lini Mohan John v. Mohan John** (2001 (1) KLJ 809), it was held that to constitute cruelty, physical violence is not absolutely necessary. Inflicting mental agony is also cruelty. Mental cruelty can consist of verbal abuses and insults by using filthy and abusive language leading to constant marital discord.

In **Princy v. Varkey** 2000 (1) KLT 756-(FB), the court held that to constitute cruelty, physical violence is not absolutely necessary. Inflicting mental agony is also cruelty. Mental cruelty can consist of verbal abuses and insults by using filthy and abusive language leading to constant marital discord. Cruelty in matrimonial law may be of infinite variety. It can be subtle or brutal. Cruelty is a form of torture.

#### **Ground available only to the Wife**

In addition to the above said grounds, a wife can present a petition for divorce on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

#### **Adulterer or Adulteress to be Co-respondent**

By section 11 of the Act, when a petition for divorce is filed on the ground of adultery, the petitioner shall make the alleged adulterer or adulteress a co-resopondent. However, under the following circumstances the petitioner will be excused by the court from making the adultere or adulteress a co-respondent.

- a) If the wife who is the respondent is leading the life of a prostitute.

- b) If the husband who is the respondent is leading an immoral life.
- c) If the name of the alleged adulterer or adulteress is unknown to the petitioner.
- d) If the alleged adulterer or adulteress is dead.

In **Jose v. Ali Joseph** (1990 (2) KLT 224), the court held that if the husband files a petition for divorce on the ground of adultery and could not name the alleged adulterer as co-respondent leave must be obtained by filing a separate petition to dispense with the impleading of co-respondent. The court has no jurisdiction to entertain the petition before such leave (permission) has been obtained.

In **Thomas Kurian v. Meena** (2000 (1) KLT 183 (FB)), the court held that impleadment of the alleged adulterer is a mandatory requirement unless the applicant is excused from impleading the alleged adulterer as co-respondent in the petition by the court.

### **Divorce by Mutual Consent**

Section 10 A of the Divorce Act, 1869 deals with divorce by mutual consent. Section 10 A is inserted by the 2001 amendment. Before the 2001 amendment divorce by mutual consent was not permitted among the Christians.

By section 10 A of the Divorce Act, 1869, a petition for dissolution of marriage may be presented to the District Court (Family Court) by both the parties to a marriage together on the following grounds.

- i. They have been living separately for a period of two years or more.
- ii. They are unable to live together.

iii. They have mutually agreed that the marriage should be dissolved.

After six months and before eighteen months from the date of presentation of the petition, the court shall, after hearing the parties, pass a decree declaring the marriage to be dissolved with effect from the date of decree.

In **Sherly Thomas v. Johny**, 2002 (1) KLT 98; a petition for divorce filed by one of the spouses was pending before the High Court of Kerala for a pretty long period. During the pendency of the petition, the Divorce Act was amended and incorporated section 10A, allowing the parties to file joint petition for divorce by mutual consent before the Family Court ( District Court). The spouses filed a joint petition for divorce by mutual consent under section 10A of the Divorce Act before the High Court of Kerala instead of Family Court. The Kerala Court held that though a petition for divorce by mutual consent is to be filed before the Family Court ( District Court), such a petition can be entertained by the High Court in a pending case. Further the court held that where it is established that the marriage between the parties had irretrievably broken and it was practically and emotionally dead, there is no need to wait for a further period of **six months** after filing of the joint petition under section 10A. In this case the Kerala High Court waived the procedural requirement of waiting for six months and allowed the petition for divorce by mutual consent.

But in **Anil Kumar Jain v. Maya Jain** (2009)10 SCC 415 and in **Manish Goel v. Rohini Goel** (2010) 4 SCC393, the Supreme Court held that the statutory period of six months has been prescribed for giving opportunity to parties to reconcile and withdraw petition for dissolution of marriage, and the waiver of statutory period of six months can **only be granted by the Supreme Court** in exercise of its jurisdiction under Article 142 of the Constitution. Thus no other courts (including High courts) can waive statutory period of six months.

In **Soumya Ann Thomas v. Union of India** (2010 (1) KLT 869), a

Division Bench of the Kerala High Court held that the stipulation in the Divorce Act that the spouses must have been living separately for a period of two years or more before filing petition for divorce by mutual consent is unconstitutional as it violates the fundamental rights to equality and right to life under Article 14 and 21 of the Constitution. To save the provision and to avoid the vice of unconstitutionality the period of "two years" stipulated in section 10A of the Divorce Act is read down to a period of "one year".

In **Shiv Kumar v. Union of India and Others** (AIR 2014 Kar. 73), a Division Bench of the Karnataka High Court approved the Kerala High Court's decision in **Soumya Ann Thomas v. Union of India** (2010 (1) KLT 869).

## **II. Decree of NULLITY of Marriage**

By section 18 of the Divorce Act, 1869, the husband or wife can present a petition to the District Court (Family Court) praying that his or her marriage may be declared null and void.

By section 19 of the Act a decree declaring the marriage as null and void can be passed on the following grounds:

54:

- 1) **The respondent was impotent at the time of marriage and at the time of institution of the suit.**

In **Valsa v. Moore** (1991 (1) KLT 132), the Kerala High Court held that vasectomy is only a mode of sterilization. Sterilization does not render a man impotent. Impotent is one who suffers from impotency which is the inability to perform the sexual act. Sterility is not necessarily associated with impotency.

In **Beena v. Varghese** (2000 (1) KLT 684 (FB)), the Kerala High Court held that the impotency contemplated in section 19 does not signify sterility but incapacity to have normal sexual intercourse. It means the incapacity to perform full and natural intercourse. When impotency is alleged, evidence

of expert medical officer is normally necessary. A person charged of impotency cannot be compelled to undergo medical examination. However if there is positive refusal by the husband to submit to medical examination and vice versa, it is open to the court to draw adverse inference.

In **Poulose v. Mary** (1996 (1) KLT 520 (FB)), the wife did not allow the husband to have sex with her. She expressed her aversion to sex with him on the ground that she wanted to become a nun. The above circumstance is one establishing the impotency of the wife. The husband is entitled to a decree of nullity of marriage.

In **Sheeba Daniel v. Alexander** (1989 (1) KLT 405), the Kerala High Court held that a person is impotent if his mental or physical condition makes consummation of the marriage a practical impossibility. It is indeed difficult to prove impotency by oral evidence. It can be proved only through medical evidence. Though a party cannot be compelled to undergo medical examination, from his refusal to undergo medical examination, the court can definitely draw adverse inference.

In **Georege Philip v. Saly Elias** (1994 (2) KLT 947), one of the parties to the petition for nullity of marriage refused to submit to medical examination to prove potency. The court held that in such a case the inference would be that had such a party appeared for medical examination its result would have been against that party.

In **Joy v. Shilly** (1995 (2) KLT 546), it was held that refusal to give reasons for non-consummation of the marriage can lead to an inference regarding the impotency of the respondent.

- 2) The parties are within the prohibited degrees of relationship.
- 3) Either party was a lunatic or idiot at the time of marriage.

In **Usha Abraham v. Abraham Jocom** (1987 (2) KLT 582), it was

held that a mere weakness of intellect, mild mental retardation or psychic inability will not justify an annulment of marriage. The petitioner should show that because of the mental disorder the other spouse was unable to know the nature and consequences of his or her acts.

In **Thomas v. Ann Thomas** (1998 (2) KLT 335 (FB)), there was no evidence to show that the wife was suffering from mental illness before or at the time of marriage. The court held that in such a case decree of nullity of marriage cannot be granted even if it is found that the wife has developed some mental illness after the marriage.

4) **Either party has a living spouse at the time of marriage.**

In **Annu Thomas v. Mathew Thomas** (2001 (2) KLT 688, it was held that if the former marriage is still subsisting and is legal, court has no discretion but must annul the marriage.

5) **The consent of either party was obtained by force or fraud.**

In **Valsa v. Moore** (1991 (1) KLT 132, the husband concealed from the wife the fact that he had undergone vasectomy operation before marriage. The Court held that active concealment of a fact by one having knowledge of the fact would amount to fraud and in such a case the marriage is liable to be declared null and void.

In **Peter v. Moly** (1997 (2) KLT 897), the fact that the respondent-wife was mentally ill and suffering from physical incapacity to conceive was concealed from the petitioner-husband. It was held that the petitioner's consent to marriage was obtained by playing fraud. The marriage was declared null and void.

In **Jomon v. Mercy John** (2000 (1) KLT 823), the fact that the wife was pregnant by some other person at the time of marriage was suppressed from the husband. The court delared the marriage as null and void as the

consent of the husband was obtained by fraudulently suppressing the factum of pregnancy.

### **III. Judicial Separation**

By virtue of section 22 of the Act the husband or wife may obtain a decree of judicial separation on the ground of adultery or cruelty or desertion for two years or upwards. An application for a decree of judicial separation may be made to the District Court ( Family Court).

By section 22 of the Divorce Act,1869 a court shall not make a decree for a divorce *a mensa et toro*. However, a decree of judicial separation shall have the effect of a divorce *a mensa et toro* for the specific purposes mentioned under section 24 and 25 of the Act.

By section 24 from the date of decree of judicial separation the wife shall be considered as unmarried with respect to property of every description which she may acquire or which may come to or devolve upon her. Such property may be disposed of by her in all respects as an unmarried woman and on her decease the same shall, in case she dies intestate, go as the same would have gone if her husband had been dead.

By section 25 the wife shall, whilst so separated, be considered as an unmarried woman for the purpose of contract, and wrongs and injuries, and suing and being sued in any civil proceedings and her husband shall not be liable in respect of any contract, act or costs entered into, done or omitted or incurred by her during the separation. However, if upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same is not duly paid by the husband, he shall be liable for necessaries supplied for her use.

In **Thomas Kuriakose v. Abraham Mary** (2003 (2) KLT 41), it was held that a decree passed for judicial separation does not have the effect of a divorce in view of section 22 of the Divorce Act though the decree have the effect of a divorce *a mensa et toro* for the specific purposes mentioned un-

der sections 24 and 25 of the Act. A divorce cannot be claimed on the basis of the decree of judicial separation.

### **III. Restitution of Conjugal Rights**

Section 32 of the Divorce Act deals with restitution of conjugal rights. When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved spouse can apply by petition to the District Court ( Family Court) for restitution of conjugal rights. If the court is satisfied that the statements made in such petition are true and there is no legal ground for withdrawal it may decree restitution of conjugal rights.

If the respondent has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after passing the decree against the respondent, the petitioner can apply to the court for a decree of divorce.

### **Expenses of the Suit and Alimony pendente lite**

By section 36 of the Act, in any suit, whether it be instituted by a husband or a wife, the wife may present a petition for expenses of the proceedings and alimony pending the suit. If the court is satisfied of the truth of the statements in the petition, it may order the husband to pay to the wife of the expenses of the proceedings and alimony pending the suit as it may deem just.

### **Maintanance of Wife and Children**

There is no specific statute (other than the Code of Criminal Procedure, 1973) mandating a Christian husband to maintain his children.

In **Scariah Varghese v. Marykutty** (1991 (2) KLT 71), it was held that though there is no specific statute mandating a Christian husband to maintain his children, a decree for maintenance of the children can be passed

against a Christian.

A wife can claim expenses of suit and alimony *pendente lite* as per the Divorce Act. If a decree of dissolution of the marriage or a decree of judicial separation is obtained by the wife, the court may order the husband to secure to the wife a gross sum of money or an annual sum of money. 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.

## PART-III

### MUSLIM LAW

#### **Topic -I**

#### **Introduction**

Muslim Law is a personal law. Muslim law deals with matters such as marriage, dower, divorce, maintenance, guardianship, inheritance, will, gift etc. Muslim law is applicable only to Muslims. A Muslim is one who says that there is one God, Allah, and that Mohammad is prophet of God.

In **Sulaiman v. Broadway Hanafi Juma -ath Palli** (1995 (1) KLT 167, the Kerala High Court observed as follows:

"Any person who professes Islam and acknowledges that there is only one God and that Mohammad is his prophet is a Muslim. One can be a Muslim by birth or by conversion. It is not necessary that he should observe any particular rites or ceremonies or be an orthodox believer in that religion."

The modern Muslim law has its origin in Arabian Peninsula. This law had no existence before Mohammad became a Prophet. Prophet Mohammad was born at Mecca in 571 A.D. At that time there was no general law of the races inhabiting in the Arabian Peninsula. Each tribe was governed by its own laws. The conduct of the Arabs was regulated by custom. Most of the customs of the Arab people were barbarous and inhuman. In the pre-Islamic period a very high rate of interest was charged on the debts. Gamblin was rampant. It was days of superstition and idolatory. The position of women was not much better than that of animals. They had no legal rights. Polygamy was universal. Divorce was easy. Female infanticide was common. Prophet Mohammad could bring about a complete transformation of such a society.

The Prophet was a posthumous child. His father Abdulla, while returning from Syria, where he had gone for some business, died at Medina. The Prophet was brought up by his mother, Amina. On his mother's death, while he was six years old, the Prophet passed into the care of his grandfather, Abdul Muttalib. Two years later, the grandfather also died and the boy was then brought up by his uncle, Abu Talib. After the age of twenty five years he spent much of his time in a lonely cave named *Hira*. He spent much time for prayer and meditation. He became a Prophet at the fortieth year of his age, when he received his first *wahi* or message from God. Thereafter his endeavour was to change the barbarous Arabian society. At the first stage he had to face opposition from the idolators. He was abused, spat upon, covered with dust and dragged from the temple of Mecca by hair of his head. All these compelled him to leave Mecca and to take refuge among his followers at Medina. The flight of Prophet known as *Hirjat* marked the beginning of Muslim era. He got acceptance in Medina and became sovereign of the city of Medina. He rallied his followers and defeated Mecca in the battle of Badar (A.D. 623). He became the ruler of the empire of Arabia within ten years. This absolute supremacy continued till his death in 632 A.D. During the period when he was the ruler, most of the legal verses of the Quaran were revealed.

The Prophet Mohammed died without leaving a son. Then the question of succession to Caliphate (or *Imamat* or spiritual leadership of Islam) arose and the difference of opinion resulted in two main sects of Muslims, namely, Sunnis and Shias. Shias maintained the view that the Caliphate should be hereditary. They advocated that the *Imamat* was to be confined to the Prophet's family or his nominees. But the Sunnis maintained the view that the Caliph or Imam should be a person elected by the votes of the faithful (Jammat).

Abu Baker, a disciple and early companion of the Prophet, became the first Caliph in 632 A.D. Then Umar became his successor in 634 A.D. He was also a disciple and early companion of the Prophet. Usman succeeded

Umar, and became the third Caliph. He was also a disciple and early companion of the Prophet. Usman was succeeded by Ali and became the fourth Caliph. Ali was the son-in-law of the Prophet Mohammad. Ali married to Fathima, the daughter of Prophet Mohammad. The Shias regarded the first three Caliphs as usurpers. According to Sunni, the first three Caliphs were not usurpers but beloved to the Prophet.

The division of Muslims into two sects, namely, Sunnis and Shias, has some impact in the law applicable to them in India also. Sunnis are governed by Sunni Law and Shias are governed by Shia Law. There are some differences between these laws; though the sources of these laws are one and same, namely, the *Holy Quaran*, the *Sunnat* and the *Ijma*.

## **Sources of Muslim Law**

The following are the sources of Muslim Law

### **1. The Quaran**

The Quaran is the paramount source of Muslim law. It contains the revelation of God to His Prophet Mohammad, through angel Gabriel. It contains the very words of God as they communicated to the Prophet.

The Holy Quaran in its present form is a book divided into 114 Chapters and consists of about 6666 verses. The verses of the Quaran are called Ayat and the Chapters of this Holy Book are called Sura. The verses were given to the world in fragments during a period of 23 years. It was not collected and arranged in the lifetime of the Prophet. It was compiled in the textual form in 650 A.D. by Usman, the third Caliph. Not more than 200 verses of Quaran are concerned with legal principles and nearly about 80 verses are concerned with marriage, dower, divorce and inheritance.

### **2. The Sunnat**

The Holy Quaran contains the revelations of God communicated to Prophet Mohammad through angel Gabriel.

Sunnat are the opinions of the Prophet on questions that happened to be raised before him. Sometimes it happened that no direct revelation came to the Prophet from the God and in the meantime some questions had to be decided. In such circumstances, the Prophet exercised his own judgment and gave his opinion. Sunnat also includes those practices and conduct which Prophet had tacitly allowed.

### 3. The Ijma

Ijma is another source of Muslim Law. Ijma refers to the consensus of opinion on a question of law amongst the companions of the Prophet. After the death of the Prophet, the questions raised were answered by the jurists. The common opinion derived by agreement of the jurists is called Ijma.

### 4. The Qiyas

Qiyas means reasoning by analogy from the Quran, Sunnat and Ijma. In the absence of clear guidance in the Quran, Sunnat and Ijma, the Judge has to decide and state the rules by his own reason and analogy from the Quran, Sunnat and Ijma.

The other sources of Muslim law are (1) Urf or Custom (2) Judicial Precedents and (3) Legislation.

In **Vishwa Lochan Madan v. Union of India others** 2014 (3) KLT 206), the petitioner alleged that All India Muslim Personal Law Board strives for establishment of parallel judicial system in India by setting up Dar-ul-Qazas (Muslim Courts) and Sharia Courts aimed to administer justice to Muslims living in this country according to Shariat i.e., Islamic Canonical Law based on the teachings of the Quran and the traditions of the Prophet. The petitioner brought to the notice of the Court three Fatwas and questioned the validity of Fatwas (opinion of expert on a religious issue) issued by Dar ul Qazas.

A Fatwa was issued by Dar ul Qazas of Deoband in relation to Imrana's incident. Imrana, a 28 year old Muslim woman, mother of five children, was

raped by her father-in-law. The question arose about her marital status and those of her children born in the wedlock with rapist's son. The Fatwa of Dar ul Uloom reads as follows:

"If one raped his son's wife and it is proved through witnesses, or the rapist himself confesses it, Haram Musaharat will be proved. It means that the wife of the son will become unlawful forever to him i.e., the son. The woman with whom father has copulated legally or had sexual intercourse illegally in both ways, the son cannot keep physical relationship with her."

The Holy Quran says:

"Marry not the woman whom your father copulated"

The Fatwa has dissolved the marriage and passed a decree for perpetual injunction restraining the husband and wife living together, though none of them ever approached the Dar-ul-Uloom.

Another Fatwa ruled that no police report can be filed against father-in-law of Asoobi, who had raped her. According to Fatwa, father-in-law could have been blamed only if there had been a witness to the case or the victim's husband had endorsed Asoobi's allegation.

Yet another Fatwa is in connection Jatsonara, a 19 year old Muslim woman, who was asked to accept the rapist father-in-law as her real husband and divorce her husband.

After hearing the petitioner, the Union of India and All India Muslim Personal Law Board, the Supreme Court ruled as follows:

**A Fatwa is an opinion, only an expert is expected to give. It is not a decree, not binding on the court or the State or the individual. It is not sanctioned under our Constitutional scheme. It is within the discretion of the persons concerned either to accept, ignore or reject it.**

## **Topic -II**

### **What are the Essentials of a Valid Marriage under Muslim Law ?**

Under 'Muslim Law', marriage is known as *Nikah*.

In Muslim Law, marriage is considered to be a civil contract for the purpose of legalising sexual intercourse and procreation of children. Marriage is a union of a man and a woman for the purpose of sexual intercourse and procreation of children.

In *Abdul Kadir v. Salima* (1886) 8 All 149), the court held that a Muslim marriage is a civil contract, upon the completion of which, by proposal and acceptance, all the rights and obligations which it creates arise immediately and simultaneously.

A Muslim marriage is a civil contract, between a Muslim male and a female. Female need not always be a Muslim. A Muslim marriage will be complete when an offer for marriage is accepted by the other. The purpose of Muslim Marriage is legalising sexual intercourse and the procreation of children.

#### **Essentials of Muslim Marriage**

A Muslim marriage is considered to be a civil contract. The following are the essentials for a valid Muslim marriage.

##### **1. Capacity to Marry**

Every Mohammedan of sound mind and who has attained the age of puberty may enter into a contract of marriage. The word 'puberty' means the age at which a person becomes capable of performing sexual intercourse

and procreation of children. A person is presumed to have attained the age of puberty on the completion of 15 years of age.

In **Sadique Ali Khan v. Jai Kishori** (1928) 30 Bom LR 1346, the Privy Council held that the earliest age of puberty for girls is 9 years and a boy is 12 years. This decision was given by the Privy Council after considering a passage in 'Hedaya'. Thus if the boy and girl has attained puberty, they can validly contract a marriage though they have not completed 15 years of age.

According to the Child Marriage Restraint Act, a marriage of male below 21 years of age and a female below 18 years of age is a child marriage. The Act prohibits such marriages. The parties who are violating the provisions of Child Marriage Restraint Act are liable to be punished. Thus if two Muslims marry before attaining the age prescribed under the Child Marriage Restraint Act they are liable to be punished. However, the marriage would be valid.

## **2. Proposal and acceptance**

Under Muslim Law, for the validity of a marriage, there must be a proposal and acceptance at the same meeting. A proposal made at one meeting and acceptance made at another meeting will not make a valid marriage.

## **3. Witnesses**

Under Sunni Jaw, the proposal and acceptance must be made in the presence of two male Muslims who are of sound mind and have attained puberty or one male and two female witnesses.

A marriage contracted in the absense of witnesses will not be void but only irregular. A marriage contracted in the presence of four female witnesses is an irregular marriage.

Under Shia law, witnesses are not necessary at the time of marriage.

The proposal and acceptance need not be in writing. If the offer and acceptance are in writing, the document is called *Nikah Nama* or *Kabin Nama*.

#### 4. Free consent

If there is no free consent, a Muslim marriage will be void.

In **Hassari Kutti v. Jainabha** (1929) 42 Mad. 397, the court held that a marriage of a girl who has attained puberty and is of sound mind would be void, if her consent is not obtained.

If the consent to marriage was obtained by force or fraud, the marriage will be invalid, unless it is ratified.

In **Abdul Kasim v. Jameela Khatum** (1940) a marriage was contracted without the consent of girl who has attained puberty. The marriage was consummated against the will of the woman. The court held that the consummation of marriage against the will of the woman will not validate the marriage.

A valid marriage of a minor (person who has not attained puberty) may be contracted by his or her guardian. The right to contract a minor in marriage belongs successively to the following persons:

- 1) Father
- 2) Paternal grand father (h.h.s - How high-soever)
- 3) Brother and other male relations on the father's side.
- 4) Mother
- 5) The maternal uncle or aunt and other maternal relations.

Under Shia law, only the father and the paternal grand father (h.h.s) are recognised as guardians for contracting marriage of a minor.

In **Ayub Hassan v. Aktarri** (AIR 1965 All 525), the court held that, if a marriage of a minor was contracted by a remoter guardian, while nearer guardian is present and available and such nearer guardian does not give consent to the marriage, the marriage is void. However, if the parties ratify it after attaining puberty, it will be valid.

#### **KHYAR-UL-BULUGH** [Option of Puberty]

If a marriage of minor is contracted by the father or father's father, the marriage is valid and binding and it cannot be annulled by the minor on attaining puberty. If a marriage was contracted for the minor by a guardian other than the father or father's father, the minor has the option to repudiate the marriage on attaining puberty. This right is called Khyar-ul-bulugh.

In **Abdul Kassim v. Jamila khatum** ((1940)1 Cal 140), the court held that the right of repudiation of minor wife should be exercised within a reasonable time after attaining puberty. If she fails to exercise her right of repudiation within reasonable time the right will be lost.

The option of puberty will also be lost if she permits the marriage to be consummated after attaining puberty. If the consummation was without her consent the right of repudiation will not be lost.

The Dissolution of Muslim Marriage Act, 1939 has considerably modified the law of option of puberty. Prior to this Act the marriage of a minor girl contracted by father or grand father could not be repudiated by her on attaining puberty. But by virtue of section 2(7) of the Act, a minor Muslim girl, whose marriage was contracted by her father or grand father can also obtain a decree for divorce from a court, if the following conditions are satisfied:

- 1) The marriage should have contracted before she attained puberty.
- 2) She should have repudiated the marriage after attaining puberty and before attaining 18 years of age.

3) The marriage should not be consummated.

5) **No Legal Disability / Absence of Impediments**

Under Muslim Law, marriage under certain circumstances is prohibited or not permitted. The prohibitions can be classified into two heads.

They are the following:

1. **Absolute prohibition**

A marriage will be void if it is in violation of absolute prohibition. The following are absolute prohibitions.

a) **Marriage between persons who come within prohibited degree of relationship**

Under Muslim law, marriage between persons who come within the blood relationship, or certain other relationship is prohibited. The prohibited relationship are the following.

i) **Consanguinity**

Consanguinity means blood relationship. A Mussalman is prohibited from marrying the following females.

1. His mother or grand mother (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 (h.l.s)
5. His aunt (mother's sister & father's sister)

A marriage with a woman who comes within the relationship of consanguinity is absolutely void. Children born out of that wed-lock are illegitimate.

ii) **Affinity**

Under Muslim Law, a man is prohibited from marrying certain female relatives due to the nearness of relationship.

A man is prohibited from marrying -

1. his wife's mother or grand mother ( h.h.s )
2. his wife's daughter or grand daughter ( h.l.s )
3. wife of his father or paternal grand father.
4. Son's wife

A marriage with a woman who comes within the relationship of affinity is void.

iii) **Fosterage**

If a child is suckled by a woman other than its own mother, she becomes the foster mother of the child. It creates a relation by milk. A man is prohibited from marrying certain persons having foster relationship. Muslim Law considers fosterage and consanguinity on the same footing. Whatever is prohibited in consanguinity is prohibited in fosterage also.

Thus a male cannot marry the following females.

1. His foster-mother or grand mother ( h.h.s )
2. His foster-sister( daughter of foster mother).

A marriage between a male and the following females will be valid.

1. Sister's foster mother.
2. Foster sister's mother.
3. Foster son's sister.
4. Foster brother's sister.

b) **Polyandry**

Under Muslim Law, a female cannot contract more than one marriage at the same time. So long as the first marriage is subsisting and the husband is alive she cannot contract a second marriage.

If a second marriage is contracted in violation of this prohibition it will

be void.

## 2. Relative Prohibitions

Under Muslim Law, there are certain prohibitions which are not absolute but only relative and marriage in violation of such relative prohibitions will only be irregular and such marriage can be made valid by subsequent acts. The following are the relative prohibitions:

### 1. Marrying a Fifth Wife

Muslim Law permits a male to contract four marriages at the same time. If he marries again, while having four wives, the fifth marriage is irregular and not void. The fifth marriage can be made valid by divorcing any one of the four wives in the earlier marriages.

### 2. Unlawful Conjunction

Under Muslim Law, a Mussalman is prohibited from marrying those female relatives of his wife who could not be married by his wife if she was a male. Thus a Mussalman cannot marry his wife's sister while the wife is alive. If he marries his wife's sister, the marriage will be irregular. It can be made valid by divorcing his first wife.

In *Chand Patel v. Bismillah Begum* (2008 (2) KLT 1038 (SC)), it was held that a marriage performed by a person professing Muslim faith with his wife's sister, while his earlier marriage with the other sister was still subsisting, is only irregular and not void. The bar of unlawful conjunction (*jama bain-al-mahramain*) renders a marriage irregular and not void and that an irregular marriage continues to subsist till terminated in accordance with law and the wife and children of such marriage would be entitled to maintenance under s.125 of the Code of Criminal Procedure, 1973. A marriage which is merely irregular or voidable continues to subsist till it is set aside or declared void in accordance with law.

Marriage with a permanently prohibited woman ( mother, daughter

etc) has been considered by the exponents of Muslim law to be void and has no legal consequence. A marriage with a temporarily prohibited woman ( wife's sister ) if consummated may have legal consequences. The logic behind the aforesaid reasoning is that a marriage with sister of an existing wife could always become lawful by the death of the first wife or by the husband divorcing his earlier wife and thereby making the marriage with the second sister lawful to himself. Since a marriage which is temporarily prohibited may be rendered lawful once the prohibition is removed, such a marriage is only irregular ( *fasid* ) and not void ( *batil* ).

### 3. Absence of Proper Witnesses

A marriage contracted in the absence of witnesses will be irregular. The defect of absence of witnesses can be rectified by subsequent confirmation of marriage or by consumation.

### 4. Difference of Religion

Under Sunni Law, a Muslim male can validly marry any Muslim female, or a 'kitabia' (Yahutha & Christian). A Sunni Muslim male can validly marry a Jew or Christian female. They are 'kitabia' (following kitab, a holy book). He cannot validly marry a woman who is an idolatress or a fire worshipper. A marriage with an idolatress or fire worshipper will be irregular and not void.

In **Abdul Rahim v. Julaiga Beevi** (2001 (3) KLT SN2 P.2), it was held by the Madras High Court that a Muslim cannot marry an idolatress or a fire-worshipper. A Hindu woman comes within the category of idolatress or fire-worshipper.

A Mohammedan female cannot contract a valid marriage with a non-Muslim. According to Mulla, a marriage by a Mohammedan female with a kitabia is only irregular. But according to Fyze such marriage is void.

Under Shia law, both the spouses are required to be Muslims. A marriage with a non-Muslim is void under Shia Law.

A Sunni male can marry a shia girl and vice-versa.

### 5. Marriage During Iddat

Under Muslim law, a woman who is undergoing *iddat* is prohibited from marrying during that period. If she marries during the period of *iddat*, it will be irregular.

## **Topic - III**

### **Kinds of Marriage**

Islamic Law classifies Marriages into three heads on the basis of its validity.

#### Valid / Sahih Marriage

A Marriage which is neither void nor irregular is valid. A Marriage to be valid it must satisfy the following requirements.

1. There must be a proposal by one party and acceptance by the other. The proposal and acceptance must be made at the same meeting and before competent witnesses.
2. The parties to the marriage should be competent to contract marriage. They should be of sound mind and must have attained the age of puberty.
3. The parties to the marriage should have freely consented. The parties should not come within the degrees of prohibited relationship.

The parties to the valid marriage are entitled to certain rights and they are bound to follow certain obligations. The children born in this wed-lock are legitimate. Mutual rights of inheritance spring out of valid marriage.

### Void / Battle Marriage

If a marriage is in violation of an absolute prohibition, the marriage is void. The absolute prohibitions are on the ground of consanguinity, affinity, Fosterage and polyandry.

A void marriage does not create any legal right or obligation between the parties. Children born out of such relationship are illegitimate.

### Fasid / Irregular Marriage

Irregular Marriage is a marriage which is neither valid nor void. When a marriage is contracted in violation of relative prohibitions, it will become irregular marriage. An irregular marriage has no legal effect before consummation. If consummation has taken place, the wife is entitled to dower or mahar. The children born out of such marriage is legitimate. Irregular marriage can be validated by some subsequent act of the parties. The following are irregular marriages.

#### 1. Marriages contracted without witnesses

2. Marriage with a fifth wife.
3. Marriage contrary to the rules of unlawful conjunction.

#### 4. Marriage with a women undergoing iddat

5. Marriage with an idolatress or fire-worshipper.

## **Topic - IV**

### **Iddat**

Under Muslim Law, a woman cannot contract a second marriage immediately after the previous marriage is dissolved, either by death or by divorce. After the termination of a marriage, the wife has to lead a life of continence or seclusion for some period called iddat.

During the period of iddat, a woman is supposed to lead a life of seclusion and to abstain from certain luxuries. The abstinence is imposed to ascertain whether she is pregnant by the husband who died or divorced. It is to avoid confusion of parentage. A woman who is undergoing iddat is prohibited from marrying another husband until the expiry of period of iddat.

#### **Period of iddat**

##### **If the marriage is dissolved by divorce -**

1. the period of iddat is three courses, if the woman is subject to menstruation.
2. the period of iddat is three lunar months, if the woman is not subject to menstruation. (1 lunar month = 28 days).
3. the period of iddat extends up to delivery, if the woman is pregnant at the time of termination of marriage,

##### **If the marriage is dissolved by death of the husband -**

4. the period of iddat is 4 lunar months and 10 days.
5. the iddat lasts 4 months and 10 days or until delivery whichever period is longer, if she is pregnant,

If the marriage was dissolved by death, the wife is bound to observe iddat even though the marriage was not consummated.

If the marriage was dissolved by divorce, she is bound to observe iddat, only if the marriage was consummated.

If the marriage is irregular, the wife is bound to observe iddat only if the marriage is consummated.

If the husband had divorced his wife and had died before completion of iddat she has to follow iddat until the period expires for iddat in case of death.

The husband is bound to maintain the wife during the period of *iddat*. The wife cannot marry another person until the completion of the period of *iddat*.

## **Topic -V**

### **Khilwat-us-Sahiha (Valid Retirement)**

Under Muslim Law, valid retirement is treated as consummation for certain purposes. Valid retirement is a stage at which the husband and the wife are alone and together and there is no moral, physical or social impediment to marital inter course. When the husband and wife retire together without any impediment for sexual intercourse there is valid retirement. The husband and wife must retire together in actual privacy.

Valid retirement, has the same effect as consummation for the following purposes:-

- i) for the confirmation of mahar.
- ii) for the establishment of paternity.
- iii) for the observance of iddat.
- iv) for the wife's right of maintenance during iddat, and
- v) for the bar of marriage with the wife's sister.

Under Shia law, valid retirement is not recognised. The actual consummation must have taken place for all the above stated purposes.

## **Topic -VI**

### **Muta (Temporary) Marriage**

Muta Marriage is a temporary marriage recognised by Shia law. The word 'Muta' literally means 'enjoyment or use'. Muta marriage is a marriage for pleasure. It is a marriage for a fixed period, for a certain reward paid to the woman. Muta marriage is not recognised in Sunni law.

#### **Essentials of a Muta Marriage**

1. The period of which the union is to last should be fixed at the time when the muta is contracted. It may be for a day, a month, a year or a number of years. If no period is fixed, the marriage would be treated as permanent marriage (Nikah).
2. The dower should be specified in the contract. If the dower is not specified, the contract is void.
3. The parties must have attained the age of puberty. They must be of sound mind. There must be free consent of parties. They should not come within the degrees of prohibited relationship.
4. A shia woman cannot contract a muta marriage with a non-muslim. But shia male can contract a muta marriage with a Muslim, Christian, Jewish or a fire-worshipping woman.

#### **Legal incidents of a Muta Marriage (Rights and Liabilities )**

1. A muta marriage does not create mutual rights of inheritance between the husband and the woman.
2. The children conceived during the existence of marriage are legitimate

and capable of inheriting from both parents.

3. A muta marriage is dissolved by efflux of time (expiry of time).
4. No divorce is recognised in this form. However, the husband may make a gift of the unexpired period, which is called '*Hiba-i-muddal*'.
5. The wife is entitled to half of the dower when there is no consummation. After consummation, the wife can claim full dower even if the husband has gifted unexpired period.
6. The muta wife is required to observe iddat in case of death of her husband for a period of four months and ten days. In case of pregnancy, this period is to be extended till delivery. The period of iddat in case of termination of muta otherwise than by the death of the husband, is two courses if she was subject to menstruation and forty five (45) days if she was not. If there is no consummation, iddat is not necessary. There is no limit to the number of wives. A Mussalman can contract muta marriage with any number of women.

## **Topic - VII**

### **Presumption of Marriage**

When there is a dispute with regard to the existence of marriage, the marriage can be proved by calling the witnesses present at the time of marriage or by producing the 'Nikah Nama' signed by the parties. Some times, there may not have direct evidence to prove the marriage. In the absence of direct evidence, the marriage can be inferred from the circumstances. This is called Presumption of Marriage.

A marriage will be presumed under the following circumstances.

#### **I. Prolonged and continued cohabitation as husband and wife.**

Cohabitation for one or two days will not be sufficient to raise pre-

sumption of marriage. In order to raise presumption of marriage under this head the following conditions are to be satisfied.

1. The cohabitation must be a prolonged one.
2. The parties must have been cohabiting as husband and wife.
3. They should not come within the degrees of prohibited relationship.
4. The woman should not be a prostitute or concubine.

**Gazaufar Ali vs. Kaniz Fathima (ILR 32 All 345)**

In this case the court held that if a woman is a prostitute, cohabitation however prolonged can never give rise to the presumption of marriage.

**Khjah Hidayat vs. Rai Jai (1884) 3 MIA 295**

The court held that a marriage can be presumed when there is a prolonged and continuous cohabitation as husband and wife.

**Badri Prasad v. Deputy Director, Consolidation (AIR 1976 SC 1557)**

The court held that a strong presumption arises in favour of wed-lock when the parties have lived together for a long spell as husband and wife. The presumption is, however, rebuttable. Strong evidence is required to rebut the presumption of marriage.

**II. The acknowledgment by either party that he or she was married to the other and the other party has confirmed the acknowledgment.**

**III. A valid acknowledgment of paternity by a Mussalman of the children born to a woman results in presumption of marriage between that male and woman.**

## **Topic -VIII**

### **Restitution of Conjugual Rights**

A valid marriage creates mutual rights and obligations on both the spouses. By a marriage, one spouse is entitled to the society and comfort of other, which is known as *jus consortium*.

Under Muslim law, when either the husband or the wife has, without lawful excuse withdrawn herself or himself from the company or society of the other, the aggrieved party may bring a suit for the restitution of conjugual rights.

**Moonshee Bazloor Rahim v. Shamsoonissa Begum (1867) MIA 55**

The court held that if a wife without lawful causes ceases to cohabit with her husband, he may sue the wife for restitution of conjugual rights.

**Jain and others v. Mohammed Khan (AIR 1970 J&K 154)**

The court held that a husband is entitled to a decree for restitution of conjugual rights if the wife has refused to live with him.

When a suit is filed by the husband, for restitution of conjugual rights, the wife can defend the suit on the following grounds.

#### **1. Validity of the marriage**

When the husband files a suit for restitution of conjugual rights, the wife can defend the suit on the ground that there is no valid marriage.

If the marriage is not valid, the court will not grant a decree in favour of the husband.

**Bakh Bivi v. Quain Din (AIR 1934 Lah 907)**

The Muslim husband 'B' married 'A' a Muslim lady during iddat. The

consummation of marriage took place after the expiry of iddat. Later on the wife deserted B. B filed a suit for restitution of conjugal rights. The Court held that, the marriage performed during iddat is invalid and therefore no decree for restitution of conjugal rights could be passed in favour of B.

## 2. Legal Cruelty

A wife can defend a suit for restitution of conjugal rights on the ground that the husband is guilty of cruelty. When the wife has reasonable apprehension that her life is unsafe, the court will not compel her to live with her husband.

Under Mohammedan law, a wife is not entitled to successfully defend a suit for restitution of conjugal rights on the ground that her husband has another wife. However, a second marriage of husband, may in certain circumstances, result in cruelty to first wife justifying her refusal to live with him.

### Itwari v. Asghari (AIR 1960 All 684)

In this case the court held that in a suit for restitution of conjugal rights by a Muslim husband, against the first wife after he has contracted a second marriage, the court may not compel the first wife to live with him if it feels that the circumstances make it inequitable.

## 3. False charge of Adultery

A false charge of adultery by a husband against his wife is a good defence, available to a wife in a suit for restitution of conjugal rights by the husband.

## 4. Non-Payment of Prompt Dower

If the husband has failed to pay the prompt dower on demand by the wife she can defend the suit for restitution of conjugal right on this ground. If the marriage has not been consummated, non payment of dower is a complete defence to the suit.

**Abdul Kadir v. Salima** (1886) 8 All 149

The court held that there was no right in the wife to refuse to return to the husband after the marriage had been consummated on the ground that dower is not paid.

## **Topic - IX Jactitation of Marriage**

Jactitation is a false allegation of marriage. If a lady falsely alleges that she is married to another, she is liable for jactitation. A man can seek relief through a civil court when a woman falsely alleges that she is married to him. Injunction will be granted against the lady. He can obtain injunction on the ground that it will affect his reputation.

## **Topic - X Dower or Mahar**

Under Muslim law, the husband is bound to pay a certain sum of money to the wife on marriage. The sum which he is compelled to pay as a mark of respect for wife is known as 'dower' or 'mahar'.

According to Mulla, 'dower' is either some of money or other property, which the wife is entitled to receive from the husband in consideration of the marriage. Dower is an obligation imposed upon the husband as a mark of respect of the wife.

**Abdul Kadir v. Salima** (1886) 8 All 149

The court held that dower under Mohammedan law is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of marriage.

The amount of dower may be fixed by the parties by agreement. Even though no dower is expressly fixed or mentioned at the time of marriage, law

confers a right upon the wife to claim dower. If no amount is fixed by agreement, the husband is liable to pay the amount as per the law.

### CLASSIFICATION OF DOWER

The dower may broadly be classified into two heads. They are

#### 1) Specified Dower(Mahar-ul-Musamma)

If the amount of dower is stated in the marriage contract, it is called, 'Specified Dower' or 'Mahar-ul-Musamma'. The amount of dower may be settled by the parties to the marriage, either before or at the time or even after the marriage. The dower amount once fixed, can be increased after marriage.

Even though the parties can settle any amount by way of dower, the amount of dower should not be less than ten dirhams under Hanafi Law. Under Shia Law, there is no fixed legal minimum for dower.

The specified dower can again be classified into two heads. They are

- i) Prompt dower
- ii) Deferred dower

#### Prompt Dower(Mujjal Mahar)

The specified dower can be splitted into two parts and is payable in two installments. The prompt dower is that part of the specified dower which is payable immediately after marriage on demand.

#### Deferred Dower (Muwajjal Mahar)

It is that part of the specified dower after the payment of prompt dower which is to be paid on the death or divorce or after the dissolution of mar-

riage

### **Sheik Muhammed v. Aysha Bibi (1938 Mad 609)**

The court held that if the parties who have fixed specified dower, do not expressly split the dower into prompt and deferred, the entire amount of dower will be treated as prompt dower.

### **2) Proper Dower / Customary Dower / Maharrat**

When the amount of dower is not fixed in the marriage contract, the wife is entitled to proper dower. It is the dower which is fixed by the court. Even if the marriage was contracted on the condition that the wife should not claim any dower, the wife can claim proper dower.

While determining the amount of proper dower, the court should consider the following factors:-

- i) the qualification, age, beauty, fortune, understanding and virtue of the wife.
- ii) Social position of the family of wife.
- iii) Dower given to her father's sister.

Under Sunni law, there is no limit to the maximum amount of proper dower.

Under Shia law, the maximum amount of proper dower should not exceed 500 dirhams. It is to be noted that 500 dirhams was fixed as dower in the marriage of Fatima, the daughter of Prophet Mohammad.

### **Confirmation of Dower**

Under Sunni law, dower becomes confirmed-

- a) by consummation of the marriage
- b) by a valid retirement

- c) by the death of either the husband or wife.

Under Shia law, the dower becomes confirmed either by the consummation of marriage or by death of husband or wife. A valid retirement is not recognised for the confirmation of dower.

#### Extent of dower

The following are the principles which govern the extent of wife's claim for dower.

1. If the marriage is valid, and if it is dissolved after consummation, she is entitled to specified dower. If no specified dower is fixed she is entitled to proper dower.
2. If the marriage is valid and if it is dissolved before consummation by divorce, the wife is entitled to one-half of the specified dower.
3. If the marriage is irregular and if it is dissolved after consummation, she is entitled to specified dower or proper dower, whichever is less.
4. If the marriage was dissolved by an act of the wife before consummation, she is not entitled to get any dower.
5. If the marriage was valid and if it was dissolved, in exercise of the option of puberty, she is not entitled to get any dower.
6. If the marriage was irregular and was dissolved before consummation, she is not entitled to get any dower.

## RIGHTS AND REMEDIES OF WIFE ON NON-PAYMENT OF DOWER

Under Muslim Law, a wife has three remedies in case of non-payment of dower.

### 1. Refusal to Co-habit

A Muslim Wife can refuse to co-habit with her husband in order to compel him to pay the prompt dower. She can exercise this right only if the marriage is not consummated.

**Hamidunnissa Bibi v. Zaheer Shahi (17 Cal 670)**

The court held that the right of wife to refuse to co-habit, for the claim of prompt dower, will be lost after the consummation of marriage.

**Annis Begum v. Mohammed Istafa (1933) 25 All 743)**

The court held, that if the husband files a suit for restitution of conjugal rights before co-habitation, non payment of prompt dower is a complete defence and the suit is liable to be dismissed.

**Rabia Khatoon v. Mukhta Ahmed (AIR 1966 All 548)**

The court held that if a suit for restitution of conjugal rights is filed after sexual-intercourse has taken place, with her free consent, the court cannot dismiss a suit. However the court can pass a decree for restitution on condition that the husband should pay the prompt dower.

### 2. Right to Sue for Dower Debt

The claim for dower of the wife is considered to be a debt which husband owes to the wife. The wife who is entitled to get dower can file a suit against the husband during his life time for the recovery of dower amount. After the death of husband, she can sue the heirs of her deceased husband

for the unpaid dower debt. The heirs of the deceased husband are not personally liable for the dower debt. They are liable only to the extend of the property which they have inherited from the deceased husband. The suit for recovery of dower should be filed within three years from the date of demand and refusal of prompt dower. In the case of deferred dower, the suit is to be filed within three years from the date of dissolution of marriage, either by divorce or by death.

### **Kapoore Chand v. Nizza Begum (AIR 1953 SC 413)**

The court held that the claim of wife for unpaid dower is like an ordinary debt. The right of the wife can be compared with that of an ordinary creditor to whom the husband has to repay a loan. After the death of the husband, the widow can claim the dower amount from the legal heirs of the deceased husband and they will be bound to pay proportionate to the shares they inherited.

#### **3. Right to Retain Property**

A Muslim wife, who is entitled to dower, can possess the properties of her deceased husband until the payment of dower is made by the heirs of the deceased husband. She can exercise the right of retention as posses-sory lien only after the death of her husband or if the marriage is dissolved by divorce immediately after such divorce.

In order to exercise this right of retention she should be in actual possession of the property at the time of termination of marriage by death or divorce.

The right of retention does not give her any title to the property. The income from the property should be adjusted towards the claim for dower.

She cannot alienate (transfer by sale, gift, mortgage, lease or other wise) the property of her husband.

**Maina bibi v. Chaudary Vakit Ahmad (AIR 1925 PC 63)**

In this case one Muinuddin died in 1890. Maina Bibi was his widow, and she was in possession of her husband's estate. In 1902, the heirs of her husband filed a suit against the widow for recovery of possession of their shares. The widow defended the suit on the ground that she was holding the property in lieu of dower. The court passed a decree in 1903, allowing the claim of legal heirs of her husband. However, she was allowed to possess the property until payment of an amount of Rs. 25,387/- is paid by legal heirs of her husband. The court directed the legal heirs to make the payment within six months. The decree further provided that in case of default the suit should be dismissed. The legal heirs failed to pay the dower amount within 6 months. The suit was in effect dismissed.

In 1907, Maina Bibi executed a deed of gift of her husband's estate in favour of some donees. She gave possession of the property to the donees. Thereafter, the legal heirs of the deceased filed another suit for recovery of possession, from the donee and Maina Bibi. The court held that by giving up possession of the lands she had lost her right of retention. The widow's right is only a limited right to have possession of the properties for the purpose of enforcing the right of dower. She is not entitled to alienate the property by sale, mortgage or other wise.

**Hussain v. Rahim Khan (AIR 1971 Pat 385)**

The court held that the right to retain possession is a heritable right.

**Halima v. Mohammed Munir (1971)**

The court held that the right to retain possession can be exercised by her heirs after her death.

## **Topic -XI**

### **Talaq**

Under Muslim Law, Talaq means 'release from marriage life'. The term Talaq is used when the husband repudiates the marriage contract. Talaq is an arbitrary act of Muslim Husband by which he repudiates his wife without assigning any reason. A Muslim husband can pronounce the Talaq at any time and thereby divorce his wife.

Talaq is a divorce by husband at his will without the intervention of a court. Under Muslim law, a Mohammedan of sound mind and has attained puberty may divorce his wife by talaq whenever he desires without assigning any cause.

A Muslim husband can pronounce talaq in the presence of wife or in her absence. If talaq is pronounced in the absence of wife the name of wife should be clearly mentioned. A talaq pronounced in the presence of wife will come into effect immediately. A talaq pronounced in the absence of wife will come into effect when she comes to know of it.

Under Sunni law, talaq may be effected orally or by a written document, called 'talaqnama'. Under Shia law, talaq must be pronounced orally in the presence of two competent witnesses. A talaq communicated in writing is not valid. However, if the husband is physically incapable of pronouncing talaq orally, written talaq is valid.

In **Shamim Ara v. State of U.P.** (2002 (3) KLT 537 (SC)), the Supreme Court held that to be a valid talaq it should be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbitrators - one from the wife's family and the other from the husband's side and if the attempts fail talaq may be effected.

Earlier, in **Yousuf Rawther v. Sowramma** ( 1970 KLT 477), the

learned Judge and Jurist, V.R. Krishna Iyer, J. held that it is a popular fallacy that Muslim male enjoys, under the Quarānic Law, unbridled authority to liquidate the marriage. The Holy Quaran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him. Divorce was permissible in Islam only in case of extreme cases and where reconciliation has failed.

## **DIFFERENT MODES OF TALAQ**

There are three different modes by which talaq can be effected. They are

### **1. Talaq Ahsan**

The Arabic word 'Ahsan' means 'best' or 'very proper'. Talaq Ahsan is considered to be the best mode of talaq.

In *Talaq Ahsan*, the husband make a single pronouncement during a 'thur'. "Thur" is the period of purity, between two consecutive menstrual courses. After the pronouncement the iddat period begins. During the period of iddat, there will be no sexual intercourse. The talaq becomes irrevocable after the expiry of iddat period. Before the expiry of period of iddat it can be revoked by resumption of sexual intercourse or by express declaration.

### **2. Talaq Hasan**

The Arabic word 'hasan' means 'good'. Talaq hasan is considered to be a good mode of talaq. In talaq hasan, the husband pronounces talaq three times, each in one 'thur'. In a thur he pronounces a single talaq. In the next two consecutive thur also he pronounces single talaq. When he pronounces the third talaq, it will become complete and irrevocable. The iddat period begins from the date of first pronouncement. Thereafter, there will be no sexual intercourse. The talaq can be revoked at any time before the third

pronouncement by resuming sexual intercourse or by express declaration.

### 3. Talaq-Ul-biddat or Talaq-i-badai

This mode of talaq is considered to be a disapproved mode of talaq. In this mode of talaq, three pronouncements are made during a single thur. A talaq in this mode become irrevocable with immediate effect. The wife has to undergo iddat, though the talaq has become irrevocable.

In the case of divorce by three declaration, in order to re-marry the divorced couple, the following conditions are to be satisfied.

1. The wife should observe iddat.
2. After observing iddat she should be lawfully married to another husband.
3. That marriage must be actually consummated.
4. The second husband must pronounce talaq on die.
5. The wife should observe iddat after this talaq or iddat.

A re-marriage in contravention of the above rules shall be irregular and not void.

In **Ummer Farooque v. Naseema** ( 2005 (4) KLT 565), the Kerala High Court held that the mere pronouncement of talaq three times even in the presence of the wife is not sufficient to effect a divorce under Moham-medan Law. To be a valid talaq it should be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbitrators. If attempts fail talaq may be effected.

### Ila (Vow of continence)

If a husband, who has attained puberty and is of sound mind, swears by God that he will not have sexual intercourse with his wife, he is said to have made ila. If the husband, who has made ila abstains from sexual

intercourse with his wife for four months, the marriage will be dissolved.

### **Zihar (injurious assimilation)**

If the husband who has attained puberty and is of sound mind compares his wife to his mother or any other female relations within a prohibited degree the wife has a right to refuse to live with him until he has performed penance. If the husband fails to perform the penance, the wife has a right to apply for a judicial divorce.

The penance prescribed by law are the following:

1. freeing a slave
2. fasting for two months
3. feeding 60 poor persons.

### **Lian (false charge of adultery)**

If the husband who has attained the age of puberty and is of sound mind charges his wife of adultery or denies the paternity of her child, and the charge is false, the wife is entitled to sue for divorce.

## **DIVORCE BY WIFE**

### **1. Talaq-i-Tafweez**

Under Mohammedan law, the husband may pronounce talaq himself or delegate the power to pronounce talaq to another person including his wife. Such a delegation of power is called Tafweez. By an agreement made before or after the marriage, the husband may empower the wife to pronounce talaq under certain specified conditions such as in case the husband marries a second wife. If the wife in exercise of her power divorces herself, it is called talaq-i-tafweez.

Even though the husband has delegated power of talaq to his wife, he

can also pronounce talaq.

### DIVORCE BY MUTUAL CONSENT (Khula & Mubarat)

#### 1. Khula(Divorce at the request of wife)

A divorce by Khula is the divorce at the instance of the wife with the consent of her husband. In Khula, she gives or agrees to give a consideration to the husband for her release from the marriage tie. A khula divorce is effected by an offer from the wife to compensate the husband if he releases her from the marital tie and acceptance by the husband of that offer.

In **Juveria Abdul Majid Patni v. Atif Iqbal Mansoori** (2014)10 SCC 736, the Supreme Court held:

**Khula** is a mode of dissolution of marriage when the wife does not want to continue with the marital tie. If the wife does not want to continue with marital tie and takes mode of khula for dissolution of marriage, she is required to propose her husband for dissolution of marriage. This may or may not accompany her offer to give something in return. The wife may offer to give up her claim to Dower or Mahar. The Khula being a mode of divorce which proceeds from the wife, the husband cannot refuse subject only to reasonable negotiation with regard to what the wife has offered to give him in return. To settle the matter privately, the wife need only to consult a Mufti (juris consult) of her school. The Mufti gives his fatwa or advisory decision based on the Shariat of his school. However, if the 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.

In this case the husband challenged the validity of *ex parte* fatwa obtained by the wife from Mufti on 29-09-2009 without clear proof of acceptance of proposal of dissolution of marriage by the husband, or without issuance of qaza (judgement) of khula by Qazi ( judge). It was held that such an *ex parte* fatwa cannot dissolve marriage.

## 2. Mubarat

In Mubarat a marriage is dissolved by mutual consent. If it is effected when both the sides desire separation. The offer for divorce may be either from the side of husband or from the side of wife. When an offer is accepted it becomes an irrevocable divorce.

## **Topic -XII**

### **Grounds of divorce available to Muslim Wife under the Dissolution of Muslim Marriages Act, 1939.**

The Dissolution of Muslim Marriage Act, 1939 was enacted by the central legislature. By virtue of this Act, a Muslim wife can file a suit for divorce on the grounds available under this Act and those grounds which were recognised by the Muslim Law.

Section 2 of the Dissolution of Muslim Marriages Act, 1939 provides nine grounds under which a Muslim Wife can obtain a decree for dissolution of her marriage. They are the following:

#### **1. Absence of Husband**

The wife married under Muslim law is entitled to obtain a decree for the dissolution of her marriage if the whereabouts of her husband has been not known for a period of four years.

#### **2. Failure to provide Maintenance**

If the husband has refused or has failed to provide maintenance to his wife for a period of two years, the Muslim wife can obtain a decree for divorce.

#### ***Yusuf Rawther v. Sowramma (1971)***

A girl aged 17 years was married to the appellant. He was twice of her age. She lived with her husband for a period of one month and went back to

her parents. After two years she filed a petition for divorce, the husband contented that he is ready to pay maintenance. He admitted that he had not paid maintenance during the period of two years. The court held that she is entitled to a decree of divorce.

In *Abdurahiman v. Nassera* (2001 (1) KLT 140), the Kerala High Court held that a wife has got a right for dissolution of marriage on the ground that the husband neglected her or failed to provide for her maintenance for a period of two years. If the husband wants to continue the marriage relationship to keep the relationship in tact, he should maintain his wife.

3. Imprisonment of Husband

A wife is entitled to claim divorce on the ground that her husband is sentenced to imprisonment for a period of seven years or upward.

4. Impotency of Husband

If the husband was impotent at the time of marriage and continues to be so, the wife can claim a decree for divorce.

5. Insanity or Leprosy

If the husband has been insane for a period of two years or is suffering from Leprosy or a virulent venereal disease, the wife can claim divorce.

6. Option of puberty

If the marriage of a girl who has not attained puberty is contracted by her father or other guardian, she can repudiate the marriage before attaining 18 years and claim divorce. She is not entitled to repudiate the marriage after consummation.

7. Cruelty

A Muslim Wife can claim a decree for divorce if the husband treats her with cruelty. The following acts of husband are treated as cruelty.

- 1) Habitually assaulting her.
  - 2) Associating with women of evil répute.
  - 3) Attempts to force her to lead an immoral life.
  - 4) Disposing of her property without her consent.
  - 5) Obstructing her from observing religious practice.
  - 6) He has more wives than one and does not treat them equally.
- 8) Failure to perform marital obligation  
If the husband has failed to perform his marital obligations for three years, the wife is entitled to a decree for divorce.

9. Other grounds

A Muslim wife is entitled to seek for decree of divorce on any other grounds which is recognised under Muslim Law .

### **Topic -XIII Effect of Conversion to Another Religion**

or

### **Apostasy**

If a Muslim husband, converts to another religion, the Muslim marriage will dissolve by the mere conversion.

If a Muslim wife, converts to another religion, the marriage will not dissolve by that conversion.

If a Hindu or Christian female converts to Islam, and after contracting a Muslim Marriage, reconverts to her original religion, the Muslim Marriage will be automatically dissolved.

## **Topic -XIV**

### **Parentage**

 Parentage refers to the legal relationship between a Child and his parents. Paternity is the legal relationship between father and child. Maternity is the legal relationship between mother and child.

The maternity of the child is established in the woman who actually gives birth to the child. If a child is born to a woman the maternity is established and the child inherits from her mother even though the marriage is invalid or the child is born out of illicit connection. Paternity is the legal relationship between the father and a child. In order to establish paternity there should be a valid or regular marriage between the father and mother of child. The child born of a void marriage is illegitimate and paternity is not established.

#### Presumption of Legitimacy

Under Muslim law, there are three rules of presumption with regard to the legitimacy of a child.

1. A child born within six months of marriage is illegitimate unless, the father acknowledges its paternity.
2. A child born after six months of the marriage is legitimate, unless the father denies paternity.
3. A child born after the dissolution of marriage is legitimate, if born within two lunar years under sunni law and if the child is born with ten lunar months under shia law.
4. In India, section 112 of the Indian Evidence Act,1872 also deals with the presumption of legitimacy of children. A child born is legitimate son of a man, if the child is born during the continuance of a valid marriage between

his mother and the man. This presumption is rebuttable.

If the mother and the man had no access to each other at the time when the child could have been begotten the presumption of legitimacy is not applicable.

5. If a child is born within 280 days after the dissolution of marriage, and there is no remarriage by the mother, the presumption is that the child is legitimate son of the husband, who either died or divorced. This presumption is also rebuttable by adducing other evidence.

In **Mohammed Allahabad v. Mohammed Ismail** the court held that the presumption of legitimacy under Muslim law is superseded by Sec. 112 of the Indian Evidence Act.

In **Abdul Rahman Kutty v. Aysha Beebi** (1960), the wife gave birth to a child within four months after marriage. The court held that the presumption under Indian Evidence Act was not applicable. It is a clear case of *pregnancy per alium*. If the husband acknowledges the paternity, the child will become legitimate.

## **Topic -XV**

### **Acknowledgment of Paternity**

~~(e)~~ Muslim law does not recognise adoption. Muslim law has recognised a peculiar institution called acknowledgement of paternity.

Acknowledgement is a process by which, in doubtful cases, paternity is established and that would confer the status of legitimacy upon the child. Acknowledgement is a declaration of legitimacy in doubtful cases. The following are the essentials of a valid acknowledgement.

1. The person who acknowledges the paternity of child should have capacity to contract a marriage.

2. The acknowledgement must be done with the intention of conferring legitimacy.
3. There must be at least 12 1/2 years difference between the acknowledger and the child.
4. The child must not be the offspring of an adulterous intercourse.
5. The mother of the child should not be the wife of another person.
6. The mother of the child should not come within the prohibited degrees of relationship with the acknowledger.
7. The child should not be acknowledged by any other person earlier.
8. There should not be any impediments for a lawful marriage between the acknowledger and the mother of child at the time when the child might have been begotten.
9. The child should not repudiate the acknowledgement.

#### Effect of acknowledgement

1. If the acknowledgement is valid, the child become legitimate son of the acknowledger.
2. A presumption of marriage between the mother of the child and acknowledger will arise.

#### **Mohammed Allahabad v. Ismail**

In this case, a Musalman died leaving his widow, one son, and three daughters. The widow had an eldest son whom the deceased had acknowl-

edged as his legitimate son. The acknowledged son claimed properties of deceased in inheritance. The other son and three daughters objected the claim. The court held that the acknowledgement was valid and hence the acknowledged son can claim inheritance.

## Topic -XVI

### Custody of the Child, Guardian for the Person & Property

Mohammedan law regards a person as a minor until he or she attains puberty. Thereafter Mohammedan law conferred upon him with full juridical capacity. In India by virtue of Indian Majority Act 1875, a person is minor until he/she attains the age of Majority i.e., 18 years.

In India a Muslim, whether a male or female is regarded as major for the purpose of marriage, dower or divorce if she or he has attained puberty. For all other purposes a Muslim whether male or female is regarded as minor until the completion of 18 years.

#### Guardian for the person [Custody of Child ( Hizanat) ]

Under Sunni law, mother is entitled to the custody (*Hizanat*) of her male child until he has completed the age of seven years. The father under Muslim law is entitled to the custody of a male child who has attained seven years and above. The child will be under the custody of father till the child attains the age of majority i.e., 18 years.

In the case of female child, the mother is entitled to the custody until she attains puberty. After the attainment of puberty, the female will be in the custody of father until marriage. After the marriage, a girl will be in the custody of her husband. The mother though entitled to the custody of male

and female child, if she is disqualified or absent, certain other female relatives have to look after the child keeping the child in their custody.

In the descending order of priority they are the following:

1. Mother's mother
2. Father's mother
3. Full sister
4. Uterine sister
5. Consanguine sister
6. Daughter of full sister
7. Daughter of uterine sister
8. Daughter of consanguine sister
9. Maternal aunt.
10. Paternal aunt.

Mother and the other female relatives who are entitled to custody of a child will be disqualified under the following circumstances:

- a. If she marries a person not related to the child in the prohibited degree.
- b. If she changes her residence to a far off place.
- c. If she is leading an immoral life.
- d. If she is negligent to take proper care of the child.

In the case of boy below seven years of age or a girl who has not attained the age of puberty, the father is entitled to custody only if the mother and other female relatives are absent or disqualified.

Under Shia law, the mother is entitled to the custody of a male up to two years and of the female upto seven years.

#### **Rohan Fathima v. Syed Badimuddir (1984)**

The wife was divorced by the husband. She claimed the custody of

her son aged three and half years. She was a shia and husband was a sunni. The marriage was contracted according to sunni law. The court held that the mother is entitled to the custody of child up to 7 years. Thus the law to be applied in this case is sunni law.

In **Ayisakutty v. Abdul Samad** (2005 (1) KLT 104), the mother of the child had committed suicide and after her death child was brought up by the maternal grand parents. After sometime the grandfather of the child also died. The father of the child filed a petition before the Family Court, Manjeri for custody of his minor son who was in the custody of the maternal grandmother. The Family Court allowed the petition. The grandmother preferred an appeal and contented that as per the provisions of Muhammedan Law mother's mother is entitled to have the custody of the minor son until the child completes the age of seven years. A Division Bench of the Kerala High Court held that in a case where the question of the custody of the child is involved, the primary consideration which weigh with the court is **the welfare of the child**. Grandmother was a diabetic patient and she was residing with her another daughter (Amina); and grandmother was depending on her. The Court dismissed the appeal and allowed the father to have his son in his custody, though he had re-married and a child is born in the said wed-lock. The court considered only the welfare of the child. The court allowed the appellant to move the Family Court for 'visitorial rights'.

#### Guardian for the property of minor

Guardians for the minor's property can be classified into four heads;

- 1) Legal guardian
- 2) Testamentary Guardian
- 3) De facto Guardian
- 4) Court appointed guardian.

#### Legal Guardian

Muslim law recognises the father and father's father as the natural guardian or *de jure* guardian of a Muslim minors property. The *de jure* guardian

has the power to alienate the immovable property of the minor in cases of legal necessity or for the benefit of the property.

In **Immam Bandi v. Mutsaddi** (1918) the court laid down the following rules with regards to the power of selling of immovable property of a minor by the natural guardian.

- 1) The legal guardian can sell the immovable property of a minor, if he can obtain double the normal value of the property.
- 2) The legal guardian can sell the properties when it is absolutely necessary for his maintenance.
- 3) Legal guardian can sell the property, if the income from the property is less than expenses incurred for it.

#### Testamentary guardian

When a guardian is appointed by a natural guardian by executing a will, the guardian is known as 'testamentary guardian'. Under Muslim law, father and father's father can appoint a guardian for the minors property under a will. Such a testamentary guardian shall have all the powers of a natural guardian.

#### De-facto guardian

A *de-facto* guardian is a person who without legal authority possesses and manages the affairs of a minor's property. Muslim law recognises only de jure guardians and testamentary guardians for the property of a minor. No other relations of a Muslim minor is entitled to the guardianship of property of minor as of right. Thus mother of the child, mother's father or any other relations are not entitled to guardianship for the property of the minor.

If a defacto guardian alienates immovable properties of a minor, the transfer is absolutely void.

In **Immam Bandi v. Mutsaddin** (1918) the court held that an alienation of immovable property effected by a *de facto* guardian like the mother

or brother of the minor is absolutely void.

#### Court appointed Guardian

In the absence of legal guardian or testamentary guardian, the court may appoint a guardian for the property of minor, the powers of a court guardian are controlled by the Guardians and Wards Act 1890. The court may appoint any person including mother as guardian for the property of minor. The court appointed guardian can sell, gift or exchange or mortgage the minor's property only with the permission of the court.

### **Topic -XVII**

### **Maintenance ( Nafqah)**

Under Muslim law, a Musalman is bound to maintain his minor children, wife and poor parents and grant parents. The word maintenance signifies, provision for food, clothing, lodgging. Educational expenses of children and other necessary expenses for mental and physical well-being of a minor are also included in the term mainenance.

#### Maintenance of Children

Under Muslim law, a person is under an obligation to maintain his children during their minority i.e., until they attain puberty. In the case of sons, the father's obligation to maintain him ceases on his attaining puberty. If the son is poor and is disabled by infirmity or disease or is of unsound mind, the father's obligation continues even after attaining puberty. In the case of daughters, the obligation continues until their marriage. If the father is poor to maintain the children and the mother is affluent, the mother has to maintain the children. If both the parents are poor to support the children, the grand parent (paternal or maternal) who is affluent has to maintain the grand children.

In **Abdul Kabeer v. Aboobaker** ( 1995 (1) KLJ 448), it was held that under Islamic Law father has to maintain his sons till they attain puberty and daughters till they are married. Father's obligation to maintain his children

cannot be denied on the ground of his pecuniary incapacity or indigence so long as he has ability to earn.

By virtue of section 125 of the Code of Criminal Procedure, 1973, a man who has sufficient means is liable to pay maintenance to his child (legitimate or illegitimate) until he or she attains the age of majority (18 years) if the child is unable to maintain itself. Even after attaining majority the child can claim maintenance from his or her father, if he or she is unable to maintain himself or herself due to physical or mental infirmity. Section 125 is applicable to Muslims also. Thus a Muslim child who is unable to maintain itself can claim maintenance from his father. The application for maintenance is to be filed before the Judicial Magistrate of the First Class. Where there is a Family Court, the application for maintenance is to be filed before the Family Court. The Court can award such amount as it deems fit for the maintenance of the child.

#### Maintenance of Parents

Under Muslim law every child, whether male or female, adult or minor, who has sufficient property, is under an obligation to provide maintenance to his or her parents. If the child is poor, the grand child who has sufficient means has to provide maintenance to grand parents.

By virtue of section 125 of the Code of Criminal Procedure, 1973, a man who has sufficient means is liable to pay maintenance to his parents who are unable to maintain themselves. Section 125 is applicable to Muslims also. Thus parents who are unable to maintain themselves can claim maintenance from their son or who has sufficient means. The application for maintenance is to be filed before the Judicial Magistrate of the First Class. Where there is a Family Court, the application for maintenance is to be filed before the Family Court. The Court can award such amount as it deems fit for the maintenance of the parents.

#### Maintenance of Wife

Under Muslim law, the husband is under an obligation to maintain his

wife so long as she is faithful to him. If she refuses to cohabit with him without justification, he is not bound to maintain her. The wife's right to maintenance ceases on the death of her husband. The widow is not entitled to maintenance during iddat on the death of her husband. If the marriage is dissolved by divorce, the wife is entitled to maintenance from her former husband during the period of iddat.

By virtue of section 125 of the Code of Criminal Procedure, 1973, a wife is entitle to claim maintenance from her husband, if the following conditions are satisfied.

1. The wife should be unable to maintain herself.
2. The husband should have sufficient means.
3. The wife should have neglected or refused to maintain her.
4. The wife should not be living in adultery.
5. The wife should not refuse to live with her husband without any sufficient reason.
6. The wife should not be living separately by mutual consent.

If all the above conditions are staisfied, the Magistrate of the first class (or Family Court, where there is a family Court established under the Family Courts Act, 1984) can order the husband to pay a monthly allowance for the maintenance of his wife at such monthly rate as the Magistrate/Family Court thinks fit. Before the amendment in 2001, the maximum amount of maintenance that a court could award under section 125 of the Code was Rs. 500/- Now the Court can award any amount as it thinks fit.

The wife may be of any age-minor or major. If the wife and the husband is not possessed of suficient means, the Court may order the father of the minor child to pay the allowance until she attains her majority.

If the husband offers to maintain his wife on condition of her living with him, and she refuses to live with him, the court may consider any grounds

of refusal stated by her and pass appropriate order. If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.'

The term 'wife' includes a woman who has been divorced by, or has obtained divorce from, her husband and has not remarried.

Under Muslim Law if the marriage is dissolved by divorce (talak), the divorced wife is entitled to maintenance from her former husband only during the period of *iddat*.

In **Mohammed Ahammedkhan v. Shah Bano Begum**, (AIR 1985 SC 945), the Supreme Court held that, by virtue of section 125 of Code of Criminal Procedure, 1973, a Muslim husband having sufficient means must give maintenance to his *divorced wife*, who is unable to maintain herself, even after the period of *iddat* so long as she does not re-marry.

The above decision led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife.

Then the Parliament enacted the **Muslim Women (Protection of Rights on Divorce) Act, 1986**. The following are the salient features of the Act.

1. A Muslim divorced woman is entitled to a '**reasonable and fair provision**' and '**maintenance**' to be made and paid to her *within the iddat period* by her former husband.
2. If a Muslim divorced woman herself maintains the children born to her before or after her divorce, she is entitled to a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children.
3. A Muslim divorced woman is entitled to an amount equal to the sum of mahar or dower agreed to be paid to her at the time of marriage or at any time thereafter according to Muslim law.
4. A Muslim divorced woman is entitled to all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relative of the husband or his friends.
5. If a reasonable and fair provision and maintenance or the amount of mahar or dower due has not been made or paid or the properties have not been delivered to a divorced woman on her divorce, she or any one

duly authorised by her may, on her behalf, make application to a Magistrate for an order for payment of such provision and maintenance, mahar or dower or the delivery of properties.

6. If an application has been made by a divorced woman, the Magistrate may, after enquiry, make an order directing her former husband to pay reasonable and fair provision and maintenance, mahar or dower and to deliver the properties to the divorced woman.

7. If the husband fails to comply with the order, the Magistrate may issue warrant for levying the amount of maintenance or mahar or dower and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of warrant, to imprisonment for a term which may extend to one year or until payment, if sooner made.

8. If the Magistrate is satisfied that a divorced woman has not remarried and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay reasonable and fair maintenance to her by such relatives in the proportions in which they would inherit her property.

9. If a divorced woman is unable to maintain herself and she has no relatives or the relatives have not enough means to pay the maintenance, the Magistrate may, by order, direct the State Wakf Board to pay such maintenance.

Thus the divorced Muslim wife's claim for maintenance is now governed by the Act of 1986. It is however, possible for the Muslim spouses to opt to be governed by sections 125 - 128 Cr.P.C. by virtue of a provision in the Act of 1986. It is to be noted that the Act of 1986 only deal with the right of divorced Muslim wife. Thus a Muslim wife who is *not* divorced by her husband can claim maintenance under section 125 of the Code. By virtue of section 125 only a legally married wife can claim maintenance.

In *Tamil Nadu Wakf Board v. Syed Fatima Nachi* (1996) 4 SCC 616, the Supreme Court held that a divorced Muslim wife whose relative are incapable of maintaining her as required under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 can straightaway apply to the State Wakf Board for maintenance.

In *Danial Latif v. Union of India*, (2001) 7 SCC 740, the Constitutional validity of the Act has been challenged. The Supreme Court held that the provisions of the Act do not offend Articles 14, 15, and 21 of the Constitution of India. It is further held that the responsibility of husband to pay 'reasonable and fair provision' and 'maintenance' is not limited for the iddat period. It extends for the entire life of divorced wife, unless she re-marries.

## PART -IV

### MARRIAGE UNDER THE SPECIAL MARRIAGE ACT 1954

#### **Topic - I**

#### **Essentials of a Valid Marriage Under the Special Marriage Act, 1954**

India is a secular country. In order to achieve the secularism, the Parliament enacted the Special Marriage Act 1954 to regulate marriages between persons belonging to different religions, or castes. The Special Marriage Act permits any man and woman to marry without any restriction based on caste or religion.

The following are the essentials of a valid marriage under special marriage Act.

1. A party to the marriage should not have a living spouse.
2. A party to the marriage should not be incapable of giving a valid consent, in consequence of unsoundness of mind.
3. A party to the marriage should not be suffering from mental disorder which make him or her unfit for marriage and procreation of children.
4. A party to the marriage should not be subjected to recurrent attacks of insanity.
5. The male should have completed the age of 21 years and the female should have completed the age of 18 years.
6. The parties should not come within the degrees of prohibited relationship. However, if the custom governing them permits such a marriage, a valid marriage can be solemnised.

7. If the marriage is solemnised outside India, both the parties should be Indian citizens domiciled in the country where it is solemnised.

8. A marriage solemnised in contravention of the above conditions shall be void.

In order to solemnise a marriage under special Marriage Act, a notice of the intended marriage is to be given to the Marriage Officer (sub registrar) in writing. The marriage officer has to make entries of the contents of such notice in a book prescribed for the purpose called the marriage notice book. A copy of the notice has also to be affixed on the notice board. Any person can raise objection to the proposed marriage on the ground that the marriage is in violation of the essential conditions. If any objection is preferred within 30 days from the date of publication of notice, the marriage officer shall conduct an enquiry and pass appropriate order. If the marriage officer finds that the objection is genuine, the marriage shall not be solemnised. If it is found that the objection is unreasonable, the marriage officer can impose cost upon the objector by way of compensation.

If the marriage officer upholds the objection, the parties have a right to appeal to district court. The appeal is to be filed within 30 days from the date of order of the marriage officer.

A marriage can be solemnised only after 30 days from the date of publication of notice. There must be three witnesses for the marriage. Both the parties and witnesses should appear before the marriage officer and sign a declaration in the specified form and the declaration shall be counter signed by the marriage officer.

If a marriage is solemnised under the Act, the marriage officer shall enter a certificate of marriage in the marriage certificate book. The marriage certificate shall be signed by the parties. When the certificate is entered in the book it shall become the conclusive proof of the marriage.

If a marriage is registered under the Act, the law of succession applicable to them will be the provisions of the Indian Succession Act. However, if both the partees are Hindus, the law of succession applicable will be the Hindu Succession Act.

## **Topic - II**

### **Restitution of Conjugal Rights, Judicial Separation , Nullity of Marriage and Divorce**

#### Restitution of Conjugal Rights

If either party to the marriage deserts the other without any reasonable excuse the aggrieved person can file a petition for restitution of conjugal rights. If the respondent has deserted with sufficient cause the court will not order restitution.

#### Judicial Separation

A party to the marriage can apply to the court for judicial separation on the grounds available for divorce.

#### Nullity of Marriage

A marriage in violation of essential conditions of a valid marriage shall be null and void. Impotency of the respondent at the time of marriage and at the time of institution of the proceedings also renders a marriage void.

#### Voidable Marriage

A marriage under the Special Marriage Act is voidable under the following circumstances.

1. If the marriage was not consummated owing to the willful refusal of the respondent.
2. If the respondent was pregnant at the time of marriage by some person other than the petitioner.
3. If the consent in marriage was obtained by fraud or coercion.

**Children born out of void and voidable marriage shall be legitimate.**

**Divorce**

S.27 of the Act provides for divorce. The following grounds are available to both the parties to a marriage for a divorce.

1. **Adultery of the respondent after the marriage.**
2. **Desertion of the respondent for a period of two years.**
3. **Imprisonment of the respondent for a term of seven years or more.**
4. **Cruelty from the part of the respondent.**
5. **Mental disorder of the respondent.**
6. **Leprosy not contracted from the petitioner.**

## PART - V

### THE FAMILY COURTS ACT, 1984

#### **Topic -I Introduction**

The Family Courts Act, 1984 has been enacted by the Parliament for the establishment of Family Courts with the following objects:

- (i) To promote conciliation in disputes relating to marriage and family affairs.
- (ii) To secure speed settlement of disputes relating to marriage and family affairs

#### **Topic -II Establishment, Jurisdiction and Procedure of Family Courts**

##### **Establishment of Family Courts**

By s. 3 of the Family Courts Act, 1984, the State Government shall, after consultation with the High Court, establish a Family Court for every area in the State comprising a city or town whose population exceeds one million. Further the State Government is free to establish Family Courts for other areas in the State as it may deem necessary.

##### **Appointment of Judges**

By s.4 of the Act, the State Government may, with the concurrence of the High Court, appoint one or more persons to be judge or judges of a Family Court.

A person shall not be qualified for appointment as a Judge unless he -

- (a) has for at least seven years held a Judicial Office in India or the office of a member of a Tribunal or any post under the Union or State requiring special knowledge of law; or

(b) has for at least seven years been an advocate of a High Court or of two or more such Courts in succession; or

(c) possesses such other qualifications as the Central Government may, with the concurrence of the Chief Justice of India prescribe.

By s. 4(4) of the Act, in selecting persons for appointment as Judges -

(a) every endeavor shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counseling are selected; and

(b) preference shall be given to women.

By section 4 (5) of the Act, no person shall be appointed as, or hold the office of, a Judge of a Family Court after he has attained the age of sixty - two years.

#### **Jurisdiction of Family Courts**

By virtue of section 7 of the Act, a Family Court shall have and exercise all the jurisdiction exercisable by any District Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature stated below.

(a) A suit or proceeding between the parties to a marriage for decree of a nullity of marriage or restitution of conjugal rights or judicial separation or dissolution of marriage.

(b) A suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person.

- (c) A suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them.
- (d) A suit or proceeding for an order or injunction in circumstances arising out of a matrimonial relationship.
- (e) A suit or proceeding for a declaration as to the legitimacy of any person.
- (f) A suit or proceeding for maintenance.
- (g) A suit or proceeding in relation to the guardianship of the person, or the custody of, or access to, any person.

A Family Court shall also have and exercise the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX ( relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 and such other jurisdiction as may be conferred on it by any other enactment.

### **Procedure**

In every suit or proceeding, endeavour shall be made by Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding.

A Family Court shall be deemed to be a Civil Court and shall have all the powers of such court. The provisions of the Code of Civil Procedure shall apply to the suits and proceedings before a Family Court. The provisions of the Code of Criminal Procedure shall apply to the proceedings under Chapter IX of that Code before a Family Court.

In every suit or proceedings, the proceedings may be held in camera if

the Family Court so desires and shall be so held if either party so desires.

No party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner. If the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as *amicus curiae*.

Judgement of a Family Court shall contain statement of the case, the point for determination, the decision thereon and the reasons for such decision.

### **Appeal**

An appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973.

Every appeal shall be preferred within a period of thirty days from the date of the Judgment or order of a Family Court. An appeal shall be heard by a Bench consisting of two or more Judges.

### **Revision**

The High Court may, of its own motion or otherwise, call for and examine record of any proceeding in which the Family Court passed an order under Chapter IX of the Code of Criminal Procedure, 1973 for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order.

## **Solved Problems**

1. 'A', a Hindu male, married 'B', a Hindu female, as per Hindu religious rites and ceremonies. During the subsistence of the first marriage, 'A' solemnised a second marriage with 'C', and a child is born in the second marriage.

- i. Discuss the validity of second marriage.
- ii. Discuss the remedies available to 'C', the second wife.
- iii. Discuss the remedies available to 'B', the first wife.

### **Validity of Second Marriage**

By clause (i) of section 5 of the Hindu Marriage Act, 1955, a valid marriage may be solemnized between any two Hindus, if neither party has a spouse living at the time of the marriage.

By section 11 of the Act any marriage solemnised shall be null and void if it contravenes the condition specified in clause (i) of section 5.

In the given problem 'A' solemnised a second marriage with 'C' during the life time of first wife 'B'. Thus, by virtue of section 11 of the Act, the second marriage is null and void.

### **Remedies available to 'C', the second wife**

The second marriage of A with C is null and void. By virtue of section 11 of the Act on a petition presented by either party to a null and void marriage against the other party the court may declare the marriage as null and void by a decree of nullity. Thus 'A' or 'C' can file a petition for a decree of nullity declaring that the second marriage is null and void.

### **Remedies available to 'B', the first wife**

The second marriage of A with C is null and void. By virtue of section 11 of the Act on a petition presented by either party to a null and void

marriage against the other party the court may declare the marriage as null and void by a decree of nullity. Thus 'A' or 'C' can file a petition for a decree of nullity declaring that the second marriage is null and void. It is to be noted that by virtue of section 11 of the Act only parties to the null and void marriage can file a petition to declare their marriage as null and void. B is not a party to the null and void marriage. Thus she cannot file a petition under section 11 of the Act for a decree of nullity declaring the second marriage of A with C as null and void. However, B has the following remedies under law.

- (i) If she so chooses, she may institute a suit, under section 34 of the Specific Relief Act, 1963, for a decree declaring that the second marriage of A with C is null and void.
- (ii) If she so chooses, she can obtain a decree of divorce dissolving her marriage with A on the ground of adultery under section 13 (1) (i) of the Hindu Marriage Act, 1955.
- (iii) If she so chooses, she can prosecute 'A' for the offence punishable under section 494 (bigamy) of the Indian Penal Code, 1860.
- (iv) By virtue of section 18 (1) of the Hindu Adoption and Maintenance Act, 1956, she is entitled to be maintained by her husband during her life-time.
- (v) By virtue of section 18(2)(d) of the Hindu Adoption and Maintenance Act, 1956, she is entitled to live separately from her husband without forfeiting her claim to maintenance.

#### The Rights of the Child born in the Second Marriage

By section 16 of the Act, any child of a marriage which is void shall be treated as legitimate and the child is entitled to claim inheritance from the parents whose marriage is void. Thus the child can claim inheritance from A and C. However, such a child cannot claim inheritance from other relations.

2. 'A', a Hindu male, married 'B', a Hindu female, as per Hindu religious rites and ceremonies. After two years of marriage, A obtained a decree of divorce dissolving their marriage. Thereafter 'C', brother of A, married 'B' as per Hindu Religious rites and ceremonies. Discuss the validity of the marriage between C and B.

By virtue of section 11 of the Hindu Marriage Act, 1955, a marriage solemnized shall be null and void if it contravenes any one of the conditions specified in clauses (i) (iv) and (v) of section 5 of the Act.

Thus a marriage of two Hindus shall be void under the following circumstances.

- (i) If one has a spouse living at the time of the marriage.
- (ii) If the parties are within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two.
- (iii) If the parties are sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.

By clause (g) of section 3, two persons are said to be within the degrees of prohibited relationship -

- (i) if one is a lineal ascendant of the other; or
- (ii) if one was the wife or husband of a lineal ascendant or descendant of the other; or
- (iii) if one was the wife of the brother or of the father's or mother's brother or the grandfather's or grandmother's brother of the other.
- (iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters.

In the given problem, C married B who was wife of A, the brother of C. Thus C and B come within the degrees of prohibited relationship and their marriage is null and void, unless the custom or usage governing each of

them permits of a marriage between the two.

3. 'A', a Hindu male aged 25 years and 'B', a Hindu female aged 24 years made a joint declaration in the presence of their friends that they are going to live as husband and wife. Thereafter they gave an advertisement in the news paper saying that they married to each other and started to live together as husband and wife. After a short period of two months, A deserted B and married another lady 'C', a Hindu aged 28 years as per the Hindu religious rites and ceremonies. Discuss the validity of marriage of A with C.

By virtue of section 7 of the Hindu Marriage Act, 1955, in order to be a valid Hindu marriage, it should be solemnized in accordance with the customary rites and ceremonies of either party to the marriage. If such rites and ceremonies include *saptapadi*, the marriage becomes complete and binding when the seventh step is taken.

Ceremonies vary according to custom. The presentation of a pair of cloth by the bridegroom to the bride (*pudava koda*) is an important customary rite among the Nair caste in Kerala. Tying of a sacred thread around the neck of the bride (*Mangalya Sutra* or *tali*) is another rite.

In *Garja Singh v Surjith Kaur* (AIR 1991 P&H 177), the Court held that a marriage will be valid only if the ceremony through which it is solemnized is sanctioned by the religion of either party as customary ceremony.

In *Bibba v Ramkali* (AIR 1982 All 248) the Court held that merely going through certain ceremonies with the intention that the parties to be taken as married will not make them ceremonies prescribed by law.

Merely going through some ceremonies like distribution of sweets to the persons assembled and making a declaration that they have married each other will not be a valid Hindu marriage.

In the given problem 'A', a Hindu male aged 25 years and 'B', a Hindu

female aged 24 years made a joint declaration in the presence of their friends that they are going to live as husband and wife. Thereafter they gave an advertisement in the news paper saying that they married to each other and started to live together as husband and wife. After a short period of two months, A deserted B and married C, a Hindu aged 28 years as per the Hindu religious rites and ceremonies. In fact there is no ceremonial marriage between A and B. Thus there is no valid Hindu marriage between A and B. B cannot be treated as wife in the eye of law. After joint life of a short period, 'A' married another lady 'C', a Hindu aged 28 years as per the Hindu religious rites and ceremonies. Law does not prohibit a man from marrying an elder lady. Thus the second marriage is valid.

