(Gangamma Vs. Hanumanthappa). If a spouse is suffering from incurable or infectious diseases, the court will not issue a decree for restitution.

Scope of the decree : The decree given by the court is merely ;i directive to the parties to realise their duties or responsibilities and to live together. The court can only lead a horse to water, but cannot make it drink!

Restitution is based on the theory that both husband and wife are entitled to the society of each other. There was no remedy in case a spouse did not oblige undar this. This was introduced in England through the Court to enforce by a decree and force the spouse to return to the other. Since the decision of Jadunath Bose V. Shamsonisa Begam, the Courts have taken jurisdiction in India. This section gives this Jurisdiction to the District Court. With amendment of 1976,the burden of showing the reason is on the spouse who has withdrawn from the company of the other.

. Sn 2.5 Judicial Separation :

Sn. 10 of the Hindu Marriage Act provides for Judicial separation. The Amendment of 1976 has made drastic changes in as much15

as the grounds for judicial separation are the same as for divorce. Earlier, there were different grounds.

Petition : The petition should he presented to the District Judge praying for a decree for judicial separation. The grounds must be set out. Here also there are two additional grounds for the wife as in the case of petition for divorce.

When the decree is passed, it shall no longer be obligatory for the petitioner to cohabit with the other spouse. Such a decree may he rescinded if the court is satisfied with the truth of the statements made by a party or by both. This is an extraordinary power of the Court. A petition may be made for marriage solemnised before or after the Act.

This remedy is opposed to restitution of Conjugal rights. In restitution, the party seeks a direction from the court to force the other spouse to resume cohabitation but in judicial separation the party seeks permission to secure freedom from the other. The marriage tie is not broken in either case.

Ch. 2.6. Grounds for Judicial Separation :

Briefly the Grounds are :

1. Adultery.
2. Cruelty.
3. Desertion for 2 years.

4. Conversion.
5. Unsoundness of mind or mental disorder.
6. Virulent leprosy.
7. Venereal diseases in a communicable form.
8. Renunciation (sanyasa).
9 Disappearance for 7 years.

Additional Grounds to the wife (Bigamy) to get judicial separation :

i) Husband marrying again.

ii) Husband guilty of rape, sodomy or bestiality.

iii) Decree of maintenance by Court to wife and non cohabitation for one year.

iv) Wife marrying before 15 years of age but repudiating the marriage before attaining 18.

(For details and explanation with cases refer grounds for divorce).

Ch. 2.7. **Grounds for divorce. Sn. 13.**

The last desperate resort of the couple is divorce according to the Hindu Marriage Act 1956 and the Amendment Act of 1976.

The aggrieved party may file an applicatiqn to the District Court. The party must establish any one of the grounds stated in this Act to obtain a decree of divorce. There are eleven grounds. In addition, the wife has four special grounds for divorce. Thej court may conduct in camera proceedings. Only on clear proof of aqy one of the statutory grounds, the court may grant a decree for divorce.

Grounds:

i) Adultery: The Amendment has omittejd the reason 'living in adultery'. Hence if the wife or husband had, after solemnisation of marriage, sexual intercourse with any other person than the spouse, it will suffice.

Adultery is a secret act and hence proof is difficult. Circumstantial evidence may be established to lead to a fair inference. High standard of proof is required. It must go bevond suspicion. Mere opportunity available to the spouse is not enough.! Mere letters by paramour will not suffice. (Supreme Court: Chandra Mohini V. Avinash Prasad) The leading case is Russel V. Rusell: Evidence of non-access to the wife, during a period prior to the birth of a child, was no allowed by the House of Lords.

The other leading cases are Laxman Vs. Meena.and Pushpadevi v. Radheshyam (1972).

ii) **Cruelty** : One of the spouses treating the other with cruelty, is a ground for divorce. Cruelty is of two kinds (i) Physical and (ii) Mental: Violence to life, limb or danger to health is physical (Birch V. Birch). In Russel V. Rusell, the House of Lords held that legal cruelty is any conduct which would make marital life physically impossible.

Mental Cruelty : Intention of one spouse to inflict cruelty is necessary, though not essential; ill-treatment, attributing unchastity., etc. In fact cruelty may be of infinite variety.

In Dastane V. Dastane (1975) the Supreme Court laid down the standard of proof and held the court is satisfied when there is a preponderance of probabilities test.

Physical injury or mental injury is judged by the court. Poster v. Poster; Gipsy; v. Gipsy ; Poring for prostitution (colemam v. ~oleman) ill-treating pregnant wife: King v. king, etc

iii) **Desertion** : For two years, before presenting the applica-on.

The leading cases are :

i) Bipinchandra V. Prabhavati ii) Tickler V Tickler iii) Lakshman V. Meena wife wilfully deserting husband iv) Brewer V. Brewer.

For desertion two essentials are to be proved.

1) The factum of separation

2) Animus deserendi i.e., intention to bring cohabitation perma nently to an end without the consent of the other party.

Desertion is a matter of inference to be drawn from the various facts and circumstances.

Desertion commences when the fact of separation and .animus deserendi co-exist. But it is not necessary that they should commence at the same time. The De facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time.

Desertion means the desertion of the petitioner by the other spouse to the marriage without reasonable cause and without the consent or against the wish of that party. This also includes the wilful neglect of the petitioner by the other spouse. In its essence desertion means the intentional personal forsaking and abandonment of one spouse by the other (Bipinchandra Vs. Prabhavati). It is the total repudiation of the obligation of the marriage. Devi singh v. Susheela and Jyotichandra v. Meera Guha.

iv) Conversion : If the other spouse has ceased to be a Hindu by conversion to another religion, the affected party may file a petition for divorce. Conversion to Christian, Muslim or Jewish

religion is a ground for divorce. Of course, a party cannot take advantage of his own conversion to claim divorce.

v) **Unsoundness of mind** : Incurable unsoundness of mind or continuous mental disorder of such dimension that the other spouse cannot reasonably live together.

Mental disorder means mental illness, undeveloped mind, Psychopathic disorder or Schizophenia. The disorder shows abnormal aggressive or seriously irresponsible conduct of the person.

Unsoundness :

As per 1976 Amendment unsoundness should be incurable or permanent in nature, Banidevi v. banerji: wife had incurable unsoundness.

If husband did not submit for medical examination, inference can be drawn against him Shanta Devi v. Ramesh Chamda.

vi) **Leprosy** : It must be virulent and incurable. Under the amendment Act of 1976, no period is fixed. But, the other spouse must be suffering from this disease upto the date of the decision (Padma Rao V. Swaraj Laxmi).

vii) **Venereal disease**: The other spouse must be suffering from venereal disease in a communicable form. The Amendment has omitted the period of time. The petitioner should not take advantage of this ground by himself communicating this disease to the other spouse.

viii) Renunciation : There must be a genuine renunciation to enter the religious order, Sanyasa. This is civil death when there is complete and final withdrawal from all wordly affairs, hence, the other spouse may get the marriage dissolved.

ix) Disappearance : If the other spouse is not heard of for 7 years and above there is a presumption of death and hence, this is a ground for divorce. The burden is on the party asserting that the other spouse has disappeared (Evidence Act).

x) **Non cohabitation** : If there has been no resumption or cohabitation for one year and above after the decree for judicial separation, then, this can be a ground for divorce.

xi) No **restitution** : If for one year or above, there is no restitution of conjugal rights it is a ground for divorce.

xii) Special grounds for the wife : In addition to the above grounds, the wife has the following grounds for divorce.

a) Remarriage by husband.

b) Rape, Sodomy or bestiality of the husband.

c) If the wife has obtained a decree for maintenance (S. 125

Cr. P. C.) etc. provided since the date of the decree there is no cohabi tation for one year.

d) If the wife is married before 15 years of age, and if she repu diates before attaining 18 years, she may file a petition for divorce.

Ch. 2 (8) Divorce by Mutual consent:

Sn. 13 (b) provides that any spouse may file a petition for divorce in the District court on the ground.

a) That they are living separately for one year or above.

b) That they have not been able to live together.

c) That they have mutually agreed that the marriage should be dissolved.

Procedure:

(i) After 6 months of filing the application, but before 18 months, (if the parties have not withdrawn the case), the court if satisfied about the statements made, may pass a decree for divorce :

ii) No petition can be filed within one year of the marriage.

Exception : Exceptional hardship of the petitioner is a special circumstance to entertain a petition within one year. The court will issue suitable orders regarding children, if any.

The court examines whether there forced is consent fraud or undue influence. No specific reasons, as in case of divorce, under snl3, need be proved.

The court endeavours to reconcile' if not possible, a decree of divorce may be passed. Leading cases Sumatidevi v. Premnath. Ravi shakar v. Sharada.

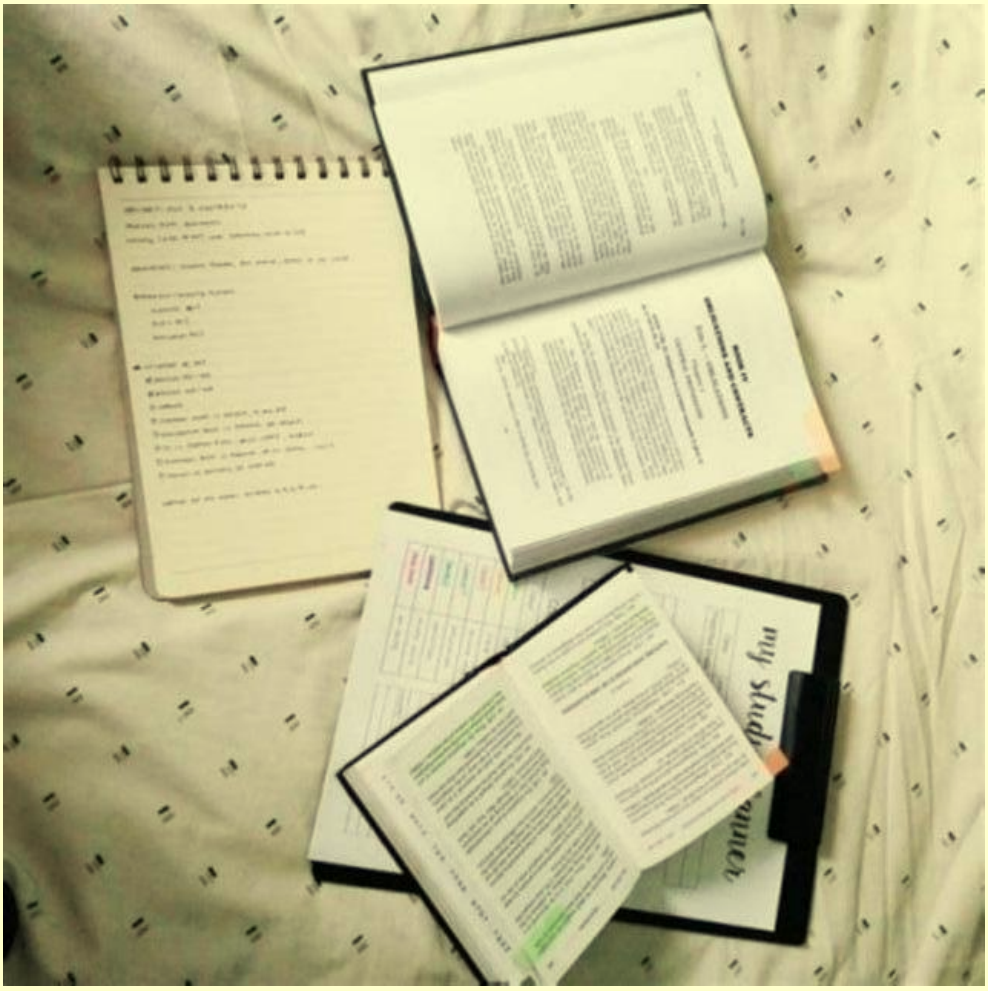
It was held that nothing more than what 13(B) says need be proved before the court.

No petition within one year of marriage in entertained except in exceptional circumstances Meghanath Nayar v. Susheela : Here the court has given examples of exceptional hardship:

Amendment to Sn 13 by adding 13 C D and E to make divorce easier

Not yet passed by Parliament.May 2012 For text

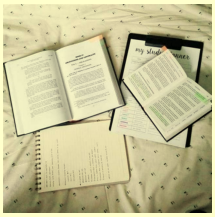
see Reference Section Page 93



Law College Notes & Stuffs

Exclusive group for Law Students

Join Us Here for More Materials



Law College Notes & Stuffs

CHAPTER-3
ADOPTION

Ch. 3.1. Meaning and Object:

i) Son meaning 'Putra' is one who saves the father from the hell called 'Puth'. Hence, in order to perform the obsequies of the parents, a son was essential. (Aputrasya Gatirnasti). In the absence of this aurasa (natural born) son, an adopted son was taken to perpetuate the lineage and to perform the obsequies. It was felt that such a person must be Saunaka (reflection of a son). Two forms of adoption became recognised 'dattaka form' .and 'kritrjma' form. The ancient commentaries available are Nanda pandita's Dattaka Mimamsa (Bengal) and Kuberas Dattaka Chandrika (South India). Adoption is an invention of the Hindus. The legend has instances of "Sunashepa" adopted by Harischandra ; Vedic story tells how Rishi Atri gave his only son in adoption to Aurasa.

ii) Object : It is both religious and secular. This is clear from Amarendra Mansingh V. Sanatan Singh where the Privy Council held that adoption was more religious and that the secular aspect was secondary. The other cases are: Balagangadhar Tilak's case, Hem Singh V. Harnam Singh (Supreme Court).

Ch. 3.2. Changes in Adoption Law :

Many changes were introduced by the Hindu Adoptions and Maintenance Act 1956. Briefly they may be stated as follows :

i) The religious or spiritual aspect of adoption is relegated to the background. Adoption is more secular according to the Act.

ii) A Hindu Male may adopt a boy or girl. A Hindu Female may adopt a boy or girl. Further a Hindu Female may adopt in her own rights. As regards the adoption of daughters, the Act has followed Nandapandita's commentary in Dattaka Mimamsa, thatputra includes

daughter, giving independent capacity for a female to adopt.

iii) The Act has deviated from Vasista's text that a wife may adopt only with the consent of the deceased husband.

iv) Sn. 12 provides that the adopted child is the child of its adoptive mother and also of father. (Subhas Misir Vs. Thyagi Misir), from the date of adoption.

v) Further it is provided that the adopted child shall not divest any person of any estate which is vested in him or her prior to adoption. This clearly abrogates the rule of the divestitute of estate which was the cause of ruinous litigation for about a century.

In this regard the leading cases are :

i) Ramachan,dra Vs. Balaji

ii) Anam *Vs.* Shankar

iii) Srir-fvas. Vs. Narayan

Bhuvaneswari Vs. Neel Kamal. ...

V&) As regards the ceremonies to be performed in adoption, the Act/learly states that Datta homa is not essential. It is optional. The secular character is introduced into the system of adoption.

Ch. 3,3. Essentials of a valid adoption .

The Act specifies four requisites for a valid adoption :

i) The person adopting must have the capacity to adopt and jnust have the right to take in adoption.

ii) The person giving in adoption must have the capacity to give in adoption.

iii) The adoptee Dattaka must be capable of being adopted.

iv) The adoption must comply with the other conditions specified in the Act.

Explanation of each condition:

i) A Hindu male only could take a boy in adoption according to old law, A female could not adopt. A widow could adopt only with the consent of the deceased husband. According to the new Act, a Hindu male or female has the capacity to adopt. A female may adopt for herself in her own right. The consent of the husband is not required.

The adoptive father or mother must be a Hindu. The Hindu male must be (1) of sound mind, (2) not a minor and (3) wife's consent is necessary. But, if the wife has renounced the world or has became a convert to some other religion or is of unsound mind as declared by the court, then consent is not necessary. In case of more than one wife> the consent of all is necessary.

A Hindu female may take a child in adoption. At the time of adoption, she must be of sound mind and not a minor. She must be unmarried or a widow or a divorcee. However, a wife may take-in adoption if her husband has renounced the world, has been declared by the court as of unsound mind or has become convert to other religion.

ii) Person giving in adoption :

Father, Mother or Guardian may give in adoption. A father may give in adoption with the consent of his wife. However, if the wife has renounced the world, or converted to some other religions, or has been declared to be of unsound mind by the court, consent is not

necessary. A Mother may not give when the child's father is alive. However, if he has renounced the world or has become a convert or a lunatic, his consent is not necessary. The Guardian may give in adoption with the permission of the District Court. The Guardian gets the right when both father and mother of the child are dead, or of unsound mind or when they have renounced the world.

If the child has no father, mother or guardian, then it could not be taken in adoption according to the Act. However, in 1962, an amendment was made. According to this, whether the child is legitimate or illegitimate or an orphan it could be taken in adoption provided it is a Hindu according to the Act. The permission of the court is necessary.

Hi) Adoptee : According to old law only a boy answering certain qualifications could be taken in adoption. A daughter, an orpan or an illegitimate son, or a person born blind, dumb, deaf could not be taken in adoption. (There was also another restriction. The adoptive father must have been in a position to marry the mother of the boy, in her maiden state). There were also restriction relating to age.

According to the new Act, the adoptee may be a boy or a girl, the person must be a Hindu, must not be married, must be within 15 years of age arid must not have ,been already taken in adoption.

iv) The other restrictions :-

a) The adoptive father or mother must not have a living son, son's son or Son's Son's son (adopted or Aurasa).

b) If the daughter is to be taken in adoption, the adoptive father or mother must not have a daughter or son's daughter living.

c) If a male wants to take a girl in adoption, he must be elder to her at least by 21 years. If a female is to take a boy in adoption, she must be elder to him at least by 21 years. This is a rule of prudence.

d) The same child cannot be taken in adoption by 2 or 3 persons.

e) There must be actual giving and taking, with an intention to transfer the child. Suffice it, if the parties know that they are transfer ring the child from its natural family to the adoptive family.

Registration of adoption is not necessary, but only optional. However, Dana and Sweekara-Giving and taking are essential.

The mere execution of an adoption deed is not adoptio™ Their" must be the physical act of giving and taking.

S. Ghosh Vs. Krishna Sundari (Calcutta).

Adopted boy sued after attaining majority. There was no actual Dana and Swekara, therefore the adoption was invalid.

f) Formalities: Dattahomam (i.e. offering clarified butter to fire

by way of religious oblation) is optional. Hence, performance of datta homam is not essential..

Ch. 3.4. Legal effects of adoption :

Art. 12 sets out the legal effects of a valid adoption.

i) The adopted child is deemed to the child of the adoptive father and adoptive mother for all purposes, and effects. This is effective from the date of adoption and from such date all the ties of the child in the natural born family are severed and replaced by the new family. Hence, the adopted child cannot renounce and return to his family. Further, adoption once made cannot be cancelled. This has secured the position of the adopted child.

However certain exceptions have been provided.

i) The adopted child cannot marry any person whom it could not have married if it were continued in the natural-born family.

ii) Any property vested in the adopted child before adoption in his natural-born family continues to vest in him. Hence, he is entitled to his property in his natural-born family including his undivided coparcenery interest. Any obligations like maintenance attached to that property continues and hence, his such property is liable. But there is no personal obligation.

iii) The adopted child shall not divest any person of any estate which is vested in or her, before the adoption, i.e., no divestiture in the adoptive family.

iv) Doctrine of 'relation back': If a widow took a boy in adoption, it related back to the death of the adoptive father for purposes of continuing the line and of divesting of the property.

The leading case *is* **Amarendra Vs. Santan Singh : In** this case one Raja Brijendra died unmarried. His collateral succeeded, to the estate. As the family custom prevented females from succeeding to

the Raja; Indumati the mother of the Raja, adopted Amarendra to her husband Brijendra. Question was whether this adoption dated back to the death of the Raja, and divested Benamali of the estate. The Privy Council held that she could be divested. Hence, Amarendra succeeded.

This was explained by the Supreme Court in Srinivas Vs. Narayan. It stated that adoption dated back to the date of death of Brijendra. This doctrine has no application now.

Other leading cases:

i) **Subash Misir Vs. Thagir Misir** *:* The Supreme Court held that a child adopted by the widow was the child of both the adoptive widow and her deceased husband. Hence, they are adoptive parents.

ii) The leading case is :

Sawan Ram V. Kalavanti (1967), the Supreme Court held that an adopted son was a preferential heir. A died leaving a widow B. B alienated a part of the property of A. Sawan Ram a collateral, challenged and claimed as reversioner. B adopted D (Deep Chand). Then B died. D brought a suit. It finally went to the Supreme Court which held that Deep Chand became a member of the adoptive family of A, and, that the adoption was not only to herself but also to her deceased husband. (The property was vested in the widow B, as per Sn. 14d. of the Hindu Succession Act, and hence, the adopted son succeeded to it).

Ch. 3.5. Dwayamshana adoption :

It means son of two fathers. It is only a variety of dattaka form. It is of two kinds : Anitya i.e., incomplete and Nitya i.e., Absolute.

Anitya is initiated by the natural father. The 'boy' is considered as son of two fathers but incompletely. This is not in vogue.

Nitya is recognised by law. There is a condition 'This is the son of both of us' natural and adoptive fathers. This is an agreement. There may be an implied condition.

The formalities are the same as dattaka-giving and taking. But, the stipulation is an addition. As the adopted boy is the son of two fathers, he is equally the son of two mothers.

The son inherits to both the families.

This type of adoption was held valid in malakappa v. mallappa(1976).

Ch. 3.6. Kritrima adoption :

This is obsolete except in some areas in the West Coast of India. Some features :

i) The boy may give himself in adoption. His consent is essential. Consent of both parties essential.

ii) A male may adopt; a female may adopt. A wife may adopt to herself even during the lifetime of her husband.

iii) The person must be of the same caste; He must be of age to give consent.

iv) Ceremonies not necessary, v) The boy inherits

to both the families.

Ch. 3.7.Ill**atom adoption :**

This is a customary form. Illatom is the affiliation of a son-in - law in consideration of the management of the family property. In vogue in parts of A P. Tamilnadu and among Reddies and kawars.

CHAPTER- 4
MAINTENANCE

Ch.4.1. Meaning :

Sn. 3. (b) of the Hindu Adoptions and Maintenance Act defines maintenance.

Maintenance is defined as including (i) in all cases, provisions for food, clothing, residence, education, medical attendance and treatment, (ii) Maintenance in case of an unmarried daughter includes also the reasonable expenses of her marriage.

This definition is merely declaratory and explanatory and not exhaustive. Maintenance may stem as a liability under two circumstances (i) as dependent on the possession of the property and (ii) independent of the possession of the property, that is a personal liability.

Manu has specified the persons who are entitled to maintenance : i.e., aged parents, virtuous wife and minor children. According to Manu, 'these persons must be maintained irrespective of the income ; Even by doing misdeeds, they must be maintained.

There are provisions for

1) Maintenance of wife Sn. 18.

2) Maintenance of widowed daughter in law Sn. 19.

3) Maintenance of children and aged parents Sn. 20.

4) Maintenance of dependents Sn. 22.

Ch. 4.2. Maintenance of wife :

Sn. 18 provides that a Hindu wife is entitled to be maintained by her husband during her life-time, when she lives with him. However, when she lives separately she may claim maintenance as a matter of right, from her husband during her lifetime, only under special circumstances as stated in the Act.

i) **Husband is guilty of desertion :**

This means abandoning her without any reasonable cause, and without her consent or against her will. He may have even wilfully neglected her (Desertion : Same as understood in the ground for divorce. Refer Ch. 2.7).

ii**) Cruelty:**

When the husband treats her with cruelty, she may claim maintenance. Cruelty must be of such a nature as to cause a reasonable fear that it will be injurious to live with him. (Cruelty : same as understood in the ground for divorce. Refer Ch. 2.7).

iii) Leprosy :

If the husband is suffering from a virulent form of leprosy, the wife may live separately and claim maintenance.

vi) **Another wife :**

If the husband is having another wife living, the wife may refrain from the company of her husband and claim maintenance.

v) **Concubine:**

If the husband has kept a concubine in the same house or has been habitually residing with her or living with her, the wife may claim maintenance by living separately.

vi**) Conversion:**

If the husband becomes a convert to any other religion the wife may live separately and claim maintenance.

vii) **Any other cause :**

The Act after enumerating the above reasons leaves a discretion to the court to consider any other reason that may be substantiated by the wife. Her living separately from her husband must have a justifiable cause. The leading case is Russell V. Russell.

Exceptions : The Act has provided certain exceptions also. If the wife is unchaste, or ceases to be a Hindu by conversion to some other religion, she is not entitled to claim maintenance. **Ch.**

4.3. Maintenance of widow by father-in-law.

If the husband is dead, the widow may claim maintenance from her father-in-law subject to certain conditions :

a) She must be unable to maintain herself out of her own earning or other property.

b) She is unable to obtain maintenance from the estate of her husband or her father or mother.

c) She is unable to obtain maintenance from her son or daughter, if any, or his or her estate.

Exception :

If the father-in-law has no means or

If she has obtained already her share in her husband's property or

If she ceases to be a widow as on her remarriage, she is not entitled to claim maintenance.

Ch. 4.4. Maintenance of children and aged parents

A Hindu is bound during his or her lifetime, to maintain the children and the aged or infirm parents. A minor child (legitimate or illegitimate) may claim maintenance from the father or mother.

This obligation to maintain extends only as long as the person to be maintained is unable to maintain himself or herself.

In case of an unmarried daughter the obligation extends even after minority if she is unable to maintain herself.

Special feature: A Hindu female is also under an obligation to maintain her children and aged parents, if they are unable to maintain themselves. There was no such law in Old Hindu law.

Ch. 4.5. Maintenance of dependants :

Sn. 21 defines who are dependants of a 'Hindu'. Sn. 22 deals

with the right of a dependant against the estate of a deceased Hindu.

a) The heirs of the deceased Hindu are bound to maintain the dependants out of the estate of the deceased Hindu. This is subject to certain conditions.

i) The dependant has not received any share in the estate of the deceased then, he can claim the maintenance.

ii) The liability to pay maintenance is on all those who get the estate. They must pay proportionately.

iii) One dependant heir need not contribute to the other dependant if what he gets is itself less.

b) **Dependants :**

The following '"relatives' are entitled to maintenance from the estate of the deceased male or female Hindu (Propositus).

i) Father

ii) Mother

iii) Widow, so long as she remains unmarried

iv) Son, son of a predeceased son provided he is a minor and unable to maintain himself.

v) Unmarried daughter or the unmarried daughter of a predeceased son provided she is unable to main herself.

vi) Widowed daughter if she is unable to maintain herself from the estate of her husband or from son/daughter or from father in law.

vii) Any widow of the son, or a widow of predeceased son as long as she remains unmarried.

viii) Minor illegitimate children (son or daughter)

Ch. 4.6. Amount of maintenance : Sn. 23.

The quantum (amount) of maintenance is determined by the court at

its discretion. Its discretion is judicial. The Act has given certain factors which must weigh with the Court

to award maintenance. There cannot be any mathematical certainty, but the court must take all factors into consideration.

i) In respect of wife, children and parents the following factors are important.

a) The position and status of the parties

b) Reasonable wants

c) Claimants separate living -justified or not ?

d) Claimants income, property and other sources

e) The number of persons entitled to maintenance under the Act

ii) In respect of maintenance of dependants : the factors are

a) Net value of the assets of the deceased after paying all debts.

b) Provisions for dependants in the will if any

c) The degree of relationship

d) Reasonable wants

e) Past relations if any

f) Assets of the dependant

g) The number of dependents

Furthere, the claimant should be a [vv]Hindu" The amount fixed by the court (or by agreement) may be altered, if there is material change in circumstances.

CHAPTER - 5
GUARDIANSHIP

Ch. 5.1. Guardian :

The Hindu Minority and Guardianship Act defines 'puardiarr in Sn. 4.

Guardian means a person having the care of the person of a minor or of his property or of both his person and property. They are

i) Natural Guardian

ii) Testamentary Guardian

iii) Court Guardian

iv) Guardian under Court of Wards

v) De facto Guardian : Though not prohibited by the Act, he is subject to restrictions under Sn.ll.

Ch. 5.2. **Natural Guardians :**

A Natural Guardian may be in respect of a minor as well as his property (i.e., person+property) excluding the undivided share in the joint family property. In case of a boy or unmarried girl, the natural guardian is the father and after him, the mother. Generally, for a child, below 5 years, mother is the custodian. In case of an unmarried girl, illegitimate boy, the natural guardian is the mother and after her death, the father. In case of a married girl the husband is the natural guardian.

Certain qualifications are specified to a natural guardian :

a) He must be a Hindu.

b) He must not have completely and finally renounced the world by becoming a sanyasi or a vanaprasta.

In respect of an adopted son, the adoptive father is the natural guardian, and after him the adoptive mother. (Step mother and Step father are not natural guardians).

, Ch. 5.3. **Powers of a natural Guardian :** **,**

The natural guardian is empowered under the Act (Sn.8) to do all acts which are necessary or reasonable and proper for the benefit of the minor. He may do all acts (1) for realisation (2) for protection (3) for benefiting the estate of the minor. However, the Act strictly prohibits the natural guardian from committing the minor under a personal covenant. This seems

to be in keeping with the decision of the privy council in **Hanuman Prasad's case.** Here a natural guardian was held authorised to alienate on the grounds of legal necessity. How ever, under the new Act, the sanction of the court for alienation is an essential condition in respect of immovable property.

Further the natural guardian should not, without the permission of the Court. (1) Mortgage, (2) Charge, (3) Sell, gift or exchange or (4) Lease the property above 5 years, or for period extending more than one year beyond the period of minority of the minor. Any transfer in violation of above, is voidable. While granting permission to the natural guardian the court shall look to the necessities of the minor and also the advantage to him.

The leading case is Manik Chand V. Ramchandra. The Supreme Court held that in a Contract entered into by the Guardian the test is whether it is for the benefit and interests of minor.

Ch. 5.4. **Testamentary Guardian. Sn. 9.**

i) He is a person appointed under a will by a person who could be the natural guardian of the minor. The guardian may be appointed for the legitimate children, for his property or for both. He cannot appoint for illegitimate children.

* ii) Under old Hindu law, a mother could not appoint a guardian, but under the Act, she may by will appoint a guardian for the minorhis property or for both. (Here, in old law, father could exclude the mother of the minor from acting as a guardian by appointing some other person, but now she cannot be excluded).

iii) A **Hindu** Mother (who could act as the natural guardian) may by will **appoint** a guardian for illegitimate children.

iv) Powers: (a) The guardian so appointed has the power to act after the death of the testator.

b) He is entitled to exercise all the powers of a natural guardian (Add Ch. 5.3].

c) His power as guardian ceases, on the marriage of the minor girl.

Ch. 5.5. **Court Guardian :**

The court may appoint a guardian as provided for in the Court of Wards Act 1898. His appointment, powers and responsibilities are fixed by the court itself, as per the Court of Wards Act.

The Welfare of the child must be the paramount consideration

in appointing the guardian by the court. All the acts of the guardian are tested on the touchstone of the interests and benefit of the minor.

Ch.5.6. De facto Guardian :

He is a person who has in fact (i.e., factually), the care of the minor or his property or both. He has no status, under this Act (Sn. 11). This section does not bar such a person from exercising his power. Thus de facto guardian is not abolished, but his power to alienate is taken away.

Hence, he cannot sell the minors property even with courts permission. In such a case, the court may appoint a court guardian with authority to sell etc.

CHAPTER - 6

MITAKSHARA COPARCENARY

Ch.6.1. Characteristics of a Mitakshara coparcenary :

The Hindu Succession Act has not changed the concept of Mitakshara Coparcenary.

The Mitakshara coparcenary is a smaller group within the Hindu Joint Family. The members of the group by virtue of relationship have a right to hold and to enjoy the property, to restrain the act of others and also to enforce a partition.

The characteristics are as follows : i)

Status of Coparceners :

They are the persons of the Mitakshara coparcenary who acquire a right to partake of the inheritance. Their right arises by birth. Mayne defines them as three generation next to the owner, in unbroken male descent, i.e., Propositus, his sons, grand sons and great grand sons, all of them constitute a single coparcenary. Each member is entitled to offer the funeral oblation (cake or Pinda). The son of the great grandson is not a coparcener so long as the common ancestor, the prepositus is alive. While fresh links are being continually added to the chain of descendants by, births, earlier links are being constantly detached or removed by death. Hence, the membership of the coparcenary may be increasing or diminishing.

ii) Survivorship :

There is community of interest and unity of possession among all the members of the coparcenary - (**Katama Nachiar Vs. Raja of Shivaganga).** On the death of a coparcener the others take by survivorship. The words of Lord Westbury in **Approvier Vs. Ramasubbayyan a**re classic. 'No individual member of the family while it remains undivided, can predicate that he, that particular member, has a certain definite share of the joint and undivided property'.

The Hindu Women's Right to Property Act 1937 made an inroad into the coparcenery and provided that on the death of a coparcener his interest devolved on his widow. The Hindu Succession Act 1956 has by declaring that the widow, becomes the absolute owner of the property (Sn.14), abolished limited estate.

iii) Partition :

Each member of the coparcenary has a right to claim partition. Without a partition a member cannot predicate his share in the joint

family property. The property will be fluctuating, the quantum of it in the share will be diminishing by birth and increasing by death.

iv) Heritage :

It is divided into two classes, Aprathibandadaya and Saprathibandadaya (Un-obstructed property and obstructed property). According to Mithakshara the wealth of a father becomes the property of his son, sons son and son's son's son and this is unobstructed property.

Property which devolves on parents or on brothers and collaterals on the death of the owner is obstructed property.

v) **Position of women :**

Women are not members of the coparcenary. "The twin principles of the right by birth and aprathibandadaya make it evident that women were kept outside the coparcenary".

vi) Son's Right :

A son as a coparcenet takes his grandfather's property and father's property on the principles of right by birth and aprathibandadaya. Smriti Chandrika makes it clear that in case of grand father's property the ownership and independent power of son and father are equal but in the property of the father the ownership of father and son are unequal. The right of the son remains dormant and enables him to succeed by survivorhsip or by aparthibandadaya. This was clearly

affirmed in Arunachala Vs. Muruganatha (1953) (Supreme Court).

vii) Changes made by the Act of 1956 :

The Hindu Succession Act has made drastic changes in two aspects:

a) The coparcener may by a will or any testamentary document, dispose of his undivided interest in the coparcenery (Sn.6).

b) Survivorship: The rule relating to survivorship in a Mitakshara coparcenery is kept in tact, but some changes have been made in the provison to Sn.6. It states that if the Mitakshara coparcener T" had died leaving a female relative (Class 1 heir) (or a male in that class who claims through such female), the interest of P in the coparcenery property devolves by intestate succession and not by survivorship i.e., the female gets the property by succession. Hence, no,survivorship.

Illustration : of Coparcenary

A This is a case of Hindu joint and