Abstract and Keywords

This chapter estimates the movement within family laws from the sacramental premises of ‘love and honour’, ‘obedience and subservience’, and ‘duties and obligations’, to modern frames of ‘rights and entitlements’. The various nuances and the ordeal of accessing justice are dealt. It then covers the right to matrimonial property. The right to reside in the matrimonial home and the right to a financial settlement at the termination of marriage are the two distinct rights which are underlying the marriage contract. It is noted that women will choose to leave economic advantages during divorce settlements to obtain sole custody of their children. The connections between a woman’s claim of child custody and the dependency it produces while evolving a framework for property division poses a challenge to the equality model of marriage as partnership.

**Keywords:** matrimonial rights, marriage, justice, divorce settlements, child custody, matrimonial property, matrimonial obligations
Section A: Maintenance Rights of Women

This chapter examines three crucial rights which flow from the contract of marriage and assesses their impact upon women when there is a breakdown in matrimonial relationships.

The right of maintenance, which is a right of subsistence and survival, warrants an elaborate discussion. This right is accessed by a wide section of women across class and social strata. Since it is a well-established right which is deeply engrafted into our matrimonial statutes, a wide range of issues surface during the legal contests. This is the only provision for economic claims within marriage and, hence, is highly contested. The important ingredients are the husband’s ‘obligation’ and the wife’s ‘need’, but, situated within the patriarchal order, it revolves around issues such as ‘matrimonial fault’ and ‘sexual purity’. Rights of children, issues of legitimacy and paternity, inheritance rights of illegitimate children, and the impact of men’s bigamy upon women’s claims, are contextualized.

Apart from the rights of women, which is the primary concern of this book, incorporated within the provision of maintenance are also claims of minor children, major unmarried daughters, disabled children, educational expenses of major sons, and the rights of parents. More recently, there have also been instances of husbands claiming maintenance from their wives who may be in a more secure financial position. The implications of this provision upon women is also examined. Most challenging among the procedural aspects of the litigation is the process of enforcing a decree, or in other words, execution proceedings. An attempt is made in this section to expose the reader to the various nuances and the ordeal of accessing justice. These issues are addressed in the second section.

The third section deals with yet another important economic right which affects women in conflict marriages, the right to matrimonial property. This right can be further divided into a right to assets and a right to shelter. Though, the right to shelter is implicit in the marriage contract, it was not clearly articulated in matrimonial statutes. Devoid of statutory recognition, this (p.118) right has evolved through judicial interventions. The right to division of the matrimonial home and joint assets is also being recognized, tentatively and hesitantly, by our courts in a few cases on the basis of contribution.

Since India follows the English common law tradition of separate property regime, marriage does not impact property relations and the courts do not have the power to order division of all matrimonial assets. The notion of community of property or joint matrimonial assets has not yet been awarded statutory recognition. This important aspect of matrimonial litigation requires legislative intervention in order to safeguard women’s financial interests upon divorce. Hence, the theoretical framework of this right, the rules which govern the division of property, and the development of this right in England and other common law tradition countries, are briefly sketched out.

Women’s right to custody of their children and concern over access rights are discussed in the fourth section. This section traces the transition from the legal maxim ‘father as...
natural guardian’ to ‘best interest of the child is paramount’ and the doctrinal shift from father’s ‘rights’ to parental ‘duties and obligations’.

The Right to Maintenance

Maintenance: An Overview

Maintenance can be claimed by wives (for themselves as well as their children) under all matrimonial statutes (except under the Dissolution of Muslim Marriages Act) as an ancillary\(^1\) relief in matrimonial proceedings. The right can be claimed only as a subsidiary relief while claiming a primary matrimonial relief such as divorce, judicial separation, annulment of marriage, or restitution of conjugal rights. There are other statutes/legal provisions which grant women, children, parents, and widowed daughters-in-law, an independent right to maintenance according to the Hindu Adoption and Maintenance Act, 1956, the uncodified Muslim Law, Section 125 of the Criminal Procedure Code (Cr.PC), etc. The Protection of Women from Domestic Violence Act, 2005 (PWDVA, also referred to as DVA), provides an additional avenue for women to claim maintenance and compensation from their husbands and live in partners. Under these (p.119) provisions, maintenance can be obtained without the necessity of initiating proceedings for a primary matrimonial relief.

Table 2.1 indicates the various statutory provisions under which the right to maintenance can be claimed.

<table>
<thead>
<tr>
<th>Category</th>
<th>HMA</th>
<th>SMA</th>
<th>DA</th>
<th>ML</th>
<th>PMDA</th>
<th>HAMA</th>
<th>Cr.PC</th>
<th>MWA</th>
<th>DVA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minor Children</td>
<td>S. 26</td>
<td>S. 38</td>
<td>S. 41</td>
<td>Uncodified</td>
<td>S. 49</td>
<td>S. 20</td>
<td>S. 125</td>
<td>S. 3</td>
<td>S. 20</td>
</tr>
<tr>
<td>Parents</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>S. 125</td>
<td>S. 20*</td>
<td></td>
</tr>
<tr>
<td>Husbands</td>
<td>S. 24/25</td>
<td></td>
<td></td>
<td></td>
<td>S. 40</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Widowed daughters-in-law</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>S. 19</td>
<td></td>
<td></td>
<td>S. 20</td>
<td></td>
</tr>
<tr>
<td>Adult Daughters</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>S. 20</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interim Maintenance</td>
<td>S. 24</td>
<td>S. 36</td>
<td>S. 36</td>
<td>Uncodified</td>
<td>S. 39</td>
<td>S. 18</td>
<td>S. 125</td>
<td>S. 23</td>
<td></td>
</tr>
</tbody>
</table>

**Maintenance as a Measure of Social Justice**

The legal provision of maintenance is reflective of a social obligation which the state casts upon the economically stronger members of the family to provide shelter and sustenance to weaker members, that is, women, children, the elderly, and the disabled. The provision for additional safeguards and special privileges for disadvantaged groups is grounded in Article 15 (3) of our Constitution. The Supreme Court, in *Captain Ramesh Chandra Kaushal* v. *Veena Kaushal*, commented that Section 125 of Cr. PC is a measure of social justice which is specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. In *Balan Nair v. Bhavani Amma Valalamma*, the Kerala High Court commented that though provisions of Section 125 of Cr.PC also benefits the father, the main beneficiary of the provision are women and children in distress, and the provision is consistent with Article 15 (3) of the Constitution as a measure of ensuring social justice.

The provision of maintenance needs to be grounded within the constitutional paradigm of ensuring social justice. It is based on the social obligation of preventing destitution and vagrancy. The Supreme Court, in *Bhagwan Dutta v. Kamala Devi*, has explained the rationale governing the provision of maintenance under Cr.PC in the following words: ‘Section 488, which provides for the maintenance of wives and children is a measure to prevent vagrancy, or at least to prevent its consequences. It is intended to fulfil a social purpose: to compel a man to perform the moral obligation which he owes to society with respect to his wife and children.’ In *Vimala v. Veeraswamy*, the Supreme Court noted that by providing simple and speedy but limited relief, the provision seeks to ensure that the neglected wife and children are not rendered destitute and, thereby, driven to a life of vagrancy, immorality, and crime, for their subsistence.

More recently, in 2008, the Supreme Court in *Chaturbhuj v. Sita Bhai* explained the objective of the provision of maintenance under Section 125 of Cr.PC in the following words: ‘The objective of maintenance proceedings is not to punish a person for his past neglect but to prevent vagrancy, by compelling those who can provide support to those who are unable to support themselves, and who have a moral claim to support. It provides a speedy remedy for the supply of food, clothing, and shelter, to the deserted wife. It gives effect to fundamental rights and the natural duties of a man to maintain his wife, children, and parents, when they are unable to maintain themselves.’ Similarly, in *Komalam Amma v. Kumara Pillai Raghavan Pillai*, which was also reported in 2008, the Supreme Court explained that ‘maintenance’, under the Hindu Adoption and Maintenance Act, includes provisions for food, clothing, residence, education, and medical treatment, and emphasized that it must include a provision for residence. The maintenance provided should enable the wife to live in a manner that she is accustomed to in her matrimonial home.

As can be observed from these judicial comments, the provision of maintenance is crucial.
to women who are in conflict marriages, and to deserted and destitute women. It is obvious that the right of a woman to maintenance needs to be located within citizenship claims enshrined in our Constitution. Within the historical origins of the institution of marriage based on a patriarchal social order, for a vast majority of women, marriage results in economic dependency. The roles and responsibilities assigned to women within marriage compel many to give up their jobs or sacrifice their careers to meet the demands of their marital obligations.

During matrimonial conflict, a trump card often used by the husband is to withdraw financial support to the wife. Further, when either party opts for a divorce to bring an end to a conflict marriage, it is the woman who faces economic hardship and has to engage in a long litigation to enforce her crucial right to economic subsistence. Usually, the issue of maintenance/economic settlement becomes the most contested aspect of any matrimonial/divorce proceedings.

The non-recognition of a woman’s contribution to the marriage and home reduces her to a state of destitution when the marriage breaks down. Neither the law nor society recognizes her role as a homemaker in concrete monetary terms. Irrespective of the fact that a woman has looked after the home, nursed and raised her children, and in an invisible manner contributed to the family savings, when the marriage breaks down, the law recognizes only the husband’s title to the family assets. The matrimonial home, assets, savings, and securities, are deemed the exclusive property of the man. The women, who, for the duration of their marriage, lived as homemakers, often find themselves without significant personal property or a steady income to sustain themselves during the divorce and in the post-divorce phase of their life. For most women, re-entry into the highly competitive job market is almost impossible. Even when they do enter, due to constraints of age, experience, and qualifications, their earnings will be far lower than their counterparts.

All these factors push women from an affluent class into a lower economic bracket and render women of the lower class, destitute. This is a violation of their constitutional guarantee of a right to life with dignity. The law of maintenance has emerged as a feeble attempt to remedy this malady and provide women with some semblance of economic sustenance and security when the marriage breaks down. Admittedly, the provision is based on the patriarchal premise of a protectionist approach towards women. We need to shift the discourse beyond the protectionist parameter and locate it within the constitutional scheme of citizenship claims of a right to life with dignity and as a measure of social justice.

As this section unfolds, securing an order of adequate maintenance can be an extremely humiliating experience. Since the claim of a woman’s economic sustenance within the patriarchal order is pitted against her sexual conduct, allegations of adultery and immorality are constantly hurled against women during litigation. This can extend further to a denial of the marriage itself and, consequentially, the legitimacy and even the paternity of the children. Sexual codes and the morality dictates of a patriarchal marriage often get entangled with the economic claims of women. In the case of Muslim women,
their rights (p.121) get further entwined within communal biases and deliberate misinterpretations of Islamic law.

It is in this context that statutory law and judicial interpretations must lean in favour of destitute women and vulnerable children, by moving away from the rubric of formal equality of Article 14 towards the substantive equality of Article 15(3) within the constitutional scheme, in order to set right a historical wrong.

In view of the high quotient of sexual morality which engulfs the question of maintenance, the categorization of cases under various headings is superficial and is done only for convenience’s sake. The issues constantly overlap and lines get blurred as they are intrinsically interwoven to form the complex whole of the fabric of life. The notion of a guilty wife may spill over to a dispute over paternity. Validity of marriage impacts the issue of legitimacy of children and may also adversely affect succession rights. Cases discussed under the section titled ‘Prolonged Cohabitation and Presumption of Marriage’, concerns the claims of women in bigamous marriages. Hence, the attempt has been to merely expose the reader to trends within an adversarial legal system. What is indeed striking is that every factual and imaginary legal ploy is resorted to during protracted court battles but, increasingly, the courts are able to see through the manipulations and are able to pierce the veneer of false claims while upholding women’s rights. But the false and frivolous interventions entangle women in circuitous legal rigmaroles which are time consuming, financially draining, and emotionally charged.

Despite the progressive interpretations and innovative legal maxims, the path to justice has not progressed in a linear trajectory. There is a great deal of judicial latitude which allows contradictory verdicts to emerge on the same issue, not just between various high courts but also within the same court. In addition to the facts and circumstances of each case, the legal strategy adopted by lawyers, the quality of legal representation, and the presiding judge’s notion of justice and equity, play a crucial role in the final outcome. The legal precedents have to be contextualised within this litigation reality.

This section traces the challenges and milestones in women’s struggle for survival while pursuing their legal claim of maintenance.

**Maintenance Under Personal Laws/Matrimonial Statutes**

Under matrimonial law, the term alimony is also used to denote maintenance. This term is derived from English law. In the event of separation, the wife could sue her husband for alimony if the husband refused to make a financial arrangement to enable her to live a life corresponding to her husband’s social status. The husband’s refusal to maintain his wife was construed as an injury to her, the remedy to which could be sought by compelling the husband to pay for her alimony or maintenance through ecclesiastical censures.\(^\text{11}\)

The law of maintenance is based on the ancient English principal of unity of persons within marriage. Upon marriage, the husband became the legal guardian of the wife’s person and property. The wife was legally compelled to assign her properties to her husband.\(^\text{12}\) Since women could neither work nor own property, in the event of desertion they would
be rendered destitute. In order to avert this situation, the husband was legally compelled to provide maintenance to his wife.

Later, when divorce became acceptable, the Matrimonial Causes Act, 1857, and the matrimonial court mandated that the decree of divorce was conditional on the husband setting aside some property for the wife as part of her alimony. The Matrimonial Causes Act, 1886, conferred power on the civil courts to pass orders directing the husband to pay the wife a reasonable weekly or monthly sum as maintenance. The husband was obligated to maintain his wife and pay for her expenses, not only during their marital life but even after the divorce, so long as she did not remarry. The provisions of maintenance under Indian matrimonial statutes and under Section 125 of Cr. PC are based on this principle.

Ancient Hindu law and uncodified Muslim law also cast an obligation on the husband to maintain his wife. The right under the Hindu law was codified in 1946 by enacting the Hindu Married Woman’s Right to Separate Residence and Maintenance Act. Subsequently, this was incorporated into the Hindu Adoption and Maintenance Act of 1956 (HAMA). The uncodified Muslim law recognized the wife’s right to maintenance during the subsistence of marriage and during the iddat period. But, since Muslim marriages were contractual and since the woman was entitled to remarry, Muslim law did not cast an obligation on the husband for post divorce maintenance. But he was required to pay the wife a ‘fair and reasonable’ settlement at the time of divorce, in addition to settling her mehr dues. This right received legal recognition through the statutory enactment, Muslim Women (Protection of Rights upon Divorce) Act, 1986, (MWA).13

A claim for maintenance can be made during the subsistence of marriage, at the time of initiating a divorce, or any other matrimonial relief, or even after obtaining a decree of divorce. An order of permanent alimony and maintenance as ancillary relief in divorce proceedings can be made during the passing of a decree of divorce, or even subsequently. Permanent alimony is awarded based on the income and property of the parties, other economic liabilities of the spouses, as well as the special circumstances of the case. Parties can also enter into agreements with respect to maintenance through separation agreements or through consent agreements while obtaining a decree of divorce by mutual consent.

Since maintenance is an ancillary relief, the same cannot be claimed if a primary matrimonial relief such as divorce or annulment of marriage has not been prayed for. In such a situation, a Hindu woman can file under HAMA, but for women from the Muslim minority community, the only avenue is to claim maintenance under Section 125 of Cr. PC.

Interim maintenance can be claimed during the litigation process under all legal provisions which entitle a woman to claim maintenance. These proceedings are summary in nature and have to be decided at the earliest, to ensure a level playing ground for the wife, and so that she has the means to survive during the litigation period. Even if divorce proceedings are initiated by the husband on the ground of the wife’s misconduct, the
court cannot dismiss the wife’s application for maintenance. The court has inherent powers to award interim maintenance under Section 18 of HAMA, even though it is not statutorily provided. Interim maintenance can also be awarded under Section 125 of Cr.PC.14

Maintenance may be paid as a lump sum settlement or by way of periodic instalments. Lump sum settlements are one time payments which are usually made at the time of the divorce. Periodic payments may be secured with a charge on the property or unsecured. The most common practice of periodic payments is by way of monthly instalments to cater to the requirements of the salaried class.

| Table 2.2 Relevant Sections of Cr.PC |
|-------------------------------------|----------------------------------|
| Relevant Sections | Relevant Provisions |
| Section 125 | Order for maintenance of wives, children, and parents |
| Section 126 | Jurisdiction and Procedure |
| Section 127 | Alterations/Modifications of the Order |
| Section 128 | Enforcement of Order |

(p.123) **Maintenance Under Section 125 of Cr.PC**

The provisions relating to maintenance under the Cr.PC are located in Chapter IX (Sections 125–8), but the popular term used while referring to this provision is maintenance under Section 125 of Cr.PC. Hence, this term is used throughout this section. This provision is uniformly applicable to wives, children, and parents.

The purpose of these provisions is to prevent destitution and vagrancy and not to provide economic security to dependents. Since the proceedings are summary, a destitute wife can avail of this remedy without having to file for matrimonial relief. Though, situated within the realm of criminal law, the provision is viewed more as a quasi civil proceeding.15

While it provided a speedy remedy for the lower strata, women from the upper strata of society did not avail of any benefit from this provision as the amount awarded was meagre and far below their needs. In 1898, when this remedy was first introduced, the amount which could be claimed was only Rs 100. In 1955, to change with the times, the ceiling was raised to Rs 500, but, thereafter, it remained unchanged for nearly half a century even though the buying power of Rs 500 dwindled drastically. No efforts were made to raise the ceiling despite recommendations by the Law Commission.16 Only the two states that brought an amendment to this section were West Bengal17 and Maharashtra,18 where the amount was enhanced from Rs 500 to Rs 1,500.

With the setting up of the family court, the jurisdiction shifted from the Magistrate’s court to the family court, but the amounts awarded continued to be meagre. Finally in 2001, through a Central amendment to Section 125 of Cr.PC, the ceiling was removed.19 Hence, there is currently no limit on the amount that can be claimed under this section.
The provision of maintenance under Section 125 of Cr.PC offers certain advantages as opposed to personal law. Since it is a provision under the criminal statute, it does not determine the matrimonial status of the parties. Hence, the courts are empowered to award maintenance even when a woman is unable to prove her marriage. Courts also have the power of arrest in execution proceedings, which acts as a deterrent against the non-payment of maintenance.

In contrast, under the civil/matrimonial statutes, though husbands can be arrested for non-payment of maintenance, it is construed as a civil imprisonment and the burden falls on the wife to pay for the cost of civil imprisonment. This is paradoxical, as it defeats the very purpose of awarding maintenance to a destitute woman knocking the doors of the court for a paltry sum of maintenance and casts an additional burden upon her. The advantage of the criminal provision was offset by the ceiling of Rs 500. But after the removal of the ceiling, courts are at liberty to award maintenance commensurate with the economic status of the husband and the needs of the wife. This has proved to be highly advantageous, not just to the woman but also to her children and the elderly as one can discern a gradual upward trend in the amounts awarded as maintenance under Section 125 of Cr.PC.

After the enactment of the Muslim Women (Protection of Rights upon Divorce) Act, 1986, the right of a divorced Muslim woman to maintenance has been placed under this statute. As per the provisions of this enactment, a divorced Muslim woman is entitled to maintenance for the Iddat period and for a fair and reasonable settlement for life. This stipulation entitles a divorced Muslim woman to claim lump sum settlements for her future. On the positive side, this provision relieves the divorced Muslim woman of the liability to execute the order of a recurring monthly maintenance. But on the negative side, a poor Muslim husband may not have the resources to pay an adequate amount as a lump sum settlement, and the divorced wife may be compelled to accept a meagre amount as a lifetime settlement.

**Maintenance/Compensation Under the Protection of Women from Domestic Violence Act, 2005**

The Protection of Women from Domestic Violence Act (PWDVA or DVA), enacted in 2005, offers yet another economic remedy to women and girls. Wives, sisters, mothers, or any other female relative, living in a shared household in a domestic relationship, including a woman in an informal relationship, can approach the court for a wide range of relief. This includes protection orders, maintenance orders, custody orders, and compensation orders. While the provision of maintenance orders enables the woman to claim maintenance, the provision of compensation orders enables her to claim damages for injuries suffered due to domestic violence.

This provision has proved to be highly beneficial for women seeking an order of injunction against their husbands/partners for protection against domestic violence and for protecting their right to the matrimonial home/shared residence. Women who are not
able to prove their marriage, or are in a non-marriage or live-in relationship, have also benefited from this provision.\textsuperscript{25}

\textbf{Matrimonial Misconduct and Right to Maintenance}

Historically under English law, only virtuous or good women were entitled to maintenance. If a husband obtained a divorce on the ground of the wife’s adultery, cruelty, or desertion, she was denied maintenance and at times even the custody of her children. There is ample evidence of this phenomenon in both English and Indian matrimonial jurisprudence.

\textit{(p.125)} For example, in \textit{Dailey v. Dailey},\textsuperscript{26} reflecting the old English position, it was held that a wife who was guilty of adultery, desertion, cruelty, or any other matrimonial misconduct, was not entitled to receive maintenance. At best, she could be awarded a compassionate allowance to save her from utter destitution. Endorsing the view of the ecclesiastical court that wives who had violated their vows ‘shall be fed with the bread of affliction and with the water of adversity’ (\textit{Manby v. Scott}),\textsuperscript{27} in \textit{Sardari Lal v. Veshano}\textsuperscript{28} it was held that ‘a woman once divorced on the ground of unchastity should be left to the resources of her immortality.’

The Calcutta High Court in \textit{Sachindra v. Bammala}\textsuperscript{29} had commented: ‘Unchastity on the part of a woman (and sexual intercourse by a man with a woman outside wedlock) is a sin against the ethics of matrimonial morality in this country.’ The judge, while conceding that moral law is not the civil law of the country, made the sweeping assumption that the meeting place of law and morality was Section 25 of the Hindu Marriage Act and Section 18 of the Hindu Adoption and Maintenance Act. This apparently justified the denial of maintenance to the wife, letting her survive on the resources of her immortality.

\textbf{A Compassionate Approach Towards the ‘Guilty’ Wife}

From the 1980s, one can discern a gradual shift to a more compassionate approach towards women who are accused of matrimonial fault in divorce proceedings. It is now an accepted judicial view that merely because the husband has obtained a decree of divorce on grounds of the wife’s cruelty or any other matrimonial fault, the same cannot be used to deprive her of the right to maintenance.

In 1985, the Bombay High Court, in \textit{Gulab Jagdusa Kakwane v. Kamal Gulab Kakwane},\textsuperscript{30} held that merely because the husband had obtained a decree of divorce on the ground of the wife’s adultery does not disentitle her from claiming maintenance. In 1986, the Gujarat High Court, in \textit{Dwarkadas Gurmukhidas v. Bhanuben},\textsuperscript{31} while upholding a woman’s right to interim maintenance stated: ‘Under Section 24 of the Hindu Marriage Act, it is the right of the wife who is unable to support herself to get maintenance. Maintenance should be made available to her without any reference to her conduct.’ In 1990, the Andhra Pradesh High Court, in \textit{T. Raja Rao v. T. Neelamma},\textsuperscript{32} held that the ground of adultery in divorce proceedings \textit{ipso facto} does not disentitle the wife from claiming maintenance, and the wife is entitled to claim maintenance till she remarries.

In a case reported in 1986, \textit{Shanti Devi v. Raghav Prakash},\textsuperscript{33} the wife had burned the
husband’s thesis. The husband filed a petition for divorce on the ground of the wife’s cruelty. The court awarded a decree in the husband’s favour but awarded Rs 200 per month as maintenance to the wife. In an appeal, the Rajasthan High Court held that in view of the fact that the divorced wife is a cursed human being, abhorred by society, and illiterate as well, she would not be able to support herself. Remarriage would also be a difficult and far fetched proposition. Therefore, the court decreed that alimony should be a substantial relief for her and raised the amount from Rs 200 to Rs 350. Although this can be construed as a positive ruling, it also reflects the contemptuous attitude of the judiciary and society towards divorced women.

In Re: Samsuddin Mohalat, the husband challenged the maintenance of Rs 250 awarded to the wife on the ground that she is living in adultery. Rejecting his plea, the Calcutta High Court commented that the only intention of the husband in making such allegations is to cause death by starvation. The court held that maintenance need not be based on law but on human rights and directed the lower court to enhance the amount. It also decreed that if the husband does not pay, his property should be attached and sold to save the wife from death.

A more recent and significant ruling in the context of the present discussion is Usharani Lenka v. Panigrahi Subhash Chandra Dash. In his petition for divorce, the husband made every possible allegation against his wife. He alleged that the wife was impregnated by another person and had terminated the pregnancy just before the marriage. Hence, the marriage could be annulled on the grounds of Section 12 (1) (d) (pre-marriage pregnancy) of HMA. He also alleged that the wife had a permanent gynaecological problem on account of which she refused to have sexual relations with him and, therefore, claimed that Section 12 (1) (a) (non consummation of marriage owing to impotency of the respondent) could also be invoked to annul the marriage. He also accused her of cruelty and desertion. The court held that the conduct of the wife amounted to mental cruelty and the husband was granted a decree of divorce. But the husband’s plea that the wife is not entitled to maintenance, as she is the guilty spouse, was rejected. The court not only upheld her claim for maintenance but increased the amount of permanent alimony from Rs 40,000 to Rs 1,00,000 on the ground that it would be just, adequate and reasonable.

Distinguishing ‘Living in Adultery’ from ‘Occasional Lapses of Virtue’

Despite this positive shift in judicial approach, the terrain of maintenance litigation continues to be contentious. A notion still prevails that an adulterous woman is not entitled to maintenance. Hence, there is a constant effort to defeat the woman’s claim by making baseless allegations and casting aspersion on her character. Two sub-clauses under Section 125 Cr.PC contribute to this confusion:

(4) No woman shall be entitled to receive an allowance if she is living in adultery.
(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, the magistrate shall cancel the order.

These stipulations provide the armour for husbands to entangle women in vicious and
dilatory litigation over a pittance of maintenance. But the defence is available to the husband only if he is able to prove that the wife is living in adultery. It is not available if it is proved that the wife was leading an unchaste life prior to her marriage. Only post marriage adulterous conduct is relevant. A wife can only be denied maintenance if she is living in adultery and it can be established that she is being maintained by the adulterer.

In Mahalingam Pillai v. Amsavalli,\textsuperscript{36} it was held that a woman who is accused of adultery is entitled to a reasonable amount of maintenance as a matter of right, except in cases where the husband is able to prove that the wife is being supported by the person she is committing (p.127) adultery with. In Sandha v. Narayan,\textsuperscript{37} it was explained that there is an important distinction between a person who is living in adultery and who has merely committed adultery. Living in adultery denotes a continuous course of conduct and not isolated acts of immorality. In Baishnab Charan Jena v. Ritarani Jena,\textsuperscript{38} it was held that a single act of unchastity or a few lapses of virtue will not disentitle a wife from claiming maintenance from her husband under Section 125 Cr.PC.

In Laxman Naik v. Lalita Naik,\textsuperscript{39} the court clarified that while a single act of adultery is sufficient for the purpose of judicial separation under matrimonial law, for the purpose of awarding maintenance under Section 125 Cr.PC, merely proving one or more instances of such lapses is not sufficient to absolve the husband from his liability to pay maintenance.

The above rulings clarify that the denial of maintenance is not intended as a punishment for adultery. Rather, it is in the context of a continued and stable relationship with the person she is alleged to have committed adultery with. The standard of proof required, to prove adultery on the part of the wife, is high in order to prevent this provision from being misused by husbands as a means of escaping from the legal obligation of maintaining their wives (S.S. Manickam v. Arputha Bhavani Rajan).\textsuperscript{40}

Faced with a number of cases involving false allegations of adultery by husbands in proceedings for maintenance, the court in Baishnab Charan Jena v. Ritarani Jena\textsuperscript{41} held that such baseless allegations by the husband and his family members will entitle the wife to live separately and claim maintenance from her husband. In Kamal Kishore v. State of UP,\textsuperscript{42} the court reprimanded the husband for making reckless charges of immorality against his wife. In Mahesh Chandra v. Addl. Civil Judge,\textsuperscript{43} the Allahabad High Court held that the husband had caused incalculable harm to the wife by terming her a woman of loose morals and awarded Rs 20,000 as exemplary costs. The facts of this case are rather absurd. When the wife, who was hearing impaired, filed for maintenance, in order to create evidence of immoral character, the husband requested a friend to file a false and frivolous case of restitution of conjugal rights against his wife, and later used these as proof of her immorality. In Mahesh v. Madhu,\textsuperscript{44} the wife was driven out of the matrimonial house when she was three months pregnant. Later, the husband made allegations of adultery against her and disputed the paternity of the child. The court directed the husband to pay a compensation of Rs 100,000 along with interest at 6 per cent per annum from the date of filing the suit till its realization. The court commented that the allegations are based on illusion rather than reality.
As we can observe, the courts take a serious view of baseless allegations of immorality which are advanced only as a legal ploy to avoid the payment of maintenance to wives and to humiliate them in court rooms during proceedings.

An interesting comment on this issue is found in Arun Kumar v. Meenu Kumar.45 In this ruling, S. Ravindra Bhat J. of the Delhi High Court, warned the lower judiciary to adopt a cautious approach and restrain from making presumptions on the basis of allegations of adultery. His Lordship’s comments on this provision are illuminating and contribute substantially (p.128) towards ushering a new gender-just legal order, away from conventional patriarchal dictates. Following is an excerpt from this ruling:

Though Section 125 Cr.PC is in the nature of a welfare measure, and perhaps falls within the description of ‘special provision’ under Article 15 (3) of the Constitution, the exception under Section 125 (4) is loaded with gender unequal terms, against the woman. Hence, it must be invoked with due care and circumspection. The enacting part of Section 125, which entitles a woman to maintenance, makes no distinction whether the cause for her approaching the court is adultery or infidelity of the husband. Yet, the possible effect, viz, estrangement and the situation of her living in adultery is sought as a ground to deny that welfare measure. Without examining the logic of this enforcement of morality through the legal process, which has to receive a wider debate, what can be said is that the court should be loath to rush to conclusions or apriori assumptions, since Section 125(4) enacts an exception. It should be satisfied about the soundness of such a charge and cannot be content to elevate allegations into findings (Para 13 pp. 824–5).

In cases where the husband is able to prove to the court that the wife has been living in adultery, the courts are bound to deny her maintenance (Angoori v. Phool Kumar).46 In Subal Chandra Saha v. Pritikana Saha,47 the woman had left her matrimonial home and was found living with another man in rented premises. The court held that their intention to continue living with each other cannot be brushed aside and held that the woman was ‘living in adultery’ within the scope of Section 125(4) of Cr.PC. More recently, in Sukro Devi v. State of Jharkhand,48 it was proved that the wife had voluntarily left her matrimonial home, without reasonable cause or excuse, and was living with another man. Hence, the finding of the trial court and revision court, that it was not an isolated instance of a lapse in character on the part of wife, was upheld by the high court.

Even after maintenance has been awarded, if the wife is living in adultery, the husband can approach the court for cancellation of the order of maintenance under Section 125(5). If it can be satisfactorily proved that the woman is living in adultery, the magistrate has the power to cancel the order of maintenance. But in such cases, the woman will be entitled to maintenance till the date she commenced living in adultery (Ram Kishore v. Bimla Devi).49

Lump sum amounts awarded to the wife as a divorce settlement cannot be rescinded if a divorced woman subsequently remarries. In Nanigopal Chakravarty v. Renubala Chakravarty,50 the Orissa High Court, while dismissing the husband’s application for
rescinding the lump sum amount awarded to the wife as divorce settlement upon her remarriage, held that such an order would amount to an annulment of a past liability and not a future obligation.

**Post Divorce Adultery Not Within the Ambit of Section 125 (4) Cr.PC**

If after divorce the woman remarries, the husband is entitled to move the court for a cancellation of the order of maintenance. But this stipulation or the stipulation under Section 125 (4), discussed above, cannot be invoked to deny maintenance to a divorced woman on the ground of her adulterous conduct. The courts have held that the stipulation under Section 125(4) that ‘no woman shall be entitled to receive an allowance if she is living in adultery’ refers to her conduct within a prevailing marriage and not to her conduct after she obtains a decree of divorce, or even when she is divorced on an allegation of adultery.

*(p.129)* This clarity on the stipulation was provided by an interesting ruling of the Supreme Court in *Rohtash Singh v. Ramendri*. Through this ruling, the court has attempted to contain the mischief caused in this section by holding that it applies only to cases where the marriage between parties is subsisting and not where it has come to an end. The court explained that the relevant provision presupposes the existence of a matrimonial relation since adultery denotes the sexual intercourse of two persons, either of whom is married to a third person.

In *Valsarajan v. Saraswathy*, the wife was refused maintenance on the ground that she was living in adultery. Later, the husband obtained a divorce on this ground. After divorce, the wife filed for maintenance under Section 125 of Cr.PC. The high court held that her claim as a divorced wife cannot be defeated on the ground that she was living in adultery, or had lived in adultery, or had suffered an order of divorce on the ground that she was living in adultery (*Gopi v. Krishna* and *Dalip Singh v. Rajbala*).

In *Sanjeev Kumar v. Dhanya*, the husband challenged the order of the family court which awarded the wife Rs 1,500 per month as maintenance on the ground that the woman who has suffered an order of divorce on account of contumacious matrimonial conduct is not entitled to maintenance. The court held: Merely because the woman continues to be the wife for the purpose of claiming maintenance under Section 125 of Cr.PC, no husband can demand cohabitation, loyalty or chastity from his divorced wife as a condition for awarding her maintenance.

---

**Box 2.1 The Indian Evidence Act, 1872, Sec. 112: Birth During Marriage, Conclusive Proof of Legitimacy**

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, and the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to marriage had no access to each
other at any time when he could have been begotten.

Presumption of Paternity and DNA Testing

Presumption Under Section 112 of the Indian Evidence Act, 1872

The allegation of adultery and immorality sometimes extends to denying the paternity of the child. But if cohabitation is proved, or if the wife is able to prove that there was a likelihood of sexual contact during the time of conception, the courts generally uphold the validity of the marriage and paternity of the child. The law leans in favour of the innocent child and prevents it from being bastardized if there is some indication of the child’s parents living together around the time of conception, or even if there was a possibility of sexual access between the two. The well established legal maxim which is invoked in disputes over paternity is *Pater est quem nuptiae demonstrant*: He is the father whom the marriage indicates. The rights of the child to paternity and legitimacy are protected through a presumption contained in Section 112 of the Indian Evidence Act, 1872 (IEA).

In *Dukhtar Jahan v. Mohammed Farooq*, the Supreme Court stipulated as follows:

(p.130) ...Section 112 of IEA lays down that if a person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution and the mother remains unmarried, it shall be taken as conclusive proof that he is the legitimate son of the man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. This rule of law based on the dictates of justice has always made the courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimization of the child would result in rank injustice to the father. Courts have always desisted from lightly rendering a verdict on the basis of slender evidence, which will have the effect of branding a child a bastard and its mother an unchaste woman.

The child was born after seven months of marriage. Ten months later, the husband divorced the wife. When the wife filed for maintenance the husband denied paternity. The court held that the wife could not have hid her pregnancy from her husband. But the husband continued to cohabit with her until the child was born and for ten months thereafter. Since the parties were close relatives, the husband had access to the wife even prior to marriage.

In *Banarasi Dass v. Teeku Dutta*, the Supreme Court elaborated this concept further:

The law leans in favour of a presumption of marriage and legitimacy of children and against a presumption of vice and immorality. The law presumes both that a marriage ceremony is valid and that every person is legitimate. It is in this context that marriage and filiations (parentage) are presumed. It is a rebuttal presumption
of the law that a child born during lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities. In matters of this kind, the court must have regard for Section 112 of the Evidence Act. This section is based on the well known maxim *pater est quem nuptiae demonstrant* (he is the father whom the marriage indicates). The presumption of legitimacy is that a child born of a married woman is deemed to be legitimate. The burden of proving that it is not a thrust on the person who is interested in making a case of illegitimacy.

**Context in Which the Demand for DNA Test is Raised**

Recent innovations in medical technology have contributed towards a more accurate determination of paternity. Blood group testing has been replaced with an advanced process of genetic identification through the use of a DNA (Deoxyribonucleic Acid) test. This sophisticated method of determining the identity of a person was first developed by scientists in 1985 in England, and has been accepted by the legal system (*Anil Kumar v. Turaka Kondala Rao*). Demands for conducting these tests have been made, both in matrimonial and maintenance proceedings, for achieving different objectives.

In instances where the biological father has denied paternity, women have demanded DNA tests of their husbands/partners to conclusively prove paternity and claim their right to maintenance. While the courts have held that no one can be compelled to undergo the test, adverse inference can be drawn if the man refuses to undergo the tests and his contention of denying paternity gets weakened by this denial during the litigation process. There are cases where an illegitimate child has also demanded a DNA test while claiming maintenance from his putative father.

At other times, demands for DNA tests are made frivolously by husbands to delay the judicial process of awarding maintenance to the wife and child, merely as a ‘roving’ enquiry or a ‘fishing’ enquiry. In such cases, courts have declined to grant relief to the husband, based (p.131) on the presumption of legitimacy under Section 112 of the IEA. In cases where a *prima facie* plea of non-access (the possibility of sexual intimacy and consequent conception) has not been made, the presumption under Section 112 of the IEA prevails to save the woman from the humiliation of undergoing a DNA test to determine paternity. The proceedings for maintenance are not criminal and the stringent rule of evidence applicable in criminal proceedings of proof ‘beyond reasonable doubt’ cannot be applied. But at the same time, the rule of evidence applied in civil proceedings, ‘preponderance of possibility’ is too lax. Hence, courts have attempted to strike a balance and arrive at a middle ground where the burden of proving ‘non-access’ is thrust upon the person disputing paternity.

In *Kanti Devi v. Poshi Ram*, the Supreme Court explained the concept as follows:

*The standard of proof of prosecution to prove guilt beyond any reasonable doubt belongs to criminal jurisprudence whereas the test of preponderance of probabilities belongs to civil cases. The test of preponderance of probability is too light and may expose many children to the peril of being illegitimatised. Hence, by*
way of caution and as a matter of public policy, the law cannot afford to allow such a consequence to befall an innocent child on the strength of a mere tilting of probability. Its corollary is that the burden on the husband should be higher than the standard of preponderance of probabilities. The standard proof in such cases must at least be of a degree in between the two so as to ensure that there was no possibility of the child being conceived through the plaintiff-husband.

Regarding the relevance of presumption under Section 112 of the IEA in the context of the DNA test, the court explained:

Section 112 of the IEA act was enacted when modern scientific advancements with Deoxyribonucleic Acid (DNA) as well as Ribonucleic Acid (RNA) tests were not in contemplation by the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not sufficient to escape from the conclusiveness of Section 112 of the Act. For example, if a husband and wife are living together during the time of conception but the DNA test reveals that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. This may seem unfair from the point of view of the husband who would be compelled to bear the fatherhood of the child of which he may be innocent. But even in such a case, the law leans in favour of the innocent child if his mother and her spouse were living together at the time of conception.

As explained by the Supreme Court in the above passage, the courts will exercise abundant caution before a child is subjected to DNA tests, which may cause stigma and humiliation and jeopardise his/her rights as a child. Hence, under the law of maintenance which is a beneficial legislation enacted to prevent destitution and vagrancy, the courts will rarely concede to this demand. Courts have held that since proceedings for maintenance under Section 125 of the Cr.PC are summary and do not finally determine the marital status of the parties concerned, the courts have granted maintenance to the wife and child and directed husbands to initiate civil proceedings by way of declaratory suits to determine legitimacy and paternity. Only in very rare cases when non-access is proved, will the courts entertain the demand for a DNA test during maintenance proceedings.

The third category of cases where the demand for DNA tests is raised is in matrimonial litigation, specifically in proceedings for the annulment of marriage on the ground of pre-marriage pregnancy or in proceedings for divorce on the ground of adultery. Again, courts will not concede to a flippant demand. But if it is necessary to conclusively prove adultery or pre-marital pregnancy, the courts may concede (p.132) to the husband’s demand and subject the woman and child to a DNA test. There are instances where the refusal of the woman to undergo tests has led to an adverse inference being drawn against her.

The following cases illustrate the various strands of this complex legal discourse.

**Denial of Paternity and Legitimacy**
DNA tests have proven to be extremely useful in determining the rights of illegitimate children. While fathers have tried to wriggle out of the obligation of maintaining children by claiming that there was no valid marriage, the law has pinned the responsibility of maintenance on the father even when there is cohabitation or a presumption of marriage between the mother of the child and the putative father. As per the stipulation under Section 125 of Cr.PC, the obligation to maintain the child extends to both legitimate and illegitimate children. Courts have adopted the principle that while granting maintenance to an illegitimate child, the primary concern is paternity and not the legitimacy of the child.

DNA testing has been a highly disputed matter. The constitutionality of DNA testing in succession, maintenance, and matrimonial cases, has been upheld by the Madras High Court in *Bommi v. Munirathinam*, 59 In this case, the husband challenged the order of the trial court directing him to undergo a DNA test to determine paternity, but the Madras High Court declared that such a direction is not in violation of Article 21 of the Constitution. In *Syed Mohd Ghouse v. Nooummisa Begum*, 60 the husband denied both marriage and paternity but challenged the order of the family court to undergo a DNA test. The high court held that while as per the ruling in *Goutam Kundu* (discussed later) the court cannot compel a person to give a sample of blood; the court can draw inferences as a necessary corollary in sequel thereof. The importance of the DNA test in clarifying a case has been expressed in *Joseph v. State of Kerala*, 61 where the Kerala High Court upheld the directions issued by the Kerala State Women’s Commission to two men in two different cases to undergo DNA tests. Upon the men disputing marriage and paternity, the women had filed complaints before the State Women’s Commission. The latter issued directions which were challenged by both men before the high court. The court upheld the direction of the Women’s Commission and held that the test may absolve the women of the slur suffered by them and redeem them of the trauma they were undergoing for several years. On the other hand, if the stand adopted by the two men was correct, they too would be absolved of the false allegations made against them.

Courts exercise the power to direct the person disputing paternity to undergo a DNA test in order to protect the rights and entitlements of the child and, thus, lean towards protecting an innocent child. DNA testing has, therefore, been used in a number of cases.

For example, in *Anil Kumar v. Turaka Kondala Rao*, 62 an illegitimate son claiming maintenance from his biological father pleaded that his father, a married man, working as Station Superintendent in the railways, had a sexual relationship with his mother and he was born out of this union. The trial court rejected his application on the ground that it could not be established that the respondent was his putative father. In an appeal, his claim was upheld (p.133) based on the report of DNA tests and he was awarded Rs 300 as maintenance. Similarly, in *Nani Gopal Kar v. State of West of Bengal*, 63 a woman cohabited and conceived under a promise of marriage. When the respondent refused to marry her, the woman filed a criminal complaint of rape and cheating and claimed maintenance for herself and her child. A DNA test proved paternity and the woman and child were awarded maintenance. The court commented that pendency of criminal case (of rape) is not a bar against granting interim maintenance to the child.
If the husband declines to undergo the test, the courts have the power to draw adverse inference. This is seen in the Supreme Court decision of *Dwarika Prasad Satpathy v. Bidyut Praya Dixit,*64 where it was held that if the husband declines to undergo a DNA test he will be disentitled to dispute the paternity. The apex court commented that the provision under Section 125 Cr.PC is not to be utilized for defeating the rights conferred by the legislature upon destitute women, children, or parents, who are victims of the social environment.

In *Kanchan Bedi v. Gurpreet Singh Bedi,*65 when the wife filed for maintenance for her son, the husband denied marriage and paternity. In order to conclusively prove paternity, the wife pleaded for DNA testing. The husband vehemently opposed this on the ground that if the test revealed that he was not the father the child would be defamed and exposed to the risk of being declared a bastard. But, since the husband had already challenged the paternity of the child in his written statement and alleged that the child was illegitimate, the court held that he had no concern for the welfare of the child and his pleadings on this ground lacked credibility. The court branded the concern as ‘crocodilian’ and directed the husband to present himself at the hospital for a DNA test.

**Maintenance Proceedings and Roving Enquiries**

The following cases illustrate the stern response of the higher judiciary to the demands raised by husbands for a DNA test as a delaying tactic, and to avoid the payment of maintenance to their wives/partners and children.

In a leading case, *Goutam Kundu v. State of West Bengal,*66 the Supreme Court laid down the following guidelines for ordering blood tests to determine paternity.

1. Courts in India cannot order a blood test as a matter of course;
2. Whenever applications are made for such prayers in order to have a roving inquiry, the prayer for a blood test cannot be entertained;
3. There must be a strong *prima facie* case that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the IEA;
4. The court must carefully examine the consequence of ordering a blood test—whether it will have the effect of branding a child a bastard, and the mother an unchaste woman;
5. No one can be compelled to give a sample of blood for analysis.

It was held that there is a very strong but rebuttable presumption under Section 112 in favour of legitimacy and the section requires that the party disputing paternity should prove non-access in order to dispel the presumption. The court also explained the term access as the existence of opportunities for sexual intercourse and not actual cohabitation.

In conclusion, the court commented that the purpose of the application was nothing more than a ploy to avoid the payment of maintenance, without making any ground whatsoever to have recourse to the test.
The rulings in *Laxmikant v. Premwati*, *V Yedukondalu v. V. Nageswaramma*\(^67\) and *Nandlal v. Shankari*\(^68\) serve to clarify the point regarding access and cohabitation. In *V. Yedukondalu*, the family court at Vijayawada granted maintenance of Rs 400 per month to the wife and Rs 100 per month for each of the three children. In appeal, the husband denied paternity of the third child and pleaded non-access. While upholding the order of the trial court, the high court held that the mere fact that the wife had left the matrimonial home can scarcely constitute evidence of non-access when both husband and wife were living in the same district and the child was born during the continuance of their valid marriage. The court also commented that charges of adultery were not raised in the divorce petition filed by the husband. The wife had left the matrimonial home due to cruelty and harassment for dowry. In *Nandlal* the husband challenged the maintenance awarded to the wife and child on the ground that he was in judicial custody at the time when the child could have been conceived. The high court held that since the wife used to regularly visit him while he was in custody and look after him, sexual contact cannot be ruled out. The court commented: ‘Nowadays, nothing is impossible.’

In *Rajesh Chaudhary v. Nirmala Chaudhary*,\(^69\) the Delhi High Court, while admitting that the result of a genuine DNA test is said to be scientifically accurate, ruled that it is not enough to escape the conclusiveness of Section 112 of the IEA. For example, if a husband and a wife are living together during the time of conception but the DNA test reveals that the child was not born to the husband, the conclusiveness in law would still remain irrefutable. In this context, Section 112 assumes primary importance while defending the claim of the paternity of the child. The husband had challenged the paternity of his daughter but in his pleadings, he admitted that he had clear access. Hence, his application for a DNA test was rejected.

In *Md. Mhasin Sk. v. Sayeda Khatun Bibi*,\(^70\) the husband disputed the paternity of the child alleging that the wife had sexual relations with other men. But the wife was able to prove that her husband alone had access to her and, thus, had fathered the child. The Calcutta High Court upheld the wife’s contentions and rejected the husband’s plea for a DNA test as he had no basis for demanding it. The court commented that DNA tests cannot be ordered without some evidence to substantiate the allegations of non-access or some proof of the wife’s adultery.

Similarly, in *Didde Sundara Mani v. Didde Venkata Subbarao*,\(^71\) the Andhra Pradesh High Court quashed the order of the trial court permitting a DNA test. This was done on the ground that the party disputing the paternity of the child has to prove non-access to the mother during the time when the child could have been conceived, to dispel the presumption under Section 112 of the IEA. The presumption would have to be displaced by leading strong preponderance of evidence and not merely by filing a petition for determining the paternity through a DNA test.

(p.135) In *Partha Majumdar v. Sharmishta Majumdar*,\(^72\) the trial court rejected the husband’s plea for DNA testing. The Calcutta High Court upheld the order of the magistrate and held that the husband, through this application, wanted to introduce new
and inconsistent facts which were totally irrelevant while deciding maintenance. He wanted to project his wife as a prostitute, which cannot be permitted in proceedings under Section 125 of Cr.PC.

It was also held that the Supreme Court ruling in Sharda v. Dharmpai, which dealt with the issue of annulment of marriage on the ground of a mental disorder, has no relevance to the present case. That ruling was given in proceedings to obtain a matrimonial remedy of annulment of marriage. The same principle cannot be applied to summary proceedings under Section 125 of Cr.PC. This provision is a social device, introduced for the welfare and benefit of poor and neglected wives who are unable to maintain themselves. The court commented that allegations of adultery and accusations that the birth of the child due to the adulterous life of the wife are nothing but wild, vague, and baseless and, hence, the prayer for a DNA test was rightly rejected by the magistrate. The court further commented that if after the decision in proceedings, under Section 125 of Cr.PC on the basis of evidence and materials on record, the husband feels aggrieved, he is at liberty to approach the appropriate civil court for challenging the paternity of the child and for a necessary declaration in this respect.

In Heera Singh v. State of UP, while dismissing the appeal filed by the husband for a DNA test, the Allahabad High Court held: When the law requires strict and direct proof to rebut the presumption of legitimacy, the DNA test of a minor child cannot be allowed in the absence of evidence and on vague pleadings. The court, in the capacity of ad litem guardian of the minor cannot direct such a test in the absence of direct and positive evidence of non-access as required under Section 112 of the Evidence Act.

In Amarjit Kaur v. Harbhajan Singh, in a petition for divorce filed by the husband on the ground of cruelty and adultery, the wife filed for maintenance. Since the application was rejected, she filed an appeal in the high court which awarded maintenance to her and the minor daughter, but directed the trial court to conduct a DNA test with respect to the son, whose paternity was disputed by the husband. The court held that if the report is negative, the wife and the minor son would not be entitled to maintenance. The Supreme Court set aside the order and held that the court cannot impose conditions for the DNA test to be conducted, and such a condition is unreasonable.

The following two cases are illustrative of the cancellation of maintenance awards upon cogent evidence which rebutted the presumption of paternity under Section 112 of the IEA. In Noor Alam v. State of Bihar, the trial court awarded Rs 300 per month as maintenance to the daughter. The husband denied paternity, pleading that the daughter was born two years after he had divorced his wife. This explanation was accepted by the high court. In Abdul Razak Haji Gulambahi Qureshi v. Johrabibi Haji Kalubhai Qureshi, the trial court awarded Rs 200 per month as maintenance to the minor child despite evidence that the husband had no access to the wife when the child could have been conceived. In an appeal, the high court held that a child who was born while the marriage was subsisting, but without the father having access to wife at the relevant time is not entitled to maintenance. However, the court issued a word of caution and commented: It is necessary to observe that even though the wife herself has not
challenged the findings against her, the finding or the inference that she was living in adultery may not be taken as approved or confirmed by this court.

**Determination of Pre-Marriage Pregnancy and Adultery**

While in maintenance proceedings courts are extremely reluctant to entertain applications for a DNA test to defeat the women’s claims, in declaratory suits and matrimonial proceedings, tests are relied upon to prove the husband’s allegation of adultery or pre-marriage pregnancy. High courts have upheld the trial courts power to direct the parties to undergo tests while deciding matrimonial disputes. Courts have held that such directions are not in violation of Article 21 of the Constitution. But this power is to be exercised sparingly and only where sufficient material is available with the court that a *prima facie* case has been made out by the applicant.

For instance, in *Jyothi Ammal v. K. Anjan*, the court upheld the husband’s plea of adultery and granted him a divorce based on the reports of DNA tests which excluded him as the father. Since the husband had no access to the wife during the time she could have conceived the child, the court held that allegations of adultery had been proved.

In *B. Vandana Kumari v. P. Praveen Kumar*, the husband had filed for annulment on the ground of pre-marriage pregnancy. The wife delivered the child during the pendency of the petition. The husband sought a DNA test of the wife along with the child which was permitted by the trial court. In appeal, the high court upheld it and stated: To determine the paternity of the child and for an effective adjudication of the controversy between the parties, a DNA test is necessary. The direction is not contrary to conclusive proof enjoined under Section 112 of the IEA.

*Maya Ram v. Kaml Devi* is also a case of pre-marriage pregnancy, where a daughter was born within six months of marriage. The husband was able to prove that he had no access to the wife at the time when the child was begotten. While upholding the direction of the trial court to conduct a DNA test, the court commented that while it has the power to direct the parties to undergo the tests, it cannot compel any party to subject themselves to it. But in case a party does not undergo the test, adverse inference can be drawn.

However, the courts will not entertain any applications by a third party to determine paternity. In *Renubala Moharana v. Mina Mohanty*, the court rejected the application filed by the mother of the deceased for a declaration that the child is the illegitimate progeny of her deceased son. The court held that declaratory relief as regards the illegitimacy of the child cannot be granted as it would violate the principles of natural justice.

### Box 2.2 The Indian Evidence Act, 1872

**Section 50–Opinion on Relationship, When Important**
When the court has to form an opinion as to the relationship of one person with another, the opinion, expressed by conduct, as to the existence of such a relationship, of any persons who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact.

Section 114–Court May Presume the Existence of Certain Facts
The court may presume the existence of any fact which it thinks is likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Similarly, in Sunil Trambake v. Leelavati Trambake, the wife filed an application for a DNA test of her husband’s child through a bigamous marriage in civil proceedings for a divorce filed by the husband. The trial court allowed the application, but in an appeal the high court held that a DNA test cannot be directed as a matter of routine. The tests can be directed only when they become indispensable to resolve the dispute. The court should record a reason as to how and why such a test is necessary to resolve the controversy. This is necessary since these tests will have an adverse impact on the child and mother. The court held that the wife can produce documentary proof such as a birth certificate and school record to prove her case. Since the second wife and her child were not party to divorce proceedings, it would violate the principle of natural justice. Such tests would not be in the interest of the minor child. Further, the court commented that even if the test was positive, it would not help the wife prove her husband’s second marriage.

Presumption in Favour of a Valid Marriage
A corollary to the denial of paternity is a denial of the marriage itself. This legal ploy is constantly used in proceedings for maintenance filed by the wife, both under Section 125 of the Cr.PC as well as in civil suits and matrimonial proceedings. If a marriage is not valid, the status of the woman is reduced from that of a wife to a mistress or concubine. The children will also suffer stigma by being branded illegitimate and will have to bear the economic consequences of the denial of their rights. To avoid this eventuality, the law leans in favour of a presumption of the marriage being valid rather than in favour of its being an illegitimate relationship, which the courts would view as a vice.

The plea for invalidity of marriage is often based on technicalities that certain essential ceremonies were not performed or some essential conditions were not fulfilled at the time that the marriage was solemnized. Summarised below are some frequently used grounds for denying women maintenance and the positive approach of the courts while deciding these cases.

Violation of Essential Conditions of a Marriage
Challenges to the validity of marriage are based on the absence of any essential conditions for a valid marriage such as free consent, minimum age, etc. The courts have
held that a violation of the stipulation of the minimum age of marriage cannot be used to deprive the minor wife of her right to maintenance.

Regarding the absence of consent, in *Basanti Mohanty v. Parikhit Rout*,\(^83\) while upholding the wife’s right to maintenance, the Orissa High Court held that even if it can be proved that the marriage was entered into without the consent of the husband, the mere absence of consent will not render a marriage that has been performed in accordance with the provisions of the Hindu Marriage Act, invalid for the purpose of claiming maintenance.

Similarly, violating the age bar will not render the marriage invalid and the husband cannot escape the liability of paying maintenance to the wife on this ground.\(^84\)

**Non-Performance of Essential Ceremonies of Marriage**

Another challenge to the validity of marriage is the non-performance of certain essential ceremonies as prescribed by the Hindu Marriage Act. However, various courts have held that if there is other evidence to prove the marriage, evidence of the performance of *saptapadi* (in the context of Hindu marriages) is not necessary, especially since ceremonies vary in different castes and communities.

In *Dwarika Prasad Satpathy v. Bidyut Praya Dixit*,\(^85\) the Supreme Court held that once it is admitted that some marriage procedure was followed and if the court is *prima facie* satisfied with regard to the performance of the marriage, it is not necessary to probe further into whether ceremonies were complete as per Hindu rites or if the ceremony is in accordance with the provisions of the Hindu Marriage Act. The marriage would be deemed valid.

Numerous high courts have also held similarly. For instance, in *Subhash Popatlal Shah v. Lata Subhash Shah*,\(^86\) the marriage was performed by a priest in a temple who chanted mantras, *tilak* was applied, the bride and groom garlanded each other, and the marriage was consummated. Later, the husband challenged the validity of the marriage on the ground that saptapadi was not performed. But the court held that saptapadi was not proven to be an essential ceremony as per the customs prevailing among both parties to the marriage. The court further commented that even if it can be proven, it cannot be held that the marriage is invalid on this basis. When some ceremonies of marriage have been performed, there is always a presumption of the validity of the marriage under Section 114 of the IEA. Until this presumption is rebutted by cogent and satisfactory evidence, the marriage will be deemed valid. Based on this presumption, the Bombay High Court upheld the claim of the woman and awarded maintenance of Rs 400 per month to the wife and Rs 500 per month to her son. The court also commented that the Supreme Court ruling requiring strict proof of a valid marriage in the context of prosecution for bigamy under Section 494 of IPC is not relevant in matrimonial proceedings.\(^87\)

The view that saptapadi is not required for a valid Hindu marriage was also upheld by the Rajasthan High Court in *Roop Singh v. State of Rajasthan*,\(^88\) where the marriage was
performed as per the custom of nata, which is permissible amongst many lower caste communities of Rajasthan. While acknowledging that saptapadi may not be an essential ceremony amongst some communities, the court ruled that the necessary ceremonies had been performed, and that the standard of proof needed to prove a marriage is not as high as that required in connection with proceedings under the IPC for the offence of bigamy.

The Patna High Court commented in Veena Devi v. Ashok Kumar Mandal, that it is irrelevant for the place of marriage to be mentioned and saptapadi to have taken place in the application in proceedings under Section 125 of Cr.PC. The court also commented that the failure to name the priest and barber who were present at the wedding could hardly serve as a ground to disbelieve the factum of marriage because every bride and bridegroom are not expected to recollect the names of attendees after twenty years of marriage.

In Laxmikant v. Premwati Devi, the wife had filed for restitution of conjugal rights against her husband in the trial court. Although, the husband pleaded that no marriage existed between him and the woman, the wife pleaded that some marriage ceremonies had been performed. Based on this she was awarded a decree in her favour. When, the husband appealed and produced a voters list as evidence (where the woman was not listed as his wife), the court held that once marriage between the parties is proved, presumption would be drawn that all the required ceremonies of marriage were performed. The court commented that the policy of the law was to lean in favour of the validity of marriage rather than against it.

In Muthumanicam v. Sekaran, despite the husband’s contention that there was no valid marriage, the Magistrate’s court awarded maintenance of Rs 175 to the wife and Rs 125 to the child. The sessions court reversed the order on the ground that the marriage had not been proved as saptapadi was not performed. In an appeal, the Madras High Court upheld the right of the child to maintenance, but did not grant maintenance to the wife. The Supreme Court reversed the orders of the two Appellate courts and upheld the order of the Magistrate’s court and commented: ‘In Tamil Nadu, marriage by exchange of garlands is permissible. The small discrepancy regarding the time of marriage is not a ground for discarding evidence and denying maintenance to the wife.’

In Manmohan Vaid v. Meena Kumari, the Delhi High Court commented: As regards the alleged non-performance of saptapadi, firstly, it shall be presumed in the circumstances in the form of lagan feras and, secondly, non-performance in itself is not a sufficient condition to declare a marriage invalid/void or voidable. The court declared a marriage solemnized in a Gurudwara Saheb according to rules of the committee as valid. This was a love marriage where the couple were having a relationship for four years and the marriage was performed against the wishes of parents on both sides but the maternal uncles on both sides attended the wedding. Later the husband denied the marriage and alleged that he was drugged. But the court commented that the trial court and the high court had observed the demeanor of the husband and were convinced of the falsity of
his contentions. The high court commented that he was a person who could go to any extent (to depose falsity).

The Calcutta High Court, in *Jitendra Nath Das v. Minati Das,* upon the husband’s denial of the marriage, permitted a photograph of the wife with the husband along with its negative, as evidence. In an elaborate and well reasoned order, the Magistrate upheld the wife’s claim and awarded Rs 400 per month as maintenance. While dismissing the appeal filed by the husband, the Calcutta High Court held that Section 125 of Cr.PC is a piece of welfare legislation to protect the wife from destitution and vagrancy, and proceedings are summary to facilitate a speedy disposal. Rigours of strict proof of all the formalities of a Hindu Marriage can be dispensed with. The husband could not adduce evidence that was sufficient to question the veracity of the testimony of witnesses for the wife, who were found to be sound, authentic, and dependable.

In *Namita Patnaik v. Dillip Patnaik,* the husband alleged that a document titled ‘Bibaha Bandhan Agreement’ registered before the District Sub-Registrar of Cuttack was fraudulent. He contended that no marriage had taken place between the petitioner and himself. In the registered document, the husband had categorically stated that he had duly married the woman and the District Sub-Registrar stated in court that the document had been presented to him by the husband. It was held that a right accrued by means of a registered document cannot be taken away by a deed of cancellation and, hence, any such deed has no legal basis.

In *Jagdish v. Shobha,* the wife pleaded that she was pregnant at the time of marriage, which was performed as per Buddhist rites. Soon after, she gave birth but the child died. The husband denied the marriage but admitted to the pre-marriage pregnancy. The Magistrate court dismissed her application but the sessions court awarded her Rs 400 as maintenance. The high court upheld the order of the sessions court and held: ‘Evidence tendered by the wife shows that the husband tied the marriage necklace and applied vermilion on the wife’s forehead in the presence of several others. This is in accordance with the customs applicable to Buddhists.’

It is evident that in a pluralistic society, the rigid application of stipulations regarding the essential ceremonies of marriage under the Hindu Marriage Act, only serve to deny the crucial rights of basic survival to women and children. The benefits of such a rigid application of legal provisions only helps husbands validate their manipulations to take advantage of their own wrongdoing. Hence, as can be observed from the above rulings, a strong presumption of the law operates in favour of marriage and legitimacy, which cannot be rebutted by a mere balance of probability. The evidence for rebutting the validity of a marriage should be cogent, satisfactory, and conclusive.

**Inter-Religious Marriages**

Christian law permits a Christian marriage to be solemnized between a couple, even if one of them is a follower of Christianity. Hence, inter-religion marriages are valid under Christian law. Muslim law permits inter-religious marriages under certain specific circumstances. Religion is not a bar under the Special Marriage Act. But Hindu law applies
only to Hindus and, hence, an inter-religious marriage performed as per Hindu rites is not valid. The same condition applies to a Parsi marriage wherein, if a Parsi marries a non-Parsi, such a marriage is invalid under the Parsi Marriage and Divorce Act, 1936 (Diwan and Diwan 1997).  

(p.141) But, since Hindu society is pluralistic, Hindu law validates diverse ceremonies and no notice period or written document of marriage is required, it is common practice for an inter-religious couple to opt for a Hindu Marriage. Later, when conflicts arise, the husband conveniently advances the plea that since the marriage is inter-religious, it is not legally valid.

_Sreedharan v. Pushpa Bai_ is a case of a marriage between a Hindu and Christian belonging to the Nadar community. The validity of the marriage was being contested by the husband. Janaki Amma J. of the Kerala High Court, reiterated that the standard of proof of marriage for awarding maintenance is not as strict as it is for bigamy under the IPC. The court held that a woman cannot be denied the status of a wife after undergoing a ceremony of marriage, merely because the husband and wife follow different religions. It is an insufficient condition to surmise that there was no marriage.

In _K. Selvaraj Surendran v. P. Jayakumary_, after the delivery of a child, the husband refused to take the wife back and declined to pay maintenance to her and the child. When the wife filed for maintenance, the husband denied the existence of the marriage and the paternity of the child. He claimed that since he is a Christian and a bachelor, and the wife a Hindu, there cannot be a marriage between them. The wife pleaded that they were both Hindus and married under the HMA. The family court concluded that the woman is legally married and that the child was born within the marriage. It further held that the denial of marriage and paternity was tantamount to cruelty. In an appeal filed by the husband against the order of the family court, the Kerala High Court upheld it and stated that the wife is entitled to a separate residence and maintenance.

In _Patricia v. Purushothaman_, the husband pleaded that he is Hindu and since the wife is Christian, there could be no valid marriage between them. But the court rejected this plea and held that since the parties were accepted by their respective families as husband and wife, it is difficult to infer that their relationship was construed by family members as mere concubinage. Further, it can be justifiably presumed that there was a legal marriage between them due to their long cohabitation for the purpose of awarding maintenance under Section 125 Cr.PC.

In _Madhavi Ramesh Dudani v. Ramesh K. Dudani_, the marriage was between a Christian wife and a Hindu husband. When the wife left the matrimonial home due to estrangement and filed for maintenance for herself and her two daughters, the husband denied the validity of the marriage on the ground that certain essential ceremonies like _sudhikaran_ were not performed. The trial court upheld this plea. In an appeal filed by the wife, while setting aside the verdict of the trial court, the Bombay High Court held that purification ceremony is not necessary as per Section 4 of the Hindu Marriage Act and hence the absence thereof cannot lead to the conclusion that such a person did not
convert to Hinduism prior to the marriage ceremony. Further, it held that Section 114 of the IEA expects the court to presume the existence of certain facts which it believes are likely to have happened, regard being shown to the common course of natural events.

Courts usually decline to uphold frivolous pleas such as the invalidity of inter-religious marriages. These claims provide an escape route to husbands from the legal obligation of maintaining the wife with whom they cohabited, in what was perceived by the parties as well as their families, as a valid marriage. If the courts were to accept such frivolous pleas advanced by husbands, the legislative intent of providing maintenance to women in a vulnerable situation would be defeated. Hence, the courts are bound to appreciate the evidence in accordance with the provisions of the statute in order to achieve the goal of social justice.

If the girl herself alleges fraud and misrepresentation regarding religion and social status, the courts are likely to annul an inter-religious marriage performed as per Hindu rites as held by the Supreme Court in Gullipilli Sowria Raj v. Bandaru Pavani.103

**Rights of Women in Bigamous Marriages**

One of the most commonly used legal strategies to deny a woman maintenance is to claim that the marriage is bigamous. Prior to 1955, Hindu marriages were polygamous. But the codified statute of 1955, the Hindu Marriage Act, rendered Hindu marriages monogamous.104 But, while it was deemed monogamous in letter, Hindu marriages continue to be polygamous in reality. Within the legal domain, these marriages are void. But historically, most communities accepted the customary practice of bigamous marriages and treated these unions as valid marriages. Ironically, this situation is prevalent not only in rural areas, but urban centres as well.

The advantage of the mandate of legal monogamy lies with the husband as he can escape from the economic liability of maintaining his wife on the plea that the marriage suffered from a legal defect or lacked legal sanctity. Since ancient Hindu law and customary practices validated the institution of concubinage, even in present times, the plea that the woman concerned is a ‘concubine’ or ‘mistress’ and not the ‘wife’ can be advanced with ease in legal arguments. The fact that husbands have taken undue advantage and grossly misappropriated this mandate is exemplified by the volume of case law on the subject. An oft invoked legal ploy is to term the woman the domestic maid, a mistress or a ‘keep’, and not the wife with rights, status and entitlements.

**Maintenance Rights of Second Wives**

On the positive side is the ruling of M.H. Kania J. of the Bombay High Court, in Govindrao v. Anandibai,105 delivered in 1976. In this case it was held that since the HMA is a social legislation, it could not have where a Hindu woman was duped into contracting a bigamous marriage with a Hindu male, she should be deprived of her right to claim maintenance.

Several later decisions followed this legal dictum. In a leading case, Vimala v.
Veeraswamy, the Supreme Court held: Section 125 of Cr.PC is meant to achieve a social purpose. The objective is to prevent vagrancy and destitution. When an attempt is made by the husband to negate the claim of the neglected wife by depicting her as a kept mistress, on the plea that he was already married, the court insists on strict proof of the earlier marriage. A provision in the law, which disentitles the second wife from receiving maintenance from her husband under Section 125 of Cr.PC for the sole reason that the marriage ceremony, though performed in the customary form, lacks legal sanctity, can be applied only when the husband proves the subsistence of a legal and valid marriage. This is so particularly when Section 125 of Cr.PC is a measure of social justice intended to protect women and children. In the absence of clear proof that the respondent is living with another woman as husband and wife, the court cannot be persuaded to hold that the marriage duly solemnized, between the appellant and respondent, suffers from any legal infirmity.

This view was furthered in a later ruling, Mallika v. P. Kulandai, where the woman got married to a man who claimed to be a widower and there was a daughter born out of this union. When she later filed for maintenance, the husband challenged the validity of the marriage on the ground that he had an earlier marriage subsisting. The lower court upheld the husband’s plea that the marriage was not legal and denied maintenance to the woman. But in an appeal, the Madras High Court held that though the marriage could not be strictly proven, there was sufficient evidence to establish that the parties lived together continuously for a period of time long enough for a child to be born. The court upheld the woman’s claim of Rs 250 maintenance for herself and Rs 50 to the child born of this union. In 2002, the Bombay High Court, in R. Arora v. B. Arora, upheld the right of the second wife to a separate residence and maintenance under Section 18 of the Hindu Adoption and Maintenance Act. In this case, while divorce proceedings were pending against the first wife, the husband entered an informal relationship with another woman, but later, reconciled with his wife. The woman filed for a declaration that her marriage is valid, for an injunction against dispossession, and for maintenance. The family court passed an order restraining the husband from throwing the woman out of the flat in which she was residing along with her daughter, and awarded maintenance of Rs 10,000. In an appeal, the Bombay High Court ruled that since the husband had reconciled with his first wife, the subsequent partner could not be expected to reside in the same house and that she was entitled to a separate residence.

The turning point in this line of arguments came with a contrary view advanced by the full bench verdict in Bhausaheb Raghuji Magar v. Leelabai Bhausaheb Magar, in 2003 by the Bombay High Court. In this case, it was held that the earlier decision of the Bombay High Court, upholding the right of maintenance to the illegitimate wife (or faithful mistress) by a liberal construction of the word ‘wife’ as contained in Section 25 of HMA, is not good law. The court commented that though such a liberal construction, which may benefit second wives who are innocently drawn into marriages, it may encourage bigamous marriages with full knowledge, in spite of the existence of a legislation preventing bigamous marriages.
The Supreme Court ruling in 2005, in *Savitaben Somabhai Bhatiya v. State of Gujarat*, also endorsed this view. In this case, a woman, claiming to have been married according to customary rites and rituals, pleaded that her husband had an illicit relationship with a woman named Veenaben. The husband denied the marriage and pleaded that Veenaben whom he had married 22 years ago was his lawful wife. The Gujarat High Court upheld the validity of his marriage with Veenaben. Endorsing this verdict, the Supreme Court held that it is inconsequential that the man was treating Savitaben as his wife. However desirable it may be to take note of the plight of the unfortunate woman, it is the intention of the legislature which is relevant and not the attitude of the party. There is no scope for enlarging it by introducing a woman not lawfully married in the expression ‘wife’. Following this ruling, the Bombay High Court, in *Atmaram Tukaram Suradkar v. Sau Trivenibai Atmaram Suradkar*, held that the position of a woman who is married to a person whose spouse is living at the time of the second marriage is a mistress and not a married wife, and is not entitled to maintenance under Section 125 of Cr.PC. Similarly in *Buddepu Khogayya v. Buddepu Kamalu*, the woman admitted that the husband was married at the time of her marriage to him, but that he had promised to divorce her in the course of time, which he did not do. Later, after two children were born, he deserted her. The Magistrate’s court awarded her Rs 400 as maintenance, but relying on the Supreme Court ruling in *Savitaben*, the high court reversed the order and held that such a plea under Section 125 of Cr.PC was of no avail to her.

The derogatory attitude towards women who are in such relationships is further reflected in *Malti v. State of U.P.*, where the husband developed a sexual relationship with the domestic maid and started cohabiting with her. When the wife returned, he turned the maid out of the house. When a claim for maintenance was filed by the domestic maid, the judge declared: ‘The two may agree to live together to satisfy their animal needs. But such a union is never called a marriage and a woman leading such a life cannot be bestowed with the sacrosanct honour of a wife. No marital obligations accrue to such a woman against her husband.’ While comments about the high moral standards may appear salutary, it does seem that the price for immorality is to be paid only by the woman, while the man is left free to exploit both women. This seems to be the outcome of enforcing a strict code of monogamy under the Hindu Marriage Act.

In this context, one needs to elaborate on two recent judgments delivered by the Delhi High Court, reported in 2008. These judicial pronouncements have attempted to cross the stumbling block posed by the stipulation of monogamy under Section 5 of the HMA by innovating legal maxims to protect the rights of women.

In the first case, *Suresh Khullar v. Vijay Kumar Khullar*, while contracting the present marriage, the husband’s first marriage was dissolved by a court of law. The wife was innocent and oblivious of the fraudulent circumstances under which the husband had obtained an ex parte decree of divorce against his first wife. After a few months of her marriage, the woman was driven out of the matrimonial home. Thereafter, the husband’s ex parte decree of divorce was set aside on the ground of fraud and, through this legal
incident Suresh Khullar’s marriage was rendered bigamous and invalid. The woman filed a suit for damages against the husband and his first wife on the ground of fraud and cheating, which was decreed by a civil judge. While (p.145) upholding the right of the woman, the court with respect to Section 18 of HAMA, the Delhi high court held as follows: ‘While interpreting a statute, the courts may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress.’ The court invoked the legal maxim construction ut res magis valeat quam pereat, that is, where alternative constructions are possible, the court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. The court commented that if this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. It was held that for the purpose of claiming maintenance under Section 18 of HAMA, the woman should be treated as the legally wedded wife.

The second ruling was pronounced in Narinder Pal Kaur Chawla v. Manjeet Singh Chawla. The wife had approached the court for maintenance under Section 18 of HAMA in 1997 and pleaded that her husband had duped her by suppressing his earlier marriage. The couple had lived together for fourteen years and had two daughters. The husband pleaded that since his earlier marriage was valid and subsisting, his marriage with Narinder Pal Kaur was void. After a prolonged and contentious litigation, she was able to secure an order of interim maintenance of Rs 1,500 per month. But, when the case was finally decided in 2005, the trial court dismissed her petition on the ground that she could not be treated as a Hindu wife under Section 18 of HAMA as she did not have the status of a legally wedded wife. But in appeal, the Delhi High Court upheld the right of the wife and held that even if the woman cannot be treated as a Hindu wife, she is entitled to a lump settlement by way of damages.

Customary Divorce and Subsequent Remarriage

Despite the enactment of the Hindu Marriage Act, which provided for a judicial divorce, the practice of customary divorce is prevalent among large sections of society, and more so among the poor in rural areas who find it difficult and expensive to access the formal court structures. The customary divorce and remarriage was an accepted practice among the lower classes and even the codified law validates such practices. But, when women in such marriages claim maintenance, the husbands challenge the customary divorce to invalidate the present marriage and defeat the woman’s claim of maintenance. Here, too, the courts have held contradictory views. While some judgments have seen through the falsity of such claims, others have held in favour of husbands, thus, rendering women trapped in such situation extremely vulnerable.

On the positive side is the case of Pushpabai v. Pratap Singh. When the wife was awarded maintenance of Rs 500 per month by the trial court, the husband filed an appeal and pleaded that there was no valid marriage between the parties since the wife had not obtained a divorce from her first husband and, hence, she is not his legally married wife. The sessions court set aside the order of maintenance. In appeal, the wife pleaded that she had been divorced according to the custom of the caste and the divorce took place
before the Gona ceremony.\textsuperscript{118} On examination of evidence, the Madhya Pradesh High court upheld (p.146) the order of the Magistrate’s court that the customary divorce and the subsequent marriage is valid, and awarded Rs 1,000 as costs to the wife. While the judgment is positive, it highlights the long and circuitous route to justice which women have to undertake for a paltry sum of maintenance. In 2004, in \textit{Rameshchandra Daga v. Rameshwari Daga},\textsuperscript{119} the husband had married Rameshwari, who had obtained a customary divorce (chor chittee) through a divorce deed, which was allegedly shown to the husband prior to the marriage. Later, when she claimed maintenance, the husband denied the marriage on the ground that the woman had not been formally divorced. Both the family court at Mumbai as well as the Bombay High Court upheld the wife’s and her daughter’s right of maintenance. In the final verdict, the Supreme Court upheld the woman’s plea that the husband, an advocate, was aware of the customary divorce at the time of his marriage.

The facts of this case tell the tragic tale of an Indian woman, who having gone through two marriages with a child born to her, apprehends destitution as both marriages have broken down', the judges commented with a note of compassion. Further, the Supreme Court accepted that Hindu marriages, like Muslim marriages, were bigamous prior to the 1955 enactment. There is also a tacit acceptance that the ground reality has not changed much since the enactment. So, though such marriages are illegal, as per the statutory provisions of the codified Hindu law, the Supreme Court ruled that they are not immoral and, hence, a financially dependent woman cannot be denied maintenance on this ground.

In \textit{K. Suramma v. K. Rammayyamma},\textsuperscript{120} it was held that the parties relying on custom must prove the custom. Since there was no evidence of the practice of customary divorce being ancient and continuous, and no evidence on record to prove that her divorce with her earlier husband was final, the court declined to uphold the woman’s rights to the death benefits of her deceased husband.\textsuperscript{121}

In these cases the challenge before the court is to examine whether the marriage contracted by the woman subsequent to her divorce and obtained through customary practices is valid, or whether the subsequent marriage can be declared bigamous and, hence, invalid. The courts also examine the intention of the parties—whether there was an intention to divorce, or whether there was an intention to deceive and fraudulently enter into a second marriage while the earlier one was subsisting.

In \textit{Parikshat v. State of UP}, the husband challenged the order of maintenance awarding the wife Rs 500 per month as maintenance on the ground that since she had not obtained divorce from her previous husband, her marriage with him is not valid. The high court upheld the order of the trial court and held that when the factum of marriage is admitted, it should be presumed that the wife is the legally wedded wife. The trial court had held that there had been a customary divorce called chutta chutti and, hence, the woman’s previous marriage stood terminated. Neither trial court nor the revision court specified that the husband had made a contention that the practice of customary divorce was unacceptable on the basis of the well established principle that custom cannot override
written law and, further, that divorce could be acceptable only if it was brought about in accordance with provisions of Hindu law.

After the Supreme Court ruling in *Rameshchandra Daga v. Rameshwari Daga* (p.147) (discussed earlier), it appeared that it will no longer be possible for a Hindu husband to escape from his liability of maintaining his wife on the plea that the wife is not formally divorced from her previous husband, or on the plea that the woman is his concubine since his own previous marriage is still subsisting. But the subsequent ruling in *Savitaben Somabhai Bhatiya v. State of Gujarat* (also discussed earlier) has again rendered the situation ambiguous. But subsequent to this ruling, the Protection of Women from Domestic Violence Act was enacted in 2005, which has awarded legal recognition to informal relationships and cohabitee rights. This legal provision which is discussed subsequently, as well as judicial pronouncements of various high courts, have brought in a renewed hope to women whose marriage suffer from legal or technical defect.

**Succession Rights of Second Wives**

Challenges to the rights of the second wife extend beyond issues of maintenance and spill over into the domain of succession rights. Cases arise because the claims of the second (or subsequent) wife or her heirs are contested either by the first (or former) wife, her children, or the husband’s relatives. Here, too, one can find divergent views on the issue.

On the positive side is the ruling in *Shantaram Patil v. Dagubai Patil*.122 In this case, while deciding the right of a widow in an invalid marriage, the Bombay High Court had held as follows: Even if the marriage is void, the woman has a right against the husband. The right can be enforced not only in a proceeding under Section 25 of the HMA, but in any proceeding where validity of marriage and the rights flowing from it are determined. The right can be enforced not only during the lifetime of the husband but also after his death against his property. In this case, the court also ruled that the son from the second marriage is entitled to a share in the father’s property along with the first wife and her three children, and the second wife is entitled to maintenance from the property of her deceased husband.

Following is an interesting case where the child of the second wife contested the claim of succession of the third wife and where issues of customary marriage and divorce were also involved. In *Shakuntalabai v. Kulkarni*,123 the husband had remarried as the first wife could not bear children. After the death of the second wife he married for the third time in the customary *Udiki* form. After his death, the daughter of the second wife challenged the succession claim of the third wife. The issue before the court was whether the divorce in customary form and subsequent marriage in customary form was valid under the law. The court observed that in matters of this kind, hearsay evidence, like traditions, may be received as direct evidence since direct evidence of such marriages was not always available, and one of the ways in which the marriage can be proved was from the manner of their living and from the way in which they were treated by their neighbours.

The case of *Resham Bai v. Shakuntalabai*124 involved distribution of assets between the...
mother and the two wives of the deceased. The trial court had directed that the deposit of Rs 52,248 should be distributed equally between mother and two wives. Both the wives were to get the family pension in equal share. The high court held such distribution of assets to be fair, reasonable, and based on equitable consideration.

(p.148) In 2008, the Supreme Court, in Tulsa v. Durghtiya, has laid down that if a couple is living together for a very long period as husband and wife, there would be presumption in favour of wedlock. This presumption is rebuttable, but a heavy burden is cast upon the person who seeks to deprive the relationship of its legal origin to prove that no marriage took place. The Court reiterated that the law leans in favour of legitimacy and frowns upon bastardy. In this case, the couple had lived together for thirty years and had five children. The daughters were given in marriage by the husband. After her husband’s death, the woman had legitimate claim over the property as his wife. She had incurred debt at the time of her son’s marriage and had sold part of the land for this purpose. The Supreme Court held that she had the right to sell land and there is no question of having any illegal possession. While the trial court upheld her claim, the appellate court without any evidence, had come to an abrupt conclusion that the woman had started living with the man during the lifetime of her husband and, hence, she is not the wife but merely a concubine. Hence, she does not acquire the rights of a widow and cannot inherit his property. But evidence clearly proved that her former husband was not alive when she came and started living with the deceased. The Supreme Court concluded that continuous living as husband and wife had been established.

While the above rulings favour women in invalid marriages, the following judgments are indicative of a contradictory trend.

In Rajeshbai v. Shantabai, the first wife, Shantabai contested the claim of succession of the second wife, Rajeshbai, who was in possession of the property after the death of her husband. The court commented: The injunctive rule that neither party should have a spouse living at the time of marriage is enacted to prohibit polygamy and to institute measures of monogamy. There may be cases where that status may not be available to a woman because of the injunctive process of law. Though such a woman might have undergone a formal marriage, her status would be that of an illegitimate wife, and such a wife is not conferred with the status which is available to a legitimate wife nor does she have any entitlement, as the lawful wife of her husband, to the property under the provision of the Hindu Succession Act, 1956. Hence, it was held that both by virtue of status and law, Shantabai alone would be considered as a widow and as such would succeed to the properties of the deceased. However, the court ordered payment of Rs 20,000 to Rajeshbai as full and final settlement of her claim.

Similarly, in Nimbamma v. Rathanamma, the court ruled that the provisions of Section 5(i) and 11 of HMA render the position of a woman married to a person whose wife was living at the time of the second marriage to be that of a kept mistress and not that of a legally married wife. Stating that a bigamous marriage is null and void ab initio, the court held that such a woman was not entitled to succeed to the properties of that person.
Another interesting case is *Felix v. Jemi.* The first wife and her children challenged the succession claims of the second wife and her children. The parties and the deceased husband were Christians. The court held that the divorce obtained in 1971, by the mutual consent, of the first wife and the deceased was not valid under the law applicable to Christians. Hence, as the petitioner was still the lawfully wedded wife of the deceased at the time of the latter’s marriage (p.149) with the second wife, the court stated that the relationship between him and the second wife was mere concubinage and the children born of that union were illegitimate. Stating that only because they lived under one roof, the woman could not claim the status of the wife of the deceased, the court held that once the marriage between the first wife and deceased was admitted and the marriage was not dissolved in manner known to law, the woman in a subsequent relationship will lose the status of a wife. The case is rather tragic because the Christian law had remained archaic for a very long time and the notion of judicial divorce by mutual consent was introduced only in 2001. There was no legal avenue for the parties concerned to obtain a judicial decree of divorce by consent. So, though the deceased and the first wife had separated with consent, they could not obtain a judicial decree to this effect and the second wife who had in full faith, was denied her succession rights.

**Succession Rights of Children of Void Marriages**

Rather interestingly, each of the cases discussed earlier concerned the succession rights of children of second wives. In some cases, their rights have been upheld invoking the provision of Section 16 of HMA. Prior to the 1976 amendment only children whose parents had obtained a decree of nullity were deemed legitimate and were entitled to rights. But after the 1976 amendment to Section 16, the children of void marriages were awarded the right of maintenance and succession, irrespective of whether the parties had obtained a decree of nullity. This move served to widen the scope of this section and brought within its ambit a large number of children whose parents’ marriages were deemed invalid due to the stipulation of monogamy. These children are now deemed legitimate and are awarded rights of maintenance and succession in self-acquired property of their parents. While awarding succession rights to an illegitimate child, the courts have also invoked the institution of *dasi putra* (son of a slave) which was prevalent under the ancient Hindu law. (p.150) These principles are demonstrated in the following cases.

**Box 2.3 The Hindu Marriage Act**

**Section 16: Legitimacy of Children of Void and Voidable Marriages**

(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act, and whether or not the marriage is held to be void otherwise than on a
petition under this Act.

(3) Nothing contained in Sub-Section (1) or Sub-Section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

S.P.S. Balasubramanyam v. Suruttayan @ Andali Padayachi\(^{129}\) concerned the succession rights of Ramswamy who was the son of a woman Pavayee, who lived with one Chinathambi as his second wife. The couple had been living together since 1920. The fact that Ramswamy was the son of this couple and was born while they lived together as husband and wife was not disputed. But the trial court had rejected Ramswamy’s suit for declaration and possession of the land which belonged to his father on the ground that there was no valid marriage between his parents. But the first appellate court upheld his claim on the premise that long cohabitation leads to presumption of a valid marriage. But the Madras High Court set aside this order and restored the order of the trial court. In appeal, the Supreme Court rejected the contention that Ramswamy’s mother had left her own husband and was living in an adulterous relationship with the deceased Chinathambi, the father of Ramswamy, and since she was a mere concubine, her child had no claim over the property of his father. The court held that this contention is irrelevant for deciding the issue of succession rights of the child as children born even of a void marriage are deemed to be legitimate. The Supreme Court set aside the order of the high court and restored the order of the first appellate court and upheld the rights of Ramswamy over the land which belonged to his father.

In Lalithamma v. Agricultural Engineer, Karnataka Agro Industries Corporation, Dharwad,\(^{130}\) the deceased was entitled to compensation under the Workmen’s Sale Compensation Act, 1923. The appellant, a mistress of the deceased, claimed maintenance for her minor son. While the claim was rejected in the lower court, in appeal, the Karnataka High Court held that the illegitimate child of a workman can claim damages for the loss of his father, and he is entitled to a share equal to the other legitimate heirs.

In Rameshwari Devi v. State of Bihar,\(^{131}\) it was held that children born out of an invalid marriage are legitimate and are entitled to family pension and gratuity payments of their father. The court held that it was proved that the second wife and the deceased lived as husband and wife since 1963. This gives rise to a presumption in favour of a valid Hindu marriage. But it is not a legal marriage since it was in contravention of the provision of monogamy under Section 5 of the Hindu Marriage Act and, hence, it is void and the woman cannot be deemed as a widow of the deceased. But the sons of a void marriage being legitimate are entitled to property of the deceased in equal shares along with the first wife and her son.
In *Lakshmamma v. Kamalamma*, the daughter of the second wife, of the deceased, claimed succession rights to the property of her father. The other claimants challenged her claim on the ground that there was no valid marriage between the deceased and her mother. But upholding her claim, the Karnataka High Court ruled that if the parties lived together as husband and wife for several decades and the community accepted them as husband and wife there would be a presumption of a valid marriage between the parties. The oral evidence that the marriage took place several years ago was also accepted as valid evidence.

(p.151) In *Parmanand v. Jagrani*, the claim of the children of the second wife was opposed by the children of the first wife on the ground that the children are illegitimate, as neither of their parents were married nor could they have married as the second wife’s previous marriage was still subsisting at the time she started living with their father. The second wife was married earlier, but after separating from her earlier husband she had been living for a long time with the deceased and seven children were born out of this union. The high court held that in view of the long cohabitation between the deceased and the mother of the claimants, a marriage could be presumed between them. On the basis of this presumption, the children born would be deemed legitimate and obtain benefits as per Section 16(1) of the HMA and would be entitled to inherit the property of their putative father. The Madhya Pradesh High Court commented that in Khatri community to which the parties belonged, the custom of *natra* marriage prevailed which permitted a wife to contract a second marriage during the lifetime of her first husband. After contracting marriage through *natra*, if the wife lives with the man as a wife for a number of years and if her former husband takes no action regarding his rights of the marriage then it is presumed that the *natra* is legal, and children out of this union would be considered legitimate.

The court observed further: The Hindu Marriage Act is a beneficial legislation and, therefore, it has to be interpreted in such a manner as to advance the object of the legislation. The Act intends to bring about social reforms. Conferring the status of legitimacy on innocent children, who are otherwise treated as bastards, is the prime object of Section 16 of the Hindu Marriage Act.

In *Minor Gopi, Rep. by Mother and next Friend Santhi v. Rathinam*, it was held that the illegitimate child of a void marriage is entitled to claim a share only in the property of father. While the father is alive, the son cannot claim his share in the property. The right would accrue only after the death of the father.

In *Chinnammal v. Elumalai*, it was held that under Section 16 of the HMA, illegitimate children are entitled to an equal share in the individual and self-acquired property of their father, though not in the ancestral property. In *Sarojamma v. Neelamma*, the Karnataka High Court pushed the boundaries of the claims of illegitimate children and held that the children born out of wedlock are entitled to a share, not only in the self-acquired properties of the parents, but also in the joint or ancestral properties of parents.
A Supreme Court ruling of 2003, in Jinia Keotin v. Kumar Manjhi, has contradicted this view and held: ‘Though Section 16 was enacted for legitimate children, who would otherwise suffer by becoming illegitimate, in view of an express mandate of the Legislature itself under Sub-Section (3), there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount not only to violating the provision specifically engrafted in Sub-section (3) of Section 16 of the Act but also would amount to court re-legislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself.’ More recently, the Bombay High Court, in Maruti Rau Mane v. Shrikant Maruti Mane, while determining succession rights of the children of the second wife has held that these children are not entitled to inherit ancestral coparcener property. But they are entitled to an equal share in the father’s share in coparcener property.

While the amendment to Section 16 of the Hindu Marriage Act, in 1976, has strengthened the succession rights of illegitimate children/children of void marriages, the Supreme Court in 1961, in Singhai Ajit Kumar v. Ujayarsingh, had held that even under the shastric and textual law (or ancient Hindu law), an illegitimate son of a mistress or concubine is entitled to the rights of survivorship as he becomes a coparcener along with the legitimate son and, hence, is entitled to enforce a partition after the father’s death.

Some courts have distinguished between a void or voidable marriage, and mere concubinage while determining the rights of illegitimate children in invalid marriages and informal cohabitation. While the maintenance rights of illegitimate children are clearly laid out, when it comes to succession rights, the situation continues to be ambiguous. Relying on technical nuances, bordering on the absurd, and ignoring the legislative intent, some courts have held that children of a second wife are entitled to maintenance being children of a void marriage since some sort of marriage ceremony might have taken place. But if the woman is merely cohabiting without undergoing any ceremony, the courts have termed her as a concubine who is devoid of rights. Here the courts have adopted a very constrained view of beneficial provision of Section 16 of HMA and have held that an illegitimate child can inherit the property of the father only when it can be proved that the parents have undergone some marriage ceremony. In order to attract this section there should have been a ‘marriage’ between the parents and that marriage should have been null and void under Section 11. Since bigamous marriage is void under Section 11, the same would be covered under this provision, but benefits cannot be extended to the child of a mistress or concubine.

For instance, in Singaram Udayar v. Subramaniam, it was held that children acquire no rights through concubinage. There should be void or voidable marriage between parents of the individual who claims the status of an illegitimate child to get a share from the estate of his father. If there is no proof of any marriage, the children born out of this
union cannot be treated as illegitimate children entitled for share. Section 16 of HMA does not deal with rights of children through concubinage.

In *Chodan Puthiyoth Shyamalavalli Amma v. Kavalam Jisha*, the Kerala High Court held that if a marriage was solemnized between the parents, the benefit of Section 16 would have been accorded to the children. But if it is established that there was no marriage between the parents, the children born of this relationship cannot acquire the benefits of Section 16. On this ground, the court rejected the claim of the daughter of the deceased to inherit his property.

(p. 153) In another extremely negative ruling, *Kesari Bai v. Parwati*, the Madhya Pradesh High Court held that children born out of a relationship with a mistress are not entitled to a succession certificate, even if nominated by the deceased during his life-time. The lower court had upheld the right of these children. In appeal, the high court set aside this order and held that the status of such a woman is not that of a married wife. The woman had stated that she had gone through a marriage ceremony by exchange of *jaimala*. But the court held that since the parties were Brahmans, *saptapadi* is an essential ceremony of marriage. Since the woman had not gone through any such ritual, she cannot be held to be the wife/widow of the deceased. The court commented that a woman can claim her rights only when the couple has undergone a marriage ceremony. Otherwise, if she is living together with a person without undergoing a valid legal form of marriage, it will be deemed that she is merely a ‘keep’ and not a wife and there is a difference between a wife and a mistress.

This judgment is contrary to several rulings discussed earlier in this section and are reflective of the anti-women bias within the judiciary. But perhaps since the children did not have the economic means to challenge it in the Supreme Court, the rulings remained binding on them.

**Rights of Women in Informal Relationships**

**Prolonged Cohabitation and Presumption of Marriage**

The law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for a number of years.


The discussion on *succession rights of children of void marriages* brings us to our next point—presumption of marriage which arises due to long cohabitation. Even when there is no proof of any ceremonies of marriage having been performed, the courts would lean towards validity of marriage based on the presumption of marriage under Section 114 of the Indian Evidence Act. Section 50 of the Indian Evidence Act provides additional safeguards. These provisions stipulate that the presumption in favour of marriage is not mitigated or weakened merely because there may not be concrete evidence of any marriage having taken place. In such cases, the courts will examine whether a common perception prevailed that the couple are married. If the parties cohabited for long time
and if society (for example, the people of the area in which the parties resided) recognized their relationship as a marriage, presumption would arise that they are legally wedded.

In 1952, the Supreme Court, in *Mohammed Amin v. Vakil Ahmed*, while deciding the succession rights of a Muslim wife and her children, relied upon the principle of presumption of marriage. The validity of marriage was challenged by other relatives who were claiming the property of the deceased. There were no documents to prove the marriage but the couple had lived together for 23–4 years and four children were born out of their relationship. Based on this fact and on other facts, such as that the husband had purchased property in the name of his sons and had mentioned them as his sons in the sale deed, the court invoked the presumption of a lawful marriage.

The theoretical framework for this presumption was provided by the Privy Council in 1929 in the *Mohabhat Ali case* and was, subsequently, followed by the Supreme Court in the *Mohammed Amin case*. That case concerned a Muslim marriage where bigamy is permitted and the notion of concubinage is shunned. This was also pronounced at a time when bigamy was permitted even under the Hindu law. But the situation changed after the enactment of the Hindu Marriage Act in 1955. Section 5(i) of the Act read with Section 11 stipulates that bigamous marriages are void. But while monogamy was the statutory dictate, at the ground level there was hardly any change. Customary practices and community norms continued to validate bigamous marriages, though legally they were deemed as void and devoid of any rights.

Confronted with diverse practices, it was left for the courts to find a via media to do justice and protect the rights of women and children within these pluralistic traditions and social realities. It is in the context of safeguarding the rights of innocent children, who were being deprived of their rights and were facing social stigma, that the legislature brought in an amendment to Section 16 HMA (and Section 26 of SMA) and bestowed rights of maintenance and succession on children of marriages which were void, irrespective of whether there was a judicial decree to this effect. This led to a gradual recognition of the rights of illegitimate children or children of void marriages, but women continued to suffer great hardships, particularly after the death of their husbands. Their rights were severely constrained or negated in litigation initiated by the children from their husbands’ previous marriage or other relatives.

Technically, the move to award rights to illegitimate children of void marriages would have validated the rights of all children who were born in informal relationships. But the courts went into a further gradation between a wife of a void marriage and a mere mistress. As we have seen in the preceding section, there was some recognition awarded to children whose parents had gone through some ceremony, as opposed to those who had not. The women who could not prove the rituals and ceremonies were relegated to a derogative position of a mistress, concubine, or keep, and had to endure not just judicial contempt but also loss of their economic rights.

The women who were deprived of their status and rights through the mandate of
monogamy, introduced by the Hindu Marriage Act of 1955, had to suffer for fifty years before some recognition could be awarded to them. There had been an attempt to voice their concerns through the enactment of the Domestic Violence Act, 2005, and bestow some social status and legal rights on women who were part of a prevailing social system and yet could be branded thus.

The DVA transformed the yesteryear concubines into present day cohabitees and their right to protection from domestic violence and rights of maintenance and residence have been awarded statutory recognition. While some may dismiss the term cohabitee as a western or urban phenomenon, this term can now be invoked to protect the rights of thousands of women, both urban and rural, who were earlier scoffed at as mistresses or keeps in the judicial discourse because of some technical defect in their marriage. The DVA does not clearly prescribe whether the new term cohabitee will safeguard the rights of women who were earlier denigrated as concubines and mistresses. That is left for judicial interpretation. But it helps to bring the debate to a newer plane.

The recent ruling in Narinder Pal Kaur Chawla v. Manjeet Singh Chawla\(^{145}\) has an interesting comment regarding the institution of concubinage. It was held that Hindu law recognizes the (p.155) institution of marriage as well as concubinage which is reflected in the provisions of Section 18(e) of HAMA\(^{146}\) and suggested that this concept needs further dilution and judicial recognition in order to bring in a notion of justice to women. Regarding the protections awarded to women in informal relationships under the ancient Hindu law, the court commented:

One of such recognized obligations inscribed into the property of a Hindu was that of maintenance of dependents. There is no reason to hold that by codification of the laws, this basic concept for providing a sort of social security and having general insurance in favour of dependents has been completely taken away or abrogated by enacting HAMA. The necessity to provide even now may arise out of the premises of that Act and will have to be so worked out.

The call for a wider debate is salutary and also timely. In this context, we need to examine the judicial pronouncements of the preceding years which had attempted to raise this concern, though not as clearly and forthrightly as the Narender Pal judgment has attempted to do. But the Narender Pal ruling builds on these earlier legal precedents.

In the leading case Badri Prasad v. Dy Director of Consolidation,\(^{147}\) in 1978, a distinguished bench of the Supreme Court comprising of V.R. Krishna Iyer J., D.A. Desai J., and O. Chinnappa Reddy J., laid down that if a man and woman have lived as husband and wife for about fifty years, under Section 114 of IEA, a strong presumption arises in favour of wedlock. Although this presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. The court reiterated that the law leans in favour of legitimacy and frowns upon bastardy. It was held that the contention that long after the alleged marriage evidence has not been produced to sustain its ceremonial process, by examining the priest or other witnesses, deserves no consideration. The court commented that if a man and woman who live as husband and
wife are compelled to prove half a century later by eye witness evidence that they were validly married, few will succeed.

More recently, in *Radhamma v. Union of India,*\(^\text{148}\) the fact of marriage was challenged by the mother of the deceased in the context of succession rights. The Karnataka High Court held that long co-habitation between the deceased and concerned woman was proved and the society treated them as a married couple. There had not been any allegation made against the woman that the documents produced by the wife were concocted or forged. Her signatures were also admitted. The woman concerned and the son of the petitioner lived as husband and wife, and this was within the knowledge of the appellant and her family members. Hence, the court commented that a very heavy burden is caste on the person who challenges the validity of such a marriage.

In *Dnyanoba Kamble v. Mukta Kamble,*\(^\text{149}\) the fact that the respective parents had recognized the parties as a married couple and that the husband himself had accepted the woman as his wife was held to be sufficient to consider the marriage valid. While upholding the order of maintenance awarded by the family court, the high court commented: ‘Considering that the wife is not an educated lady and she comes from a backward community, there cannot be any documentary evidence on any of these aspects. (p.156) These aspects are to be considered from an appropriate angle.’

In *Rajlingu v. Sayamabai,*\(^\text{150}\) when the wife filed for maintenance the husband alleged that she is his second wife and, hence, the marriage is void. He produced the earlier wife and a daughter born through that marriage as witnesses to prove his case. The present application was filed in 1993. But the wife had earlier filed for maintenance twice in 1971 and in 1973 and on both occasions a compromise was reached, and the parties agreed to live together amicably. At that time, the husband did not raise the plea about his earlier marriage. This contention was raised for the first time in 1993 which the court held was a mere afterthought. While dismissing his appeal, the high court held that the conduct of the parties in such matters plays a very dominant role in determination of the relationship of husband and wife.

*Sobha Hymavathi Devi v. Setti Gangadhara Swamy*\(^\text{151}\) raises a slightly different but related question in the context of legitimacy.\(^\text{152}\) Contrary to the general trend, here the daughter claimed illegitimacy, which would have awarded her certain advantages Since according to law, an illegitimate child’s identity is attached to her mother, and not to the father as in cases of legitimate children, she claimed illegitimacy so that her election in the reserved category would be held as valid. Ironically, based on presumption that long cohabitation leads to a presumption of valid marriage, the courts conferred on her legitimacy which proved to be disadvantageous to her.

She had married her first maternal cousin, who belonged to a backward caste. But her plea was set aside on the basis that her father was not from a backward caste. So she pleaded that she was the illegitimate child of her parents since her mother’s previous marriage with a man from her own caste was subsisting when the mother married her father. The mother belonged to the Bhagatha Community (a scheduled tribe) while her
father hailed from a slightly higher caste. Though she denied marriage, she admitted to prolonged cohabitation from which she and five other siblings were born. Since an illegitimate child acquired her mother’s caste, she pleaded that her election in the category reserved for schedule tribes was valid. The high court rejected her plea and held that she was the legitimate child of her father and hence it could not be held that she is a member of the Bhagatha Community. On this ground her election, contested in the reserved category, was set aside.

In appeal, the Supreme Court upheld the ruling of the high court on the ground that prolonged cohabitation leads to the presumption of a valid marriage. Hence, it was not possible to hold that it was only a relationship of concubinage. Even assuming that there was an earlier marriage of the mother subsisting, it can be presumed to have been terminated in view of the subsequent long cohabitation of the couple.

Though, personally the woman concerned did not gain, the Supreme Court ruling is important in bridging the gap between a ‘void second marriage’ and ‘mere concubinage’ based on the legal presumption prolonged cohabitation leads to a valid marriage. It will bestow certain legitimacy and dignity upon children of such unions and serve to overcome prevailing judicial biases in this realm.

**Section 125 of Cr.PC: Beneficial Provision, not Determination of Marital Status**

The succession claims are civil suits and the courts are empowered to examine the marital status of the parties. But while awarding maintenance to women under Section 125 of Cr.PC, the magistrate does not have the power to examine the validity of marriage as the proceedings are summary in nature and it has been enacted as a measure of social justice.

In *Sunita Kavita More v. Vivekanand More*, the Bombay High Court commented that in proceedings under Section 125 of Cr.PC, the magistrate is not competent to decide the validity of marriage. The proper course in such cases is to grant maintenance to the wife. It is up to the husband to establish invalidity of marriage in a competent civil court. In this case, the woman was driven out of the matrimonial home and when she claimed maintenance, the husband denied the marriage and the cohabitation. He also alleged that the wife was in an illicit relationship with another person and had become pregnant, and he denied paternity of the child. The wife pleaded that they were childhood friends and upon a promise of marriage she had cohabited with him and had a child. The trial court upheld the woman’s claim and awarded her maintenance of Rs 250 per month. The sessions court reversed the order on the ground that the marriage was not proved. The high court upheld the wife’s claim regarding cohabitation and paternity of the child and restored the order of the Magistrate’s court.

In *Pradeep Gupta v. Kanti Devi*, the Jharkhand High Court reaffirmed that strict proof of marriage is not necessary while awarding maintenance under Section 125 of Cr.PC. The evidence of persons residing in and around the area, who had formed an opinion that the parties were living as husband and wife, was held to be sufficient to prove the wife’s case.
In Krishna Chandra Jerai v. State of Jharkhand, the trial court rejected the application for maintenance by the wife on the ground that she could not prove the marriage, though the fact of long cohabitation was not disputed by the husband. In revision, the sessions court awarded Rs 500 as maintenance to the wife. The high court dismissed the appeal filed by the husband and held that strict proof of marriage is not required in summary proceedings. The court also held that an order under Section 125 of Cr.PC does not finally determine rights and liabilities of parties. The parties are entitled to file a civil suit for determination of their rights.

In Shyamlal Pathak v. State of Bihar, in a criminal complaint filed by the wife under Section 494 of IPC, the husband was acquitted. But the magistrate granted maintenance of Rs 400 per month to the woman under Section 125 of Cr.PC. In appeal, it was held that the proceedings under Section 125 of Cr.PC are of summary nature and the proof of marriage is not as high as in proceedings under Section 494 or in a proceeding for divorce. All that is required to be shown is that there has been marriage between the woman and the man. If she is able to show that she and the man concerned lived together as husband and wife, the court can presume they are legally married and award maintenance even when the marriage is disputed by the husband, leaving him to establish invalidity of the marriage in a competent civil court.

In Ramakrishnan v. Subadra, the wife pleaded that she was married in 1979 as per customary rites and they lived together as husband and wife. In 2003, there was an estrangement between them and she filed a petition for maintenance under Section 125 of Cr.PC. The husband admitted cohabitation for a long period, but contended that it was not cohabitation as a legally married couple. He alleged that she was his distant relative and lived in his house as a domestic help. He contended that he was married in 1966 and had a child from this relationship. To prove his case, he also contended that his previous wife was awarded maintenance in 1980. The wife produced the ration card and electoral card to prove that they were cohabiting together as husband and wife. The Court concluded that the subsistence of a valid marriage had been satisfactorily established.

The high court upheld the order of Magistrate’s court and held that under Section 125 of Cr.PC, a criminal court is not jurisdictionally competent to make final and authentic pronouncements on the disputed status of the marriage. That jurisdiction vests in civil courts. The husband is entitled to approach a civil court for obtaining an appropriate declaration regarding the validity of the marriage. The husband contended that only because he could not produce the order passed by a Magistrate’s court awarding maintenance to his earlier wife in time in the Magistrate’s court, the present claimant was awarded maintenance which had resulted in miscarriage of justice. In response, the high court commented: No justifiable reasons have been advanced to explain why the maintenance order granted to the first wife earlier by the court was not produced before the courts below. The scandalous delay in the judicial process is certainly attributable in part to the unrestrained yearning of the courts to do substantive justice. In life, one does not get an opportunity to start the game afresh. What life and divine or
nature’s justice cannot offer, litigation cannot obviously aspire to. The impression that any and every error or inadequacy committed in the conduct of the case can be rectified later, and courts, in their indulgence and anxiety to do justice, would permit the parties to correct their errors, set the clock back, and proceed afresh, has certainly contributed in no mean measure to the scandalous delay in the judicial process. The law has been well summarized in the statement that the interests of justice may, at times, transcend the interests of mere law.

In Lakhwinder Kaur v. Gurmail Singh, the magistrate awarded maintenance of Rs 500 per month to the wife and Rs 300 per month to the daughter, respectively, under Section 125 of Cr.PC. The husband had denied the marriage and pleaded that his earlier marriage was subsisting. The sessions court upheld this plea. In appeal, the Punjab and Haryana High Court set aside the order of the sessions court and restored the order of the Magistrate’s court and held as follows: The order passed by the magistrate in proceedings under Section 125 of Cr.PC does not finally determine the rights and obligations of the parties. For the purpose of getting his rights determined, the husband had filed a civil suit for declaration that the woman is not his legally wedded wife. The said suit was dismissed by the civil court on the ground that the evidence adduced by the husband was not sufficient to prove that the woman concerned was not his legally wedded wife and the daughter was not his legitimate child. The findings of the civil court were binding not only on the parties but also on the criminal court. Further, the strict proof which is required to prove an offence under Section 494 of IPC is not required in proceedings under Section 125 of Cr.PC. If the wife succeeds in proving that she and the Respondent lived together as husband and wife, the court can presume that they are legally married.

(p.159) The Supreme Court has also upheld this view in Dwarika Prasad Satpathy v. Bidyut Praya Dixit and laid down that proof of validity of marriage for the purpose of summary proceeding under Section 125 of Cr.PC is not as strict as is required in a trial of offence under Section 494 of the IPC. Further, the order passed in an application under Section 125 of Cr.PC does not finally determine the rights and obligations of the parties. In Veena Devi v. Ashok Kumar Mandal, the Patna High Court held that the proceedings under Section 125 of Cr.PC are of a summary nature, and are not intended to determine the status and personal rights of parties and questions of marriage need not be decided like a matrimonial court. Even when the issue is being determined by the family court which has the jurisdiction to determine the matrimonial status of the parties, the court cannot examine this issue in proceedings under Section 125 Cr.PC.

Maintenance to Women in Live-in Relationships under PWDVA

More recently, the Protection of Women from Domestic Violence Act, 2005 has awarded statutory recognition to informal relationships or live-in relationships. Under the provision of this statute, any woman who claims relief such as protection orders, restraining orders, or even maintenance, need not prove the validity of her marriage, as held by the Madras High Court in M. Palani v. Meenakshi. In this case, the man had filed an application for a declaration that he was not married to the woman concerned and for an
order of injunction restraining her from representing and receiving the benefits as his wife. In the said proceedings, the woman filed an Interim Application for maintenance under the Protection of Women from Domestic Violence Act, 2005. The family court, Chennai, granted her Rs 1,000 per month as interim maintenance.

This was challenged by the appellant, who contended that the woman is not entitled to any maintenance under the provisions of DVA since they have not lived together at any point of time as husband and wife. However, he admitted that they had voluntary sexual contact but alleged that the woman had voluntary submitted to sexual contact despite knowing fully well that he does not believe in the institution of marriage and that the woman herself had not insisted on a formal marriage. Had there been even a slight reference to marriage as a pre-condition to the sexual contact, he would never have had even the casual sexual contact with her. Further, mere proximity for the sake of mutual pleasure can never be called a domestic relationship, he argued. Rejecting this argument, the Madras High Court held that there is no stipulation under the Act for the parties to live together for a particular period. Since the man had admitted to sexual contact it was evident that the couple enjoyed a close relationship within which sexual contact had taken place.

The constitutional validity of this provision was challenged in the Delhi High Court in Aruna Parmod Shah v. Union of India,162 on the ground that it discriminates against the legal wife. While upholding its validity, the high court held that there is no reason why equal treatment should not be accorded to the wife, as well as a woman who has been living with a man as his common-law wife or even as a mistress. The court further commented that like treatment to both does not, in any manner, derogate the sanctity of marriage.

(p.160) Since this concept is relatively new to the Indian jurisprudence, it would be useful to draw upon the following guidelines issued by a court in South Africa, for determining the rights of women in relationships in the nature of marriage.

i. The commitments of the parties to the shared household;
ii. The existence of a significant period of cohabitation;
iii. The existence of financial and other dependency between the parties including significant mutual financial arrangements vis-à-vis the household;
iv. The existence of children of the relationship; and,
v. The role of the partners in maintaining the household and in the care of the children.

In Chanmuniya v. Virendra Kumar Singh Kushwaha the Supreme Court while deciding a case under Section 125 Cr.PC, referred the matter of maintenance to women in informal relationships to a larger bench in view of the conflicting opinions of the Supreme Court in Savitaben Somabhat Bhatiya (discussed earlier) and several positive rulings which had granted maintenance to women in informal relationships and bigamous marriages.

The division bench of G.S. Singhvi and A.K. Ganguly JJ recommended that a broad and expansive interpretation should be given to the term 'wife' to include those cases where
a man and woman have been living together as husband and wife for a reasonably long period of time, and strict proof of marriage should not be a pre-condition for maintenance so as to fulfill the true spirit and essence of the beneficial provision of maintenance under Section 125, Cr.PC. It was suggested that the benefits awarded to 'live-in relationships' under the PWDVA should be extended to women claiming maintenance under Section 125 of the Cr.PC as such an interpretation would be a just application of the principles enshrined in our Constitution.

The case concerned a widow with two daughters, who had married her husband’s younger brother as per the custom of the community. During such marriages, saptapadi is not performed. As per the custom of the Kushwaha community, the marriage was performed through ‘katha’ and ‘sindur’. When her husband deserted her, the wife filed for maintenance. While the trial court upheld her plea, the high court held that her marriage was not valid since saptapadi was not performed.

While this reference was pending before the larger bench, a later ruling in D. Velusamy v. D. Patchaiammal delivered by Markandey Katju and T.S. Thakur JJ on 21 October 2010 created a fresh controversy by constraining the scope of PWDVA by holding that ‘mistresses’, ‘keeps’ and ‘maids’ with whom a married man may have had sexual relationships are not entitled to maintenance. This ruling leaves the ground wide open to men to enter into bigamous relationship without any civil or criminal liability. The ruling shifts the burden on women to prove that their relationship is not bigamous, disregarding community practices as well as the fraud men commit by not revealing their prior subsisting marriage. Due to the difficulty women face to prove their marriages, the PWDVA had sought to grant maintenance and compensation to women in ‘live-in relationships’. Even prior to this, several rulings of the Supreme Court and various high courts had protected the rights of vulnerable women trapped in such situations, and the reference to a larger bench in Chanmuniya case was made to obtain a clear and unambiguous verdict in defense of women, which would overrule the verdict in the Savitaben case.

(p.161) The ruling in Velusamy case is devoid of the cautious approach adopted in Chanmuniya case. The ruling, which seems to be based on a moral high ground and Western ethos disregards Indian social reality as reflected in the numerous judgements discussed earlier. The larger bench, will hopefully undo the harm caused by this reckless and insensitive ruling which violates the constitutional mandate of protecting the dignity of women, and restore the rights of women in informal and bigamous relationships.

Muslum Women’s Right to Maintenance

Notion of ‘Fair and Reasonable Settlement’ Under the Muslim Women’s (Protection of Rights on Divorce) Act

The Muslim Women (Protection of Rights on Divorce) Act was enacted in 1986, after the controversial Shahbano judgment. Through this enactment, the right of a divorced Muslim woman was taken out of the purview of the general law of maintenance under Section 125 of Cr.PC and placed under special legislation.163 After the enactment, several
groups filed writ petitions in the Supreme Court challenging the constitutional validity of the Act. While the writ petitions were pending, several high courts began to interpret the Act innovatively. They held that a divorced Muslim woman has the right to a fair and reasonable settlement for her lifetime, in addition to maintenance during the *iddat* period.\(^{164}\) Further, the courts commented that a fair and reasonable provision for the woman’s future needs (*mataaoon bil ma’aroofe*) is a Quranic injunction.

The leading judgment of the Supreme Court on this issue was pronounced in 2001 in *Daniel Latifi v. Union of India*.\(^ {165}\) The Supreme Court confirmed that the MWA has substituted the earlier right of recurrent maintenance under Section 125 of Cr.PC with a new right to a lump sum provision to be made and paid to the woman soon after her divorce. If the husband fails to make the settlement, a divorced Muslim woman has the right to approach the Magistrate’s court for enforcement of the right under Section 3 of the MWA.

The court held that a Muslim husband is liable to make a reasonable and fair provision for the future of his divorced wife, which must be made within the *iddat* period. The court further clarified that the liability of the Muslim husband to the divorced wife, to pay maintenance under the Act, is not confined to the *iddat* period. A Muslim wife is entitled to a fair and reasonable provision with respect to her future needs.\(^ {166}\)

In cases where the husband is unable to pay the entire amount, the Full Bench of the Bombay High Court, in *Karim Abdul Rehman Shaikh v. Shehnaz Karim Shaikh*,\(^ {167}\) held that the amount can be paid in instalments, and until the payment is made, the magistrate can direct monthly payment to the wife even beyond the *iddat* period.

In *Mustafa v. Fathimakutty*,\(^ {168}\) the husband was employed abroad. The court held that the husband’s contention that after the circumstances which led to divorce he became distracted and was not able to concentrate on work is a fanciful theory with nothing tangible to substantiate the same. The court awarded a lump sum of Rs 1.20 lakh which was computed at Rs 2,000 per month for five years as maintenance of the wife and two children.

In *Haseena v. Abdul Jaleel*,\(^ {169}\) it was held that the provision for educational expenses is an important criterion to fix the quantum of reasonable and fair provision. It was held that a divorced woman who has lost the support of her husband can sustain herself and maintain her child only by getting an education. Denying a woman educational support is not justified in such circumstances. Though a former husband cannot be entrusted with the liability to provide for the higher education of his divorced wife, which is expensive, the desire of the wife to continue her studies cannot be said to be unreasonable. It was held that the fact that the woman was studying at the time of her marriage and she wanted to continue after divorce is not an irrelevant factor in fixing the quantum of reasonable and fair provision and maintenance under Section 3(1a) of the Muslim Woman’s Act. In light of this, the amount payable was increased from Rs 2,00,000 to Rs 2,50,000.
In Nizar v. Hyrunneessa, the Kerala High Court rejected the plea that since the wife had remarried, she is not entitled to a fair and reasonable settlement for the future. The court held that the re-marriage of a divorced woman is not a criterion in determining a fair and reasonable settlement. The only aspect to be considered is the liability of the former husband to make a reasonable and fair provision to the divorced wife and fix the quantum sum as contemplated under Section 3(3) of the Act. The court awarded Rs 90,000 calculating the amount on the basis of Rs 1,500 per month and commented that the amount awarded as fair and reasonable settlement cannot be set aside on a plea that the divorced wife is leading an adulterous life (see also M. Alavi v. T.V. Safia, I (1992) DMC 62).

If the husband fails to comply with the order and defaults in payments of the amount ordered, he can be imprisoned. In Rayinkutty v. State of Kerala, it was held that this, in itself, will not absolve him from the liability of paying the amount which is due to the wife.

**Rights Under Section 125 of Cr.PC**

When a deserted or destitute Muslim wife files for maintenance under Section 125 of Cr.PC, the usual ploy adopted by the husband is to plead that he has already divorced his wife and hence he is not liable to pay maintenance. This tendency increased after the Muslim Women (Protection of Rights on Divorce) Act was enacted in 1986. The media reports on this enactment led to a popular perception that a Muslim husband is not liable to pay maintenance to a divorced wife.

In the leading case, Shamim Ara v. State of UP, the Supreme Court held that a mere plea of previous divorce in the written statement cannot be treated as a pronouncement of talaq by the husband on the wife. The liability of the husband to pay maintenance to his wife does not come to an end through such communication. The court commented that for talaq to be valid, it has to be pronounced as per the Quaranic injunction. Several later judgments have reiterated this position. Some of these judgments are summarized later.

When the husband is not able to prove talaq, the trial court is bound to entertain the wife’s application for maintenance under Section 125 of Cr.PC and award an adequate amount as the above case discussed in detail illustrates. But there are several other rulings which endorse this view. For instance, in Musarat Jahan v. State of Bihar, it was held that a divorced Muslim wife is entitled to maintenance under Section 125 of Cr.PC continuously and beyond the iddat period till she remarries, or is able to maintain herself. In response to the wife’s claim for maintenance, the husband pleaded that he had divorced his wife. The court commented that the family court judge had erred in holding that the wife is entitled to maintenance only from the date of filing the application till the copy of the written statement was served.

In Khairunnissa Begum v. Aslamkham, it was held that there cannot be a presumption in favour of talaq. Talaq has to be strictly proven. Since the husband could not prove talaq, the wife was awarded maintenance of Rs 1,000 per month under Section 125 of Cr.PC.
In *Moiden v. Ramlath*, the husband pleaded that the woman is his second wife and, hence, is not entitled to maintenance. He also pleaded that he had subsequently remarried. The court, while upholding the woman’s right to maintenance, stated that the fact that she is divorced or that her husband has another wife, which is permitted under personal law, is irrelevant in adjudicating the rights of the divorced wife.

In *Muneer Ahmed v. Safia Mateen*, while rejecting the husband’s plea that he had divorced his wife, the court awarded Rs 1,000 as maintenance. The court described it as the bare minimum for keeping body and soul together in the context of the present cost of living. The court held that since the woman is suffering from various diseases, she would need money for her medical expenses in addition to her maintenance.

Though, the rights of divorced Muslim women were placed under a specific Act, the Muslim Women’s Act, some courts have held that the right under Section 125 of Cr.PC has not been deleted. For instance, in *Abdul Latif Mondal v. Anuwara Khatun*, the husband challenged the order of maintenance awarded by the Magistrate’s court on the ground that he had divorced his wife two years prior to her filing the application for maintenance. But the Calcutta High Court rejected this contention and held that the Muslim divorced wife is entitled to claim maintenance under Section 125 of Cr.PC and the same are in addition to her claims under the MWA.

But the views of various other high courts as well as that of the Supreme Court in *Noor Saba Khatoon v. Mohd. Quasin*, are contrary to this view. Here the Court held that after divorce, the right of a Muslim wife are located within the Muslim Women’s Act and not under Section 125 Cr.PC. In *Shaikh Mohamed v. Naseembegum*, the Bombay High Court held that a divorced Muslim woman cannot apply for maintenance under Section 125 of Cr.PC. Her remedy is only under the special law enacted for this purpose, that is, the Muslim Women’s Act. In *Abdul Salam v. Gousiya Bi*, it was held that an order of maintenance that was passed in favour of the divorced wife under Section 125 of Cr.PC was unsustainable.

More recent judgments have reaffirmed that Muslim woman’s right to claim maintenance under Section 125 of Cr.PC are not extinguished (p.164) upon divorce. The right is extinguished only when she receives a fair and reasonable settlement as stipulated under MWA. In *Iqbal Bano v. State of U.P.*, it was held that proceedings under Section 125 are civil in nature. Hence even after the divorce, the woman is entitled to claim maintenance under this Section, considering its beneficial nature. In *Shabana Bano v. Iman Khan*, the Supreme Court held that where social legislations enacted to secure the rights of needy women are concerned adherence to rigid rules of procedure and evidence should be avoided. The court held that if a petition filed by the wife under Section 125 of Cr.PC is pending before a family court at the time of her divorce, the same must be disposed of under the provisions of MWA and until such time she should be awarded maintenance under Section 125 of Cr.PC. The Kerala High Court in *Kunhimohammed v. Ayishakutty* has held that a husband’s obligation to pay maintenance is not extinguished upon divorce. The wife will be entitled to receive
maintenance under Section 125 of Cr.PC until the husband fulfills his obligation under Section 3 of the Muslim Women’s Act or until the wife remains unmarried. These judgments have placed the right of Muslim women to maintenance under a secure footing.

Section B: Maintenance: Incidental and Procedural Aspects

Maintenance Rights of Children

Statutory and Pious Obligation of a Father to Maintain his Children

The obligation of the father to maintain his children is both a pious and religious obligation as well as a statutory duty under all personal laws. In Vinod Babbar v. Baby Swati,\(^{184}\) the Delhi High Court explained that under Hindu law, a father has not only a moral but even a statutory obligation to maintain his minor children. The scope of his duty is to be regulated directly in relation to the money and status he enjoys. The right of maintenance of a child from his father cannot be restricted to two meals a day, but must be determined on the basis of the benefit, status, and money that the child would have enjoyed if he was living with him as part of his family. Irrespective of the differences and grievances which each spouse may have against the other, the endeavour of the court has to be to provide the best to the child under the facts and circumstances of each case and, more so, keeping the welfare of the child in mind for all such determinations. Liability to maintain one’s children is clear from the text of the provisions under HAMA, as well as the various decided cases in this regard. The statutory obligation is paramount to the wish of the father and he cannot be permitted to limit this claim of the child on flimsy and baseless grounds. It is the duty and liability of parents to provide their child the best education and standard of living within their means. The fact that the child is living with the mother, who has sufficient income, will not absolve the father of his obligations towards the child.

In P.M. Devassia v. Ancy,\(^{185}\) a Christian father challenged his duty to maintain his daughter who was living with the mother. The Kerala High Court explained that the obligation of a Christian father springs from the fact that he is the guardian of his family. Thus, he has an obligation to maintain his children and carries the duty to give them the best care, and, necessarily, there is a corresponding duty to maintain them.\(^{(p.165)}\)

There was also a corresponding right that the child has the right to be maintained. The husband had not disputed the paternity of the children and the marriage was subsisting, but the parents were living separately and the children were living with the mother. The father had a decent income. The court commented that it cannot be contended that merely because one professes the Christian religion, one does not have the liability to maintain one’s children. In view of the law which is laid down, a Christian father has an obligation to maintain his daughters, who are not capable of looking after themselves, notwithstanding the fact that they have attained majority.

The personal obligation of a Muslim father to maintain his children is integrally linked to his property. Explaining this position, in Ibrahim Fathima v. Mohammed Saleem (Minor),\(^{186}\) the Madras High Court, after examining the position under Mohammedan law, held that
the children’s right to maintenance in a Muslim household always attaches to the father’s property in such a way and in such measure that it is not affected by any subsequent alienation of the property by the father. The fact that the Muslim father’s obligation to maintain his minor children is personal does not mean that the only sanction which the law imposes, for the performance of the obligation, is to proceed against his person whenever he fails to discharge that obligation. It is quite reasonable and civilized to expect all systems of law to link children’s maintenance with property as security and Mohammedan law is not an exception. In the context of the relationship between a father and his minor children, all that the idea of personal obligation imports is that he is under a duty to maintain them even on the mere aspect of his being their parent.

In *K. Masthan Bee v. Appalagari Venkataramana*, the Andhra Pradesh High Court reaffirmed this position and held that the a Muslim father is under a legal obligation to maintain his children under the Muslim personal law and if he has alienated any property prejudicial to the interest of the minors, they are entitled to create a charge under Section 39 of the Transfer of Property Act, 1882, over the said property. It is mandatory on the part of the courts to notify under Order 21, Rule 66 of the Civil Procedure Code (CPC) to the intending buyers that the property under sale is subject to such encumbrance or litigation.

**Single Mothers and Claims of Children in their Custody**

The above discussion makes it amply clear that the legal obligation of maintaining the wife also extends to an obligation to maintain minor children. But in the course of a matrimonial dispute, in order to cause further hardships to deserted women and single mothers, several legal tactics are adopted to deny children in the custody of their mother their legal rights of maintenance. While denying paternity is one ploy used to escape from the liability of maintaining the child, there are several others which have been advanced in the course of litigation. The husbands have gone to the extent of denying that there is a statutory obligation to maintain their children.

In *Praveen Menon v. Ajitha Pillai*, the husband contended that Section 24 of the HMA implied maintaining only the wife and not the child. But rejecting this contention the Kerala High Court held that a beneficial provision can not be interpreted so restrictively and that the father’s obligation to maintain the child must be read into his obligation to maintain the wife. Since the wife had to maintain the child, it was held that the husband had to pay the wife an amount that was sufficient to maintain the child too. In *Prakash Khot v. Chandani Khot*, it was held that awarding maintenance to the wife under HMA will not take away the right of the minor children to claim maintenance from their father, under Section 20 of the Hindu Adoption and Maintenance Act. In *Mandeep Sharma v. Kiran Sharma*, it was held that the fact that the wife was being supported by her parents was no ground for the husband to claim discharge of his obligation to pay maintenance to the child. It was also held that the husband could not shirk his liability to provide maintenance merely on the ground that he met with an accident and had to temporarily restrain from working due to his injuries.

The courts have also held that the rights of minor children cannot be defeated through
consent agreements between the child’s parents or through divorce deeds. In *Happy Anand v. Baby Deepali*, the daughter, who was only seven years old at the time of the divorce, filed for maintenance and was awarded maintenance of Rs 2,500 per month. The husband had agreed to pay Rs 50,000 to the wife in proceedings for mutual consent, but had paid only half the amount. In appeal, the high court upheld the order. In *Deepa Devi v. Dhiraj Kumar Singh*, the wife contended that her consent for a divorce by mutual consent was fraudulently obtained by her husband and the husband did not make any provision for maintenance for herself and her minor child. The Jharkhand High Court held that that Section 13 B (divorce by mutual consent) does not empower parties to decide the rights of minor children regarding maintenance and directed the husband to pay Rs 2,00,000 to the wife and the minor son by way of lump sum maintenance.

While a minor child is entitled to maintenance, as soon as the child attains majority the child is denied maintenance. This places an additional burden on single women since most often the child would not be independent at the age of eighteen and would still need support until the child completes the education. Some judges adopt a lenient view and mandate the husband to continue with payment of maintenance/educational expenses for a few more years until the son completes his education and is able to support himself. But usually maintenance will be discontinued as soon as the child turns eighteen. There is some leniency towards dependent major daughters. But if she has an independent source of earning, the maintenance would be discontinued.

In *Avinish Pawar v. Sunita Pawar*, the court held that the major son was not entitled to maintenance from the father, and the exception under Section 20(3), HAMA covers unmarried daughters but not major sons. This position was reiterated in *Viswambhran v. Dhanya*, where it was held that the liability to maintain the child, whatever be the sex, would continue only till the child attains majority. Then, irrespective of whether child is able to maintain itself out of its earnings or other property, it would not be maintained if it is a male child.

However, the ruling of the Punjab and Haryana High Court, in *Nikhil Kumar Singh v. Rakesh Kumar Mahajan*, advances a more humane approach towards maintenance of sons (p. 167) who have not yet completed their education. In this case, the son had filed an application for maintenance while he was a minor and was granted interim maintenance of Rs 5,000 per month. When the son attained majority, the father moved the court for cancellation of the maintenance order on the ground that his obligation to maintain his son had come to an end. In an appeal against the order of cancellation of the maintenance amount filed by the son, the high court held that the major son was entitled to claim maintenance from his father for studies and directed the father to pay Rs 8,000 per month towards his educational and other related expenses, and Rs 25,000 lump sum per annum towards additional/ancillary expenses like purchase of books, instruments, etc. The court directed that this arrangement shall remain till the son completed his education up to the post-graduation level.

But so far as the female child is concerned, such right will continue even after she attains
majority until she gets married, provided she is unable to maintain herself out of her own earnings or other property. For instance, in *Jitendra Nath Sarkar v. Dalia Sarkar*,\(^{196}\) it was held that a major unmarried daughter is not entitled to maintenance if she has an independent source of income. It is only when she is able to prove that she is unable to maintain herself that her parents are liable to maintain her.

As per the customs prevailing among several communities in India, a father is bound to make provisions for the marriage expenses of his daughters. The courts have awarded judicial recognition to this customary right. In *Kusum Krishnaji Rewatkar v. Krishnaji Nathuji Rewatkar*,\(^ {197}\) it was held that a father is bound to make provisions for the marriage expenses of the daughters as part of maintenance. If the wife has spent for the performance of marriage of daughter, the husband would be liable to reimburse his wife. He cannot escape his liability.

The courts have also upheld the rights of adopted children to maintenance from their father. *Weldone Lyngdoh v. Eva Phawa*,\(^ {198}\) is a case concerning a child belonging to the Khasi community. The customary law of the community recognizes the notion of adoption and the child is entitled to claim maintenance from its adoptive father. While upholding the right of the adoptive child for maintenance under Section 125 of Cr.PC, the Gauhati High Court held that the dominant purpose behind the benevolent provisions engrained in Section 125 clearly is that the wife, child, and parents, should not be left in a state of distress, destitution, and starvation. Having regard to this special purpose, the provisions of Section 125 of Cr.PC shall have to be given a liberal construction to fulfil and achieve the intention of the legislature.

In *Leela Yadav v. State of Bihar*,\(^ {199}\) the application filed by the grand mother of the two minor children for maintenance from their father was dismissed by the Magistrate on the ground that she lacks *locus standi* to file for maintenance on behalf of the minor children. The mother of the minor children had died under unnatural circumstances and at the time of her death, had handed over the custody of her two daughters to her mother. In appeal, the high court held that the question of custody is a matter to be decided by a civil and not criminal court. The right which is conferred under Section 125 of Cr.PC for maintenance is not dependent on guardianship. Maintenance to children living with either mother, or even grandmother, \(^{(p.168)}\) cannot be refused on the ground that they are not natural guardians, lawful guardians, or legal guardians. The husband pleaded that he is willing to take their custody but he is not in a position to provide maintenance. The daughters who were interviewed refused to go with the father and they stated that after their mother’s death their father had not cared for them, and had no love and affection or attachment towards them. The court commented that the father has not claimed the custody and guardianship of the children and held that the provisions under Section 125 of Cr.PC are not to be utilized for defeating the rights conferred by the legislature on destitute and needy children.

**Rights of Children of Divorced Muslim Couple**

After the enactment of the Muslim Women’s Act, there were several applications filed by husbands to absolve them not just of the obligation of maintaining their wives beyond the
iddat period but also of their responsibility of maintaining their children. The confusion was caused by the wordings of Section 3(b) of the Act.

Section 3(b): Where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children.

While most courts upheld the existing rights of children to claim maintenance under Section 125 of Cr.PC, in some instances, the courts held that the child is entitled to maintenance only up to the age of two. The ambiguity was finally resolved by the ruling of the Supreme Court in Noor Saba Khatoon v. Mohd. Quasin, in 1997, which upheld the rights of children under Section 125 of Cr.PC in clear and unequivocal terms. The trial court had granted Rs 200 to the wife and Rs 150 to each of the three minor children. Meanwhile, the husband had divorced the wife and approached the court for modifying the order. The trial court held that the divorced wife is not entitled to maintenance beyond the iddat period and, accordingly, revoked the order of maintenance for the wife, but upheld the maintenance for the children. The revision application was dismissed by the sessions court. But in appeal, the high court cancelled the maintenance order of the elder two children who were above the age of two years. The Supreme Court held that the husband has an obligation to maintain his children till they attain majority or are able to maintain themselves, whichever date is earlier.

This position was reaffirmed in Mahaboob Ali v. Abdul Rasheed by the Karnataka High Court, which held that the obligation of a father to maintain the minor children is absolute, irrespective of religion. As far as children born of Muslim parents are concerned, there is nothing in Section 125 of Cr.PC which exempts a Muslim father from his obligation to maintain his children. It would indeed be unreasonable, unfair, unequitable, and even preposterous, to deny the benefit of Section 125 of Cr.PC to the children only on the ground that they are born of Muslim parents.

Similarly, in Riaz Fatima v. Mohd. Sharif, the court reaffirmed that the right of the child to get maintenance is not affected even after the father has divorced the mother of the child. The court set aside the order of the Sessions Judge and restored the order of the Magistrate’s court. In Mufees v. State of UP, the daughter had approached the court for maintenance and the family court had awarded her Rs 1,000 per month as maintenance. In an appeal filed by the father, the high court upheld the maintenance awarded to her by the family court.

**Maintenance Claims Against Both Parents**

Though, traditionally the obligation to maintain the children was always upon the father, if the mother is also employed, both parents are bound to contribute for the maintenance of the child in proportion to their respective incomes.

In Padmja Sharma v. Ratan Lal Sharma, both parents were gainfully employed. But the husband earned twice as much as the wife. The Supreme Court held that both the
parents are bound to contribute towards the maintenance of their children, proportionately. The court awarded a sum of Rs 3,000 per month towards maintenance of each of the children and directed that the same should be borne by both the parents in 2:1 proportion. The court rejected the mother’s claim on the ground that she had sufficient earning.

In Sayali Pathak v. Vasant Pathak,205 the Delhi High Court clarified that maintenance is not granted as penalty against either of spouses. The purpose is to ensure that parties are able to maintain a standard of living that is in close consonance with that enjoined by them as a family prior to the outbreak of their matrimonial differences. In this particular case, the wife earned approximately Rs 40,000 per month and the husband Rs 1,00,000 per month. The court held that there is no reason to deprive the child of an affluent lifestyle and cultural exposure if the parents can afford it. Since the wife herself had submitted that the expenses of the child should be shared in ratio of 2:1, keeping their respective earnings in perspective, the court directed the husband to contribute Rs 12,000 per month toward the maintenance of the child.

The Andhra Pradesh High Court, in N. Sree Ramudu v. N. Lahari,206 also endorsed this view and held that since both the mother and father of the minor child are gainfully employed and are having equal financial capacity, the responsibility of maintaining the child ought to be shared equally.

Other Substantive Issues

Husband Guilty of Matrimonial Fault

When a deserted wife approaches the courts for maintenance and is on the verge of receiving a favourable order directing the husband to pay maintenance, a ploy, which is often used, is to submit to the court that he is willing to reconcile with his wife and is willing to maintain her. At times, a petition for restitution of conjugal rights is also filed to defeat the woman’s claim of maintenance.

If the woman refuses to accept the offer without a reasonable and justifiable cause, her maintenance claim can be defeated. But if the wife is able to prove a matrimonial fault such as bigamy, adultery, and cruelty, the courts are bound to uphold the woman’s claim of separate residence and maintenance. The courts have also held that if the husband makes baseless allegations of adultery and unchastity against the wife, she is entitled to live separately and claim maintenance (Baishnab Charan Jena v. Ritarani Jena).207

If the husband is impotent and is unable to fulfil his marital obligations, the wife would be justified in living separately. For instance, in Ashok Kumar Singh v. Addl. Sessions Judge, Varanasi,208 the Supreme Court upheld the (p.170) woman’s right of maintenance under Section 125 of Cr.PC on the ground of husband’s impotency. In Poonam Gupta v. Ghanshyam Gupta,209 the husband, a rich and prosperous businessman, had remarried. Considering the status of the families and the basic requirement for maintenance of wife and child, costs of child’s education, upbringing, etc., the high court of Allahabad upheld the lump sum of Rs 8,00,000 awarded to her as just and proper. In Puliyulla Chalil
Narayana Kurup v. Thayyulla Parabhath Valsala, the Kerala High Court held that the wife is fully justified in refusing to live with the husband as the husband was living with another woman and had three children through her. In Sangeeta Kumari Shaw v. State of West Bengal, the wife was compelled to leave the matrimonial home due to mental and physical cruelty over demands for dowry. The Calcutta High Court upheld the woman’s right to live separately and claim maintenance. In Mohanlal v. Lad Kunwar Bai, the husband contracted a second marriage. The Madhya Pradesh High Court held that on this ground the wife was entitled to live separately and get maintenance from her husband.

In Vinod Kumar Jolly v. Sunita Jolly, after divorcing his second wife, the husband had married for the third time and had two children. The court commented that if the husband can have the luxury of a third marriage and can bring up the children born of the said marriage, he should own responsibility of the two earlier wives and pay them maintenance. The wife was awarded Rs 1,500 per month and the son was awarded Rs 2,500 per month which the court commented would hardly ensure their bare existence.

Even under Muslim law, the wife is entitled to reside separately and claim maintenance if the husband has contracted a second marriage, has a mistress, or visits women of ill repute. In Begum Subanu v. A.M. Abdul Gafoor, the Supreme Court held that irrespective of the husband’s right to take a second wife under the personal laws, upon his remarriage, the wife is entitled to claim maintenance and separate residence. The court held that the provision of maintenance must be construed from the point of view of the injury to the matrimonial rights of the wife and not with reference to the husband’s right of remarriage.

In Mumtaz Begum v. Yusuf Khan, when the husband remarried, the wife left her matrimonial residence and claimed maintenance. Her application was rejected on the ground that the husband’s remarriage is not a sufficient reason to live separately and claim maintenance. On appeal, the Rajasthan High Court held that the husband cannot deny maintenance to the first wife by taking recourse under the personal laws permitting bigamy.

In Kadeeja v. Aboobacker, the wife and her four minor children were awarded Rs 200 per month maintenance under the personal law. Since the husband did not pay, the wife filed for recovery. On the husband’s plea that he has no means to pay the arrears, the court dismissed her application. The wife challenged the order in the high court which held that under Muslim law husband is bound to maintain his wife, so long as he has the ability to earn. The court cannot examine the husband’s earnings while enforcing maintenance orders.

(p.171) In Sirajmohmedkhan Janmohamadkhan v. Hafizunnisa Yasinkhan, the husband was impotent and was unable to discharge his marital obligations, which the court held was the main objective of marriage, more particularly under Mohammedan law where marriage is treated as a sacrosanct contract and not a purely religious ceremony as in the case of Hindu law. The court commented: ‘When a husband is
impotent and is unable to discharge his marital obligations, it would amount to both legal and mental cruelty which would undoubtedly be a just ground, as contemplated by Section 125 (3) of Cr.PC, for the wife’s refusal to live with her husband and the wife would be entitled to maintenance from her husband according to his means.’

Ashabi v. Bashasab Takke\textsuperscript{218} is another case where the husband had remarried. Rejecting the wife’s application for maintenance, the family court held that the wife was not able to prove that the husband had deserted her. In appeal, the Karnataka High Court held that the wife can not be denied maintenance on the ground of not joining her husband in view of the husband’s remarriage and hence, she is entitled to live separately and claim maintenance.

Under Muslim law, failure to provide maintenance is a ground for the wife to dissolve her marriage.\textsuperscript{219}

**Husband’s Obligation to Maintain the Wife**

The husband has a legal obligation to maintain his dependent wife. Unless the wife is guilty of a serious matrimonial offence, the courts will uphold the woman’s claim of maintenance, often overriding the husband’s allegations of adultery, immorality, denial of marriage, contestation of paternity, etc. Even when the wife is not able to provide proof of her husband’s income, the courts will grant maintenance to the wife and children, using the criterion of minimum wages on the premise that an able bodied man, who is capable of earning a livelihood, has a legal obligation to maintain his wife. Only when the husband is old, infirm, or physically or mentally disabled, he will be absolved of his obligation to maintain his wife.

In *Rajesh Kumar v. State of Bihar*,\textsuperscript{220} it was held that a husband cannot hide behind the plea of his unemployment. The court commented that in any case he must be maintaining himself with whatever means.

In *Meenu Chopra v. Deepak Chopra*,\textsuperscript{221} it was held that the status of the wife’s parents is an irrelevant consideration while deciding the issue of maintenance. The only determining factor for consideration is the status of husband. The husband had pleaded that since the wife comes from a family with modest means, the amount of Rs 20,000 awarded as interim maintenance was excessive. The Delhi High Court held that if the husband is wealthy and is leading an opulent life, his wife also has the right to be a partner in his prosperity and live with the same standard.

Even when the wife is being supported by her parents, the husband is not absolved from his obligation of maintaining his wife (*Radhakumari v. M.K. Nair*). The courts will not accept the husband’s contention that the woman’s own parents are well off and can provide for her, or that she does not need maintenance as she is living with her parents.

In *G.C. Ghosh v. Sushmita Ghosh*,\textsuperscript{222} the trial court awarded Rs 5,500 to the wife as maintenance and Rs 2,000 for her separate residence (p.172) from the date of filing. The husband pleaded that since the wife was living with her parents, she had not actually
spent this amount and hence was not entitled to the same. While upholding the order of the trial court, the Delhi High Court made the following scathing comments:

The husband is living with another wife. The entitlement of the wife to live separately is not in dispute. In the first instance, the husband refuses to maintain his wife and provide her shelter. He marries another woman and walks out of her life. He does not give her maintenance or provide for separate residence to which she is lawfully entitled, forcing her to live separately on her own. She is forced to resort to litigation and husband pleads the wife is not entitled to maintenance for period during pendency of the suit as she had allegedly not spent any such amount on her maintenance or on separate residence. This is wholly unjust. Section 18 of HAMA is a beneficial provision for the purpose of securing a decent living for a Hindu wife and to ameliorate the sufferings of a deserted wife. These provisions must be construed in a manner which better serves the ends of fairness and justice. When such laws are made, it is proper to assume the law makers enact laws which the society considers as honest, fair, and reasonable, and, thus, justice and reason constitute the great general legislative intent in such a piece of legislation. The courts must lean towards an interpretation which is just reasonable, and fair. If the interpretation suggested by the husband is accepted, it would offend the very sense of justice. The husband cannot avoid his obligation under the law by taking shelter of such ingenious pleas.

The fact that the son is maintaining the wife cannot be used as a defence to defeat the woman’s right to claim maintenance from her husband. In Merubhai Mandanbhai Odedara v. Raniben Merubhai Odedara,223 upholding the woman’s right to maintenance, the court commented that the son cannot be made liable for the wife’s maintenance unless the husband has died or other wise has no source of income. In Rattan Bala v. Prahlad Aggarwal,224 the Delhi High Court commented that the trial court erred in declining interim maintenance to the woman merely on the ground that she is not a destitute as she is supported by her son, who is a qualified Chartered Accountant. The court commented that the husband is legally and morally obliged to maintain his wife.

If the husband is old and infirm, he is absolved of the obligation of maintaining the wife. In Mugappa v. Muniyamma,225 where the husband was 75 years old and the wife 65 years, and the six children were all employed and well placed in life, the Karnataka High Court set aside the order of maintenance and held that the petition filed by her was with mala fide motive. The court commented that if her need is genuine, she could have sued her sons for providing maintenance.

A recent judgment delivered by the Delhi High Court brings a curious twist to the legal premise, ‘an able bodied man’ by extending this notion to women. In this case, Ritu Raj Kant v. Anita,226 it was held that maintenance is to be awarded on the basis of actual earnings and not by applying the notion of an able bodied person. The wife failed to provide any proof of her husband’s earnings. While quashing the order of the trial court awarding her Rs 1,500 per month as maintenance, the court commented that the wife is equally able bodied.
Maintenance to Working Women

Though, the principle behind the concept of maintenance is to provide economic security for those who are unable to maintain themselves, in certain cases, adopting a pro-women policy, the courts have ruled that a working wife or one (p.173) who is qualified to work is also entitled to maintenance. If the woman is earning a meagre amount, which is not sufficient for her to maintain herself, or if she has secured a temporary job, the courts have held that the woman is entitled to maintenance. Also, in cases where there is great disparity between the income of husband and wife, the courts will strive to bring in some parity by awarding maintenance to the wife. Although, the amounts awarded are far below the expectations of middle and affluent sections of women, the courts attempt to help divorced and separated women to maintain a certain standard of living and not render them destitute and force them to live in penury by virtue of their divorce or separation.

In Rajathi v C. Ganesan,227 the Supreme Court explained that the expression ‘unable to maintain herself’ would mean the means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after the desertion to somehow survive. The apex court also pointed that Section 125 of Cr.PC was enacted on the premise that it is the obligation of the husband to maintain his wife and children. This position was reitered by the Gauhati High Court in Weldone Lyngdoh v. Eva Phawa.228

In Chaturbhuj v. Sita Bai,229 the Supreme Court held that it is not necessary that the wife must be absolutely destitute before she can apply for maintenance under Section 125 of Cr.PC. Similarly, in Johnson Joseph v. Anita Johnson,230 it was held that the expression ‘unable to maintain’ does not mean that she should be a destitute before she can apply for maintenance. The court also commented that a working woman is required to spend more than a housewife as she has to work in office and keep her household. The wife was earning Rs 1,800 per month and the husband’s salary was Rs 7,500 per month. It was held that Rs 1,000 per month awarded to her as maintenance was not unjust or unreasonable.

In Sheela Devi v. Swarup Narain Bijoria,231 the trial court declined to grant maintenance to the wife on the ground that she was earning some amount of money by rolling beedis. In appeal, the Allahabad High Court awarded her Rs 500 as maintenance and held that the fact that the wife was earning a meagre amount cannot be a ground to refuse her maintenance. The husband, who was a government employee, was drawing a handsome salary.

In Anita Sharma v. Ramjilal Sharma,232 the wife was working as an Anganwadi worker and earning Rs 1,000. The court held that this amount was not sufficient to meet the needs of present day life. The husband was earning Rs 8,500, hence, it was held that the wife is entitled to a maintenance of Rs 750 per month.

In Muraleedharan v. Vijayalakshmi,233 the court addressed the issue of maintenance to educated women and held as follows: ‘Qualification by itself cannot be held to be
synonymous with ability to maintain one’s self. The mere fact that wife has qualification is not sufficient *ipso facto* to conclude she was in a position to maintain herself at the time when the claim was made or before the spouses started living separately. The mere fact that after separation on some occasions she worked as a teacher in some school is not sufficient to take her out of the category of persons unable to maintain themselves. There is no adamant refusal on her part to engage herself in any income generating activity to maintain herself. It was clearly a case of her inability to secure any such income earning activities and earn an income sufficient to maintain herself.

In *Sudhir Diwan v. Tripta Diwan*, the Delhi High Court awarded maintenance to a working woman on the ground that the woman was discharging her moral duty of maintaining her children. This is a welcome shift in judicial approach, as in most cases as soon as the son turned major, the courts discontinue the maintenance awarded to him. In this innovative approach, the fact that the wife who was employed was spending for the needs of the children became an important criterion while awarding maintenance to her. The husband was working as an agent with LIC, but did not disclose his income earned by way of commission. Based on his investments, the trial court arrived at a presumptive figure of Rs Four lakhs per annum. The wife was working as a steno in the district court and her net salary was Rs 19,000 per month. The son was a major but was still a student. Upholding the order of awarding Rs 10,000 as maintenance to her, the Delhi High Court held that the wife was spending around Rs 7,500 on his educational and incidental expenses. She would be left with only Rs 12,500 per month for herself and her minor daughter if the husband was not directed to pay her maintenance. Since the husband’s monthly income would be around Rs 30,000, he was directed to contribute at least one third of this amount to the wife towards expenses of maintaining the children. The court commented that the husband would still be left with over Rs 20,000 for his own personal expenses.

In *Ashok Kumar Bhalla v. Roopa Bhalla*, the gross monthly salary of the wife was around Rs 19,000. The husband’s salary was around Rs 22,000. In addition, he was earning Rs 20,000 by way of rent from his property. The monthly educational and other expenses of the two children were determined at Rs 15,000 p.m. Since, the earnings of the husband and wife were in the ratio of 2:1, it was held that the parents were liable to share the expenses in the same ratio. And the husband was directed to contribute Rs 10,000 per month to his wife for upkeep of the two children.

In *Sushil Kumar Gupta v. Reena Gupta* and *Radhika v. Vineet Rungta*, two cases which are discussed in *Proof of Income* below, middle class women having moderate incomes were awarded maintenance from their affluent husbands to help them to maintain a standard of life which they were used to in their matrimonial home.

In *Rekha Malhotra v. Deepak Malhotra*, AIR 1999 Bom 291 FN, both the husband and wife were professionals. The husband pleaded that his income is only around Rs 40,000 and the wife admitted that she was earning Rs 12,500. There were no children of this marriage. When the wife came to know about the husband’s affair with a young girl, she left the matrimonial home and was living with her parents. The wife had alleged that
subsequently, the said woman was living in the matrimonial home and also had a child through her husband, which was denied by the husband. He pleaded that the cause for the break of marriage was the wife’s refusal to have a child as she was only interested in her own career. He also pleaded that she is able to maintain herself and hence is not entitled to any maintenance. Examining their life style the Bombay (p.175) High Court commented that the earnings pleaded are on a lower side and the actual income of both would be much higher. Considering all the factors, the court awarded the wife Rs 7500 per month as maintenance to maintain a lifestyle similar to that of the husband.

There have also been instances where the courts have held that if the wife is able to maintain herself, or if the husband’s status is not much above that of the wife’s, the wife is not entitled to maintenance. In Rakesh v. Smt. Nandu,238 the Rajasthan High Court dismissed the maintenance application of the wife who earned Rs 20–5 per day as a daily wage labourer. It was ruled that the status of the husband, who earned Rs 100–150 as a labourer was not much above in comparison to his wife as both were working as daily wage labourers. In Satvendra Kumar v. Mithlesh Kumari,239 the wife who was serving as a teacher in a public school and getting a salary of more than Rs 6,000 per month was held as capable of maintaining herself from her own earnings and was not entitled to maintenance. But the court enhanced the maintenance awarded to her daughter. These rulings seem particularly harsh towards women.

**Maintenance Claims by Husbands**

The notion of maintenance to husbands is relatively new within our family laws. The ancient legal systems did not provide for it. Both Hindu and Muslim legal systems functioned from a protectionist approach towards women. Muslim law went further and provided for the future security of wives by securing their right of mehr within the marriage contract (nikahnama) itself. The ancient Hindu laws also protected the woman’s right to separate property (stridhan) and forbade the male relatives from usurping the property and depriving the woman of her rights.

The colonial legal system, which was introduced in India during the late nineteenth century, also adopted a protectionist approach towards women and granted them the right of maintenance under the personal laws as well as under the secular law, that is, Section 125 of Cr. PC and the Special Marriage Act of 1872 (re-enacted in 1954) as well as the law applicable to Christians, the Indian Divorce Act of 1869 (even after the 2001 amendment) did not bestow upon the husband the right to claim maintenance from the wife. Since the obligation of maintenance was framed within the context of dependents, the right was confined to wives, minor/disabled children, and unmarried daughters, who are deemed to be the weaker members of the family.

This right was first granted to Hindu husbands in the post-Independence period, under the codified enactment, the Hindu Marriage Act, 1955 (HMA). During the codification of the Hindu family law in the 1950s, the constitutional mandate of equality was an overarching presence. So this right was formulated in the context of an illusory notion of equality between the spouses. At this point in history, Hindu women were not granted
equal rights to ancestral property and only a male was awarded the right by birth to the joint family property. In 1988, when the Parsi Marriage and Divorce Act, 1936 (PMDA) was amended, this notion of equality was incorporated within it.

Under these two acts (HMA and PMDA), the provision of maintenance is formulated in a gender-neutral term using the word spouse which enables the husband to claim maintenance from his estranged wife. This reflects a new trend in matrimonial laws and, apparently, it appears that the law of maintenance is inching towards gender equality. But such superficial notions of equality and gender neutrality, in a society which is structured upon patriarchal premises and nurtures deep rooted biases against women, cause more hardships to women by entangling them into vexatious and vindictive litigation.

In Lalit Mohan v. Tripta Devi, the husband who did not have independent source of income was awarded interim maintenance.

In another unreported judgment, the Allahabad High Court awarded maintenance to a husband in a divorce petition filed by the wife. The husband not only opposed the divorce, but also claimed maintenance and litigation expenses on the ground that he is unemployed. The family court had rejected the claim for interim maintenance on the ground that the husband was an able bodied and healthy man, capable of earning his own livelihood and, therefore, did not deserve any monetary support from his spouse. The husband challenged this order in the high court. On 7 November 2005, a single judge of the Lucknow High Court allowed the appeal and ordered the wife to pay Rs 2,000 per month as maintenance to the husband. The court explained the reasons for awarding the maintenance in the following words: ‘Since the petitioner (husband) is residing in his own house and has to incur expenses of his widowed mother, his responsibilities seem to be higher than that of the Respondent wife.’ While the wife, ‘a hard working and enterprising woman’ is employed with the bank, the husband, a ‘happy-go-lucky and laid-back’ person, pleaded that he is jobless. It appeared to be of little consequence that the wife had filed the petition for divorce in 1997 on the ground of cruelty and dowry harassment by husband and his family.

Though cases such as the one discussed above are few and far between, the stipulation provides an armour to husbands to cause further harassment to wives in divorce proceedings. It appears to be rather unjust that while courts have denied maintenance to a young boy of eighteen, who has not yet completed his education and is dependent upon his divorced mother, on the ground that he is an adult capable of earning his livelihood, the courts entertain applications from adult males who have a primary obligation to maintain their wives and are also able bodied and capable of earning. As we can discern from the discussion in this chapter, women’s rights to maintenance are hinged upon their chastity. Remarriage or living in adultery disentitles a woman from claiming maintenance. These are gendered notions which are applied only to women. There is no corresponding premise to disentitle a husband from claiming maintenance. As the above unreported case reveals maintenance can be granted to a husband who has been guilty of causing violence and dowry related harassment to his wife.
Merely by adopting a gender neutral term, these gendered notions will not get diminished or fade away. Notions of equality and gender neutrality can meaningfully be applied only within an egalitarian social structure and not within a patriarchal and gender biased one. Even considering that more and more women are now entering the job market and holding higher positions within the corporate world, it still does not justify the provision of maintenance to husbands unless the gendered role assigned to women as primary care takers of their children and home makers is reversed under such a situation.

Clarifying the concept of maintenance to husbands, in Govind Singh v. Vidya,\textsuperscript{242} the Rajasthan High Court held that this provision does not entitle the husband who is capable of earning his living to claim maintenance from his wife. The provision does not empower the husband to stop earning and start depending on his wife. The court relied upon the maxim of Anglo Saxon jurisprudence that no person can be allowed to incapacitate himself, and held that the husband had voluntarily incapacitated himself from earning and, hence, he was not entitled to claim maintenance from his wife.

**Effect of Consent Agreements Relinquishing the Right of Maintenance**

At times, consent agreements drawn up either during the marriage or at the time of divorce, stipulating that the wife would not claim maintenance, are relied upon by husbands to defeat the claims of their wives. But when a wife approaches the courts for maintenance, some courts have declined to rely upon these agreements and have decided the issue of maintenance afresh. The contest arises due to a clause in Section 125(4) of Cr.PC which stipulates that a wife will not be entitled to maintenance if she is living separately as per an agreement to this effect. In Kaushalyabai Mule v. Dinkar Mule,\textsuperscript{243} where the wife relinquished her claims of maintenance under a deed of divorce, it was held that the wife was entitled to maintenance despite this because such a deed of divorce has neither the backing of law or custom.

Similarly in Manoka Chatterjee v. Swapan Chatterjee,\textsuperscript{244} it was held that in proceedings for divorce by mutual consent, terms of consent which include a clause that the wife, upon receiving a lump sum amount perpetually binds herself from any future claim of maintenance, was not tenable under the law. It was held that since Section 125 of Cr.PC. is a piece of social welfare legislation and its primary purpose is to protect the wife from vagrancy and destitution, even if the wife binds herself consciously or unconsciously to such an agreement, the law has to come to her aid and protect her statutory right to maintenance and also to her right to life, which provision must mean a life with dignity. It was held that future claims cannot be frozen merely because the wife was awarded a lump sum amount at the time of the divorce. The claim is flexible and changes from time to time according to changes in circumstances. In view of this reasoning, the Calcutta High Court set aside the particular clause in the agreement.

In Biswapriya Bhuiya v. Jhumi Banik,\textsuperscript{245} the wife had filed for divorce on the ground of cruelty but, subsequently, the petition was converted into a petition for divorce by mutual consent and the wife agreed for an unconditional divorce. A week later, she filed
for maintenance under Section 125 Cr.PC. The family court at Agartala, awarded her Rs 1,500 per month as maintenance. The husband challenged this order on the ground that since the wife had surrendered her right by agreeing for an unconditional divorce, she is barred from claiming maintenance subsequently as per stipulations under Section 125(4) of Cr.PC. But the Gauhati High Court held that there is no bar against the wife from claiming maintenance at a later stage since she has not been awarded any maintenance in the divorce proceedings.

In *P. Archana @ Atchamamba v. Varada Siva Rama Krishna*, it was held that there is no bar to claiming maintenance if there is a change in situation even after maintenance had been awarded at the time of divorce by way of compromise between the parties. The court commented that such an interpretation would defeat the very object of Section 25. Further, it was held that an agreement defeating the right of maintenance, provided under the statute, being contrary to public policy is not a valid contract, and cannot operate as a bar to exercise jurisdiction conferred under Section 25(2) of the Act. It was held that the family court of Hyderabad committed an error in holding that the wife’s claim is not maintainable and remanded the matter back for retrial.

But the Bombay High Court, in a series of judgments, has held a contrary view. In *Popat Kashinath Bodke v. Kamalabai Popat Bodke*, the parties were residing separately by an agreement and some agricultural land was transferred in the wife’s name, and the wife had signed a deed of relinquishment. It was held that in view of Section 125(4) of Cr.PC, the wife would cease to have a right to claim maintenance after execution of the agreement and if the agreement has been acted upon.

In *Vitchal Jadhav v. Harnabai Jadhav*, the wife was given Rs. 20,000 by the husband in accordance with an agreement by virtue of a customary divorce. The couple had agreed to live separately by mutual consent. Subsequently, the wife filed a petition for maintenance and was awarded Rs 400 as monthly maintenance. The Bombay High Court quashed the order of the Judicial Magistrate which awarded the wife Rs. 400 as monthly maintenance. It further held that the order of the magistrate suffered from legal infirmity as a wife loses her right to claim maintenance from her husband if she and her husband are residing separately by mutual consent, in light of Section 125 (4) of the Cr.PC.

Similarly, in *Gajanan Solanke v. Sheela Solanke*, the woman’s claim of maintenance after divorce, for herself and her minor son who was born a few months after the consent deed was signed, was upheld by the sessions court. But in appeal, the high court set aside the order of maintenance on the ground that since the woman had relinquished her claim to maintenance in divorce proceedings, she was barred from claiming further maintenance by provision of Section 127(3)(c) of Cr.PC. The husband also denied paternity of the child. But the court held that at the time of signing the consent deed the woman was pregnant and this fact had not been mentioned in the consent deed. The woman was also not cross examined on this issue, hence, the child was held to be the legitimate and the amount of Rs 400 per month awarded to the minor son was upheld.

At times, the husbands have taken the plea that the parties have gone through a
customary divorce where the wife has relinquished her right to maintenance. In *Jairam v. Sindhubai*, it was held that custom cannot only be pleaded, but has to be proved that the parties were entitled for the customary divorce. In this context, the deed of divorce could not have the effect to dissolve the marriage between the parties. Once the parties are married, the said marriage cannot be dissolved except by a decree of divorce passed under the provisions of the *Hindu Marriage Act, 1955*. The order granting maintenance to the wife cannot be revoked merely on this basis.

In *Rajesh Kumar Madaan v. Mamta @ Veena*, after criminal proceedings were initiated by the wife against the husband on the ground of cruelty and dowry harassment, there was a compromise and the husband agreed to pay Rs 4,50,000 as settlement. But after the initial instalment of Rs 50,000 on the date of the compromise, he defaulted and later filed for divorce on the ground of desertion and cruelty stating that the criminal proceedings filed by the wife construed cruelty. The court rejected his plea and dismissed the petition. The husband challenged this order in the high court. Later, he pleaded that there was a customary divorce between them. The high court held that a marriage can only be dissolved by a decree of divorce by a competent court and not in any proceedings before the Panchayat. The wife is not to be bound by a compromise unless she herself consents to the same.

While there are instances where the courts have validated customary divorce, if the plea is advanced to defeat a woman's right to maintenance, the courts are bound to reject this plea and award women their statutory rights. Hence, a custom, denying women maintenance, cannot be pleaded as such a custom is against public policy.

**Maintenance Claims by Parents**

The above provision has imposed a statutory liability on both sons and daughters to maintain their father or mother who is unable to maintain himself or herself. Section 488 of the old code did not contain any such provision aimed at prevention of vagrancy and destitution of parents who do not have means to maintain themselves (*Vijaya Monohar Arbat v. Kashirao Rajaram Sawai*). If there are two or more sons, the parents may seek remedy against any one or more of the sons. The liability to maintain the father is not dependant on failure or otherwise of the father to fulfil his normal obligation of maintaining children during childhood (*Pandurang Dabhade Baburao Dabhade*). The adoptive father is also entitled to maintenance.

Even a married daughter is liable to maintain her parents. But in this context, *Paladugula Vijayalakshmi v. Nomula Ramanadham* raises an interesting question. In this case, the parents, aged 60 and 50, had their own property and were running a small grocery store. They had not given any share of the property to their daughter to which she was entitled to. But the son, upon attaining majority was given a share. The parents also did not perform the marriage ceremony of their daughter as she had married against their wishes. The daughter, since then, was living with the husband. The parents claimed maintenance from the daughter and were awarded Rs 400 per month. The high court sent the matter back for retrial as it was held that the procedure as laid down under *Section 126* was not scrupulously followed by the lower court. The high court
directed the trial court to consider all relevant factors before upholding the parents claim for maintenance from the daughter.

**Box 2.4 Section 125(1)(d) of Cr.PC**

if any person having sufficient means neglects or refuses to maintain, his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of such father or mother, at such monthly rate as such Magistrate thinks fit and to pay the same to such person as the Magistrate may from time to time direct.

In *Akham Ibobi Singh v. Akham Biradhwaja Singh*,257 the father aged 74 years and the mother aged 71 years were claiming maintenance from their son. The family court rejected their claim. In appeal, the Gauhati High Court upheld their claim and held that it is not required to strictly prove their inability to maintain themselves and commented that while rejecting the claim of the parents, the family courts lost sight of Section 14 of the Family Courts Act, where the court has wide powers to receive evidence which is not admissible in other proceedings. The Indian society casts a duty on the children of a person to maintain their parents if they are not in a position to maintain themselves. It is their duty to look after their parents when they become old and infirm. The court lamented over the fact that there was a long drawn legal battle between parents and sons for a matter which is, unfortunately, a moral obligation. They have been fighting from the family court up to the Supreme Court via this high court, and might have spent a lot of money for that purpose. The court commented that there is no law which stipulates that the parents must claim maintenance from all sons and daughters and they should be jointly impleaded in the proceedings. It will suffice, if it is proved that the Respondent has the capacity to maintain and the parents do not have the capacity to maintain themselves.

In *Makiur Rahaman Khan v. Mahila Bibi*,258 it was held that a divorced Muslim woman is entitled to maintenance from her children under Section 125 of Cr.PC. The divorced wife had filed proceedings under the Muslim Women’s Act for a fair and reasonable settlement against her husband. While these proceedings were pending, she also filed for maintenance under Section 125 of Cr.PC against her sons. She was awarded Rs 250 from each of her two sons. In an appeal filed by the sons against this order, the high court held that women’s rights against their sons under Section 125 of Cr.PC are not substituted by the enactment of Muslim Women’s Act. The provisions of MWA are in addition to her rights under Section 125 Cr.PC against her children.

The Supreme Court, in *Kirtikant D. Vadodaria v. State of Gujarat*,259 held that even an adoptive mother and a childless step-mother, is entitled to claim maintenance allowances against her adopted son or her step-son, if she is a widow or her husband, if living, is incapable of maintaining her. The court reiterated that the while dealing with the ambit
and scope of Section 125 Cr.PC, it must be borne in mind that the primary object is social justice to those who are unable to maintain themselves, but have a moral claim for support.

The recently enacted Maintenance of Parents and Senior Citizens Act, 2007, provides an additional remedy to elderly men and women to claim maintenance from their children. The Act goes a step further and secures the rights of childless senior citizens against their next of kin or persons who would be entitled to inherit their property. The Act also seeks to protect the life and property of senior citizens and parents. In addition to maintenance and provision, the Act also seeks to ensure better medical facilities and mandates the state to set up old age homes and provide institutionalized care to the elderly.

(p.181) In order to provide for an easily accessible avenue of accessing justice and to ensure a speedy remedy, the Act provides for establishment of tribunals and office of Maintenance Officer who will represent the parent or the senior citizen in these proceedings. In order to protect this vulnerable section from the clutches of unscrupulous lawyers, the Act prohibits legal representation. In order to arrive at a settlement, rather than engage in lengthy litigation, the Act also provides for conciliation proceedings. If the dispute is not resolved at this stage, it will proceed before the tribunal and will be decided within a maximum period of ninety days. The maximum amount which can be awarded under this Act is limited to Rs 10,000 per month.

The additional safeguard that the new Act provides is punishment to the children and relatives who abandon their parents or senior citizens in order to avoid vagrancy and destitution. Also, if there is any transfer of property which has been carried out with mala fide intention, or by resorting to fraud, or undue influence, it can be set aside.

The Act empowers social organizations to intervene on behalf of the elderly and also empowers them to initiate proceedings, suo moto.

While this is a timely measure enacted with the right intentions, the working of this Act at the ground level is yet to be observed. Hopefully, it will not pose more hurdles on the path of the elderly while they seek remedial and protective relief against neglect and destitution.

While it is a positive endeavour, it may take some time till all the infrastructural and institutional support is developed. In the meantime, the parents can still take recourse under the prevailing provision under Section 125 of Cr.PC. Since the procedures are all set in place and the magistrates are well versed with the provisions and the provisions are also summary in nature, it would provide a viable remedy to a destitute parent. Two additional benefits of filing under Section 125 of Cr.PC would be that no ceiling is stipulated under it and the atmosphere of a criminal court might exert greater pressure on the opposite side to comply with the order due to the fear of imprisonment, which can be availed of in execution proceedings.
Procedural Aspects

As can be observed from the exhaustive list of substantive issues discussed above, the task of claiming maintenance can easily be compared to an ordeal by fire for the women involved. Every legal ploy is invoked in order to humiliate women and defeat their claims to maintenance. Even if these hurdles of substantive law are crossed, women are still left to deal with complex and, at times, absurd procedural aspects, some of which are briefly discussed in this section.

Jurisdiction

Jurisdiction becomes an important issue while initiating matrimonial proceedings or while claiming maintenance. For women, the place of marriage, the matrimonial residence, and her natal home, could be situated at different places. In addition, after separation, she may be constrained to set up residence at yet another place, either to seek employment or to secure school admissions for her children. Keeping in view the displacement which most women are compelled to go through by virtue of marriage patterns which are patrilocal, the law gives women wide jurisdiction while initiating matrimonial and maintenance proceedings.

Initially the jurisdiction under most matrimonial statutes was confined to the place of marriage and the place where the couple last resided together, or the place where the respondent resides. This caused a great deal of hardship to women who usually return to their native place after the marriage breaks up. In view of this, the provision of jurisdiction under the Hindu Marriage Act and the Special Marriage Act was widened in 2003 to include the place where the woman resides after the break up of her marriage. So currently, the woman can initiate proceedings at the place of her post-separation residence. Similarly, proceedings under Section 125 of Cr.PC can be filed at the place where the woman last resided with her husband or where she is presently residing (Syed Khaja Mohiuddin v. State of AP).

At times there are multiple proceedings. The wife may have filed for maintenance under Section 125 of Cr.PC at the place of her residence and, in the meantime, the husband may have filed for divorce at the place of his residence. In such cases, upon a petition for transfer of the proceedings filed by the husband, the courts would be inclined to transfer the husband’s petition to a court which would be more convenient for the wife to litigate.

The law is well settled on this aspect. The apex court has repeatedly held that the matrimonial disputes have to be dealt with by courts which are easily accessible to women (Vinay Pandey v. Roshan Kumar and Rinku Goel v. Rajesh Goel). The fact that women’s lack of exposure to the outside world, the undue hardship caused to them while travelling alone to a distant place to defend the litigation, the concern for their safety, the cost of travel, the fact that there may be young children who need constant care, or the elder children whose studies may be disrupted while the mother travels to defend the court case, the fact that she is employed at the place of her residence, etc., are factors which the courts have considered while transferring the husband’s petition to the place where the woman is residing.
In *Rachana Kanodia v. Anuk Kanodia*, the wife was residing in Varanasi, which was the permanent place of residence of her parents. The Supreme Court transferred the petition for divorce filed by her husband in the district court at Thane in Maharashtra to the district court Varanasi on the ground that great hardship will be caused to her to travel all the way to Thane. In *Chayana Das v. Tarun Kumar Das*, the wife was residing in Cooch Bihar. The husband had filed a petition for divorce in Tinsukia. The Supreme Court held that since the distance between Cooch Bihar and Tinsukia is about 830 km and involves 20 hours of travel and costs Rs 300 to 400, it is not possible for the wife to undertake travel all by herself to defend the petition.

In *Neelam Bhatia v. Satbir Singh Bhatia*, the wife filed a petition to transfer proceedings from Korba to the family court at Kolkata on the ground that she lacks financial means to travel, she had no source of income, and she had a minor daughter of five years. The husband resisted the Transfer Petition but assured to co-operate and settle the case without dragging on the proceedings. Hence, the Transfer Petition was dismissed. In *Samita Bhattacharjee v. Kulashekar Bhattacharjee*, the wife was residing with her parents at Howrah, West Bengal, along with her minor child. The husband had filed a petition for divorce in the family court at Agartala, West Tripura. The Supreme Court transferred the case to the court of district judge at Howrah, West Bengal.

When the place of residence of the wife and the place where the husband had initiated proceedings, both are within the direction of a high court, the high court has also issued similar directions for transfer. In *Kirti v. Vikas Bhagirat Rao Yeskade*, the Bombay High Court upheld the wife’s plea that she was dependent on her aged parents and she had no independent source of income, and that it was not possible for her parents to come to Nagpur to attend the hearing. Her place of residence was about 200 km away from Nagpur. The court upheld her submission that the journey will cause considerable hardship to her. The court also upheld her plea that she apprehends danger to her when she comes to attend proceedings in Nagpur. The court commented that the convenience of the wife is to be preferred over convenience of the husband and it ought to be the husband who should travel from Nagpur to Chandrapur, rather than the wife from Ballarsha (Chandrapur) to Nagpur. In *P. Himabindu v. P. Jayasimharaja*, the Andhra Pradesh High Court held that the primary concern for the court should be the convenience of the wife. Since she had no male assistance to travel to Chittoor, the transfer petition filed by her was allowed. In *Shakuntala v. Pankaj Chourasiya (Dr)*, the Madhya Pradesh High Court, while transferring the proceedings from a court in Indore to the family court at Panna where the wife was residing, commented that there was nothing on record to show that there was danger to the life of the husband if he travels to Panna to attend the court proceedings. The wife was employed in Panna and was also looking after her two-year-old child there.

The Orissa High Court in *Sujata Mohanty v. Rudra Charan Mohanty*, rather curiously has given a judgment which is contrary to this position. Rejecting the wife’s petition, the court held that the fact that the wife feels unsafe to travel alone is not a sufficient ground
for transfer of the case.

The high court’s power of transfer is limited. It can only transfer cases from a court under its jurisdiction to another court over which it has jurisdiction. In Jency Elizebeth Peter v. Biju Thomas,\textsuperscript{271} it was held that the high court of Kerala lacks jurisdiction to transfer the case filed by the husband, which was pending before the family court, Ernakulam, to the family court at Chennai where the wife was residing. But, considering the fact that the wife was residing with her mother in Chennai and had a three-year-old child, the high court directed the family court at Ernakulam to consider the request made by the wife for examining her through a court commissioner at Chennai.

**Travelling Expenses**

For women, travelling expenses also become an important aspect of litigation. Unless women are provided adequate travelling expenses, they may not be in a position to defend the case filed by their husbands against them.

An important case relating to the issue of travelling expenses is Anita Laxmi Narayan Singh v. Laxmi Narain Singh.\textsuperscript{272} The family court at Bombay had awarded a very low amount towards travel, lodging, and other expenses, for the wife who was staying in Ghaziabad. Since this made it impossible for the wife to travel to defend herself (p.184) during litigation, the husband was able to secure an ex parte decree of divorce. While setting aside the ex parte decree of divorce, the Supreme Court passed strictures against the family court for its callousness in awarding such a low amount as travel expenses. The Supreme Court also transferred the proceedings from the family court, Bombay, to the district court, Ghaziabad, for disposal in accordance with law. The respondent-husband was asked to pay the cost of the proceedings which was quantified at Rs 5,000.

If the husband is willing to pay the travel costs of the woman, the courts may not pass an order to transfer the proceedings at a place which is convenient to the wife. In Teena Chhabra v. Manish Chhabra,\textsuperscript{273} the Supreme Court accepted the husband’s offer to bear the expenses for the travel, boarding, and lodging, of the wife and dismissed her transfer petition which was filed on the ground that she had no source of income to travel. Similarly, in Kanagalakshmi v. A. Venkatesan,\textsuperscript{274} the Supreme Court accepted the plea of the husband that he would bear the expenses not only for the wife but also her companion for their travel, and stay at the place where the case was pending and, accordingly, dismissed her transfer petition. The same principle was also followed in M. Sivagami v. R. Raja.\textsuperscript{275} While disallowing the transfer petition based on monetary grounds, the Supreme Court directed the husband to pay the wife’s litigation costs and also her travel costs and expenses along with those of her witnesses.

**Delay in Filing Application**

While a woman is expected to file for maintenance within a reasonable period after the desertion, the courts will not reject her application merely on the ground that there was delay in filing an application for maintenance. Many times, women who are deserted delay filing for maintenance in the hope that there may be a possibility of reconciliation and
approaching the courts for maintenance might enrage their husbands and mar their chances of reconciliation. The legal entitlement for claiming maintenance arises from the date of filing the application and not from the date of desertion. Hence, the woman would lose out if a claim for maintenance is not filed soon after the desertion.

Since the husband is legally obligated to pay maintenance to his wife, non-payment of maintenance is a continuing or an inchoate offence, and every month when the husband fails in his obligation to maintain the wife, a new right is created. It is in this context that in Mangla Devi v. Baluram,276 it was held that though the application for maintenance should be filed within a reasonable time, no limitation can be prescribed for the same. The court commented that if there is a satisfactory explanation for the delay, the application cannot be rejected merely on the ground of delay. The woman pleaded that since her father was in service he had maintained her, but after his retirement from service he was not in a position to maintain her and, hence she had filed an application for maintenance. It was held that the delay was satisfactorily explained.

A similar line of reasoning was also adopted in Nirmalabai v. Dr. Omprakash277 The Applicant No. 1 was a housewife ignorant about the technicalities of the law, and the Applicant No. 2 was a minor child. The court held that sufficient explanation had been given for the delay. Stating that the revision court cannot take a technical view of matter ignoring the fact that Section 125 of Cr.PC is a benevolent provision. In Shobha v. Krishnakant Pandya,278 (p.185) there was a delay of twenty-five years in filing the application for maintenance. Since her parents were supporting her and since she hoped for reconciliation, the wife had not approached the courts for maintenance. Accepting this explanation, she was awarded Rs 3000 per month as maintenance and set aside the order of the family court, which had rejected her application. In Thakur Vyasnarayan Singh v. Hemlata,279 the wife was living with her maternal uncle after the death of her father. In view of this, it was held that the inordinate delay in filing the petition has been correctly explained. The court also observed that the wife had no source of income and was incapable of maintaining herself.

Even if the application was dismissed on an earlier occasion, a subsequent application on another ground is not barred and the petition will be entitled to maintenance on the fresh ground, if she succeeds in proving this ground (Puliyulla Chalil Narayana Kurup v. Thayulla Parabhath Valsala).280

Interim Maintenance

The purpose of awarding interim maintenance and litigation expenses is to provide the claimant basic minimum financial support in order to survive and carry on with the litigation process. At times, in contested cases, the litigation may go on for several years and the party claiming maintenance will be subjected to great hardships if interim maintenance is not awarded. The courts are extremely cautious if children are involved, as in the intervening period their education and health may suffer and the damage would be irreparable by the time the courts deliver the final verdict on the issue.

An application for interim maintenance (maintenance pendente lite) can be filed along with
a petition for a matrimonial relief or after a copy of the petition filed by the husband for matrimonial relief is served on the woman. It can also be filed along with an application under Section 18 of HAMA, Section 125 of Cr.PC, or under the Domestic Violence Act. It can also be filed subsequently, but before the trial of the main petition commences. The provision of interim relief is based on an urgency and must be decided expeditiously before taking up other contested issues (Sushila Viresh Chaddwa v. Viresh Nagshi Chhadva).281

Even when the statute does not explicitly provide for it, the power to award interim maintenance has been read into the power of the court to do justice.

In Savitri v. Govind Singh,282 the Supreme Court upheld the power to award interim maintenance under Section 125 of Cr.PC as follows: ‘While interpreting the provision, it had to be done in such a manner so as not to defeat the objective of the legislation. In the absence of any express prohibition, the provision must be interpreted as to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application. Applications under Section 125 of Cr.PC take several months before final disposal. In order to enjoy the fruits of the proceedings, the applicant has to be alive until the date of the final order. In a large number of cases, the same is possible only if an order for interim payment of maintenance is made. Every court, therefore, must be deemed to possess, by necessary intendment, all (p.186) such powers as are necessary to make its order effective.’

In P. Srinivasa Rao v. P. Indira,283 the Andhra Pradesh High Court explained the inherent power to grant interim maintenance under Section 18 of HAMA as follows: ‘Independent of the inherent power of the court under Section 151 of CPC, even under the provisions of the Act itself, by necessary implication, power has been conferred on the court to grant interim maintenance to the wife and minor children where circumstances so warrant and justify, to do justice on a prima facie satisfaction of the case on merits. In such cases, the court cannot decline to grant interim maintenance pendente lite till the final adjudication of the controversy on merits. The inherent powers under Section 151 of CPC and the powers conferred under other provisions of CPC are intended to do complete justice between the parties. A conjoint reading of these provisions clearly discloses that they empower the courts to pass appropriate interim orders as may appear to the courts just and convenient, to prevent justice being defeated. The object of the provisions is to preserve the rights of the parties at the same place till their cause is adjudicated. As a matter of principle, if it is held that no interim maintenance can be awarded in maintenance proceedings, it causes hardship to the parties and in some cases there is the possibility that the main relief may also become infructuous, if the party is not able to maintain herself pending proceedings.’

If the ground for interim maintenance is made out, the court cannot impose any condition on the spouse claiming such maintenance. Even in a petition for divorce filed by the husband on the ground of wife’s adultery, the court cannot dismiss the wife’s application for interim maintenance. In Dwarkadas Gurumukhidas v. Bhanuben,284 it was held that it is the right of the wife, who is unable to support herself for the interim period, to get
maintenance and the same should be made available to her without any reference to her conduct. In *Saroj Devi v. Ashok Puri,* an order imposing the condition that the wife would undertake to refund the alimony, if the allegations regarding her leading an immoral life were proved, was illegal. In *Bijal Parag Dave v. Parag Labhashankar Dave,* it was held that refusal to award interim maintenance to the wife on the ground of misconduct is not proper. In *Neelam Malhotra v. Rajinder Malhotra,* it was held that refusal to award interim maintenance based on husband’s allegations of gross misbehaviour and infidelity was improper and the trial court could not go into the allegations which would prejudice the main issue. In *Jagir Singh v. Jasbir Kaur,* it was held that denial of interim maintenance just on the basis of such an allegation would not be justified until and unless the allegation is substantiated by cogent evidence.

Even when the validity of marriage is disputed, the courts have the power to grant interim maintenance. Similarly, when paternity is disputed, the courts will not go into the lengthy question of deciding paternity while awarding interim maintenance.

The Delhi High Court, in *Rajesh Chaudhary v. Nirmala Chaudhary,* (discussed earlier) held that an estranged wife claiming maintenance for herself and her child cannot be denied interim maintenance while awaiting the results of complex DNA tests for determining the issue of alleged illegitimacy. Sustenance of the minor child and its mother, educational, and other (p.187) household expenses do not and cannot await the decision of the court on such a complex issue. The court directed that interim maintenance should be ordered expeditiously, if found payable.

In *Bobby Paulose v. Ronia Mathew,* it was held that while deciding the application for interim maintenance, which is a summary proceeding, the court cannot, in any manner, prejudice the wife’s rights. The Kerala High Court commented that since the matter was being indefinitely adjourned due to husband’s inconvenience to attend court proceedings, the family court adopted a realistic approach in granting interim maintenance to the wife.

In *Sampa Saha v. Amaresh Saha,* it was held that an order rejecting the prayer of interim maintenance, without assigning any reason and without recording any satisfactory explanation as to why interim maintenance was refused, suffers from serious illegality.

At the stage of awarding interim maintenance the courts will not permit the parties to go into lengthy legal submissions or to cross examine each other. The application for interim maintenance can be decided by affidavits of the parties.

In *Rajesh Burmann v. Mitul Chatterjee (Burman),* the Supreme Court upheld the grant of medical expenses to the wife by way of interim relief, and held that there was no infirmity in the decision or in the reasoning while awarding interim maintenance to the wife.

While protecting the rights of women, children, and parents for interim maintenance, the courts have also issued a caution that fabulous amounts cannot be awarded at the ad-
interim stage in *ex parte* orders without substantive evidence in support of the claim regarding the income of the husband (*Saibal Dey v. Chaitali Dey*).

The courts are empowered to grant interim maintenance under matrimonial proceedings even if the wife and children have been awarded maintenance in proceedings under Section 125 of Cr.PC. In *Ashok Singh Pal v. Manjulata*, while upholding the right of the wife to maintenance under Section 24 of HMA and under Section 125 of Cr.PC, it was held that the remedies under both sections are independent of each other. There is no rule that the amount of maintenance granted under Section 125 of Cr.PC be adjusted towards the amount granted under HMA, or vice versa. But a contrary view has been expressed by the Bombay High Court in *Sanjay v. Swati* which set aside the order of the family court on the ground that it was passed without taking into consideration the husband’s existing liability to pay maintenance under Section 125 of Cr.PC.

Considering the urgency of proceedings for interim maintenance, the courts are bound to give short dates to avoid delays. In *Sonia Khurana v. State*, it was held that though Magistrates are burdened with heavy work and normally it is difficult for them to give short dates, it would not justify giving a date after ten months. The courts must keep in view the nature of proceedings and when there is urgency, short dates must be given. In this case, the petitioners are destitute, having no means of livelihood. They had filed an application under Section 125 of Cr.PC for interim maintenance to get immediate support. Such applications must be decided without any delay. The court commented that issuing notice on preliminary hearing for a date after ten months is a travesty of justice.

While awarding interim maintenance, the courts are also empowered to order litigation costs to the claimant to enable her to get adequate legal assistance. While in *Ramesh Babu v. Usha*, the husband challenged Rs 2,500, awarded to the wife as litigation cost, on the ground that she can avail of free legal aid. But, the Madras High Court held that the claim of a deserving person for interim maintenance and litigation expenses cannot be rejected on the ground of availability of free legal aid. But at the same time, in *Pritiben Acharya v. State of Gujarat*, the Gujarat High Court has held that it is the duty of the judges and advocates to bring to the notice of litigants their right to free legal aid.

In *Jaya Sanjiv Mehta v. Sanjiv Baldev Mehta*, the family court, while awarding interim maintenance from the date of the order, assigned no reasons as to why the usual practice of awarding maintenance from the date of application was not followed. The high court set aside this order and awarded maintenance to the wife from the date of filing the application for interim maintenance. The court also commented that the super technical approach adopted by the family court of demanding that the wife should get her train ticket endorsed by the concerned superintendent or station master is not proper. Once the wife satisfies the court that she has travelled from Agra to Mumbai on a valid ticket and the ticket bears name and date of the train, she is entitled to claim travel allowance.

**Proof of Income**

The entire discussion on maintenance hinges on just one factor—whether the applicant has been able to secure a favourable order of maintenance, and the amount which is
awarded. There is no set formula for fixing the amount of maintenance. Within a stratified society, the amount would depend upon the facts and circumstances of each case. The courts cannot be expected to adopt a mechanical approach while interpreting a provision of law which is based on principles of social justice (Pradeep Kumar Kapoor v. Shailja Kapoor),\footnote{298} and much would depend upon humanitarian concerns. The relevant factors for consideration would be:

1. The status of the parties;
2. The needs of the claimants;
3. The income, assets, and lifestyle of the husband;
4. His other financial obligations;
5. The wife’s income and assets.

The earlier notion of a dole for bare survival has given way to the notion of physical and emotional well-being of the claimant.\footnote{299} The maintenance which is awarded should suffice the woman to take care of her basic needs such as food, clothing, shelter, medical expenses, as well as the expenses of raising her children, including their educational expenses.

From the earlier notion of awarding one-fifth of the income, the thumb rule now is to award one-third of the husband’s income as maintenance to the wife (Dinesh v. Usha).\footnote{300} But, while this is the general principle, in each case the court is duty bound to enquire into the actual earnings or income of the respondent. Hence, the claimant is expected to submit proof of income, based on which the court will determine the amount of maintenance.

It is rather ironic that most women are not able to provide the necessary proof as required by a court of law. Women lack basic knowledge regarding their husbands’ employment, income, assets, investments, bank accounts, movable and immovable property, agricultural income, or husbands’ share in the HUF property. During the subsistence of marriage, most women do not have either access or an interest in the financial arrangements of their husbands or the joint family. They don’t have access to the documents such as salary slips, bank passbooks, receipts of fixed deposits, share certificates, property cards, tenancy agreements, income tax returns, etc. In an economic order which thrives on unaccounted money, proving actual income or assets is a daunting task, which is beyond most diligent and prudent women. On the other hand, husbands prefer protracted and expensive litigation rather than conceding the claim of maintenance. At times, it becomes a matter not just of financial liability but also of personal ego. Defeating the claim of maintenance, through adversarial proceedings becomes a retaliatory measure to settle scores with the wife, who has initiated legal proceedings against them. Due to these constraints, even when women do succeed in securing an order of maintenance, the amounts awarded are meagre and far below the expectations of the claimants.

The challenging task before the court is to find a balance between the inflated claims of women and the deflated disclosures of income by husbands. In order to circumvent this
lacunae regarding acceptable legal proof, the courts have evolved certain legal maxims for determining the amount of maintenance which would be equitable, just, and fair to the parties concerned. Since, it is not always possible to apply the rule of best evidence in maintenance proceedings, the courts will rely upon probabilities which would enlarge the scope of arriving at reasonable inferences (Pendiylala Suresh Kumar Ramaraio v. Sompally Arunbindu).301

One basic criterion is that of an able-bodied man capable of earning a livelihood.302 The courts will invoke this legal premise if the husband declines to disclose his income. In the absence of evidence, the wife’s submissions will be taken into consideration for determining the amount.

In Ali Hossain v. Baby Farida,303 the wife was awarded Rs 300 per month as maintenance for herself and Rs 200 per month for each of the two children. The husband worked as a rickshaw puller and casual labourer. He challenged the order on the ground that the amount was excessive and passed without a realistic assessment of his income. The high court held: ‘The husband is an able bodied, young, healthy man, and admits that he has a regular job as a rickshaw puller and casual labourer, but he did not care to disclose even his average daily income. This omission to disclose his income is sufficient to warrant an inference that he has the capability of earning sufficient income.’

In Haseena v. Abdul Jaleel,304 the Kerala High Court held that the salary drawn by the husband is a fact within his knowledge. The wife cannot be faulted for not proving it. In the absence of evidence from the husband, the evidence adduced by the wife is accepted. The wife was awarded Rs 2,50,000 as reasonable and fair provision, and maintenance.

(p.190) In Tabassum Shaikh v. Sheikh,305 the wife pleaded that due to cruelty and accusations of unchastity made against her, she was terrified of returning to her matrimonial home. In her pleadings she provided details of the husband’s properties and business. The husband did not give details of his income. While awarding Rs 2,500 per month as maintenance to her it was held that once details of properties and business has specifically been mentioned in the petition, it was for the husband to disclose his income which he failed to do.

In Javed v. State of Uttaranchal,306 where there was no documentary evidence to prove the monthly income of the husband, it was held that nowadays, an ordinary labourer who works on a daily wage basis, earns about Rs 150 per day. Hence, the court inferred that the husband’s earning would be around Rs 4,000 per month. On this basis Rs 1,500 was awarded as maintenance to the wife.

In Kishan Dutt Verma v. Baby Parul,307 the husband, a practicing advocate, had a substantial legal practice. In addition, he also worked as an oath commissioner. His total income was assessed to be around Rs 10,000 per month. The court commented that assuming he requires 50 per cent of this amount for himself, it would be appropriate if he pays the balance 50 per cent towards the maintenance of his wife and children. The conduct of the husband during litigation was deplorable. He did not pay the amount
which was ordered by the trial court and his defence was struck down. In this context, the high court made the following observations: ‘The appellant is least concerned about the orders passed by any court and thinks that he can get away by flouting them with impunity. This is unfortunate, in view of the fact that the appellant is an advocate.’

Another criterion that is often relied upon is the standard of living. While the criterion of an able bodied man would come to the rescue of women of the poorer sections, the standard of living criterion will aid the women from the middle and affluent classes. The courts have held that a divorced or separated woman is entitled to have the same standard of living after divorce or separation, as she enjoyed in her matrimonial home. In *Meenu Chopra v. Deepak Chopra*, while awarding Rs 20,000 per month as interim maintenance, the court held that if the husband is wealthy and is leading an opulent life, his wife also has the right to be a partner in his prosperity. To arrive at this figure, the court, *prima facie*, relied upon the averments made by the wife that the husband’s income is around Rs 200,000 per month.

While applying the same standard formula, the courts will take into consideration the immovable property, and income from family business and agricultural property jointly owned by the husband and his family as HUF property, type of residential premises or matrimonial home, memberships to exclusive clubs, number of cars (or other vehicles), and types of cars owned individually by the husband or the entire family, payments made through credit cards, and the electrical and electronic gadgets. These would be fairly good indicators of the lifestyle enjoyed by the husband.

Following are some other rules that have been evolved through judge made laws: Income of the husband from the joint family business should be taken into account to determine the status of the husband and for fixing the quantum of maintenance (*Neelam Malhotra v. Rajinder Malhotra*). If the husband does not disclose the income earned from joint family business (*Dharamichand v. Sobha Devi*) or attempts to conceal his true income (*Jasbir Kaur Sehgal v. District Judge, Dehradun*) adverse inference about the same may be drawn, based on the wife’s pleadings. The husband cannot take advantage of heavy deductions from his salary which is voluntary in nature (*Sawinderjit Singh v. Kuldip Kaur*).

In *Harminder Kaur v. Sukhwinder Singh*, the wife pleaded that her husband owned two businesses and his income was not less than Rs 12,000 per month. Commenting that the wife was entitled to have the same standard of living as her husband, the court awarded Rs 4,800 per month to the wife and Rs 2,400 per month to the child.

In *D. N. Niranjan Kani v. N. Rajee*, the wife was living with her parents and she had no separate income of her own. She was also looking after two minor daughters. The financial and social status of the families was not in dispute and the husband was leading a comfortable life. It was held that to maintain herself in the same standard as her husband, the wife would require Rs 10,000 per month. In addition, the two daughters were awarded Rs 5000 per month each, towards their expenses. In *Sushil Kumar Gupta v. Reena Gupta*, the partnership business in which the husband was involved had a
turnover of approximately Rs 2 crore. He also owned an agency of luxury coaches and cars from where he generated an income of around Rs 4 to 5 crore. The wife was earning Rs 6,000 through a temporary job. The high court upheld Rs 20,000 per month awarded to her as maintenance by the trial court.

In *Indira Sonti v. Suryanarayana Sonti*,\(^{316}\) the husband failed to provide proof of his salary, income, and expenditure. The court awarded US$ 400 per month as reasonable maintenance, and held that in the course of the litigation husband had admitted that his annual savings were around US$ 9000. In *Radhika Rungta v. Vineet Rungta*,\(^ {317}\) the husband was well qualified and gainfully employed in the USA. The court arrived at a presumption that his income would be US$ 70,000 per annum. The court held that even if the income is inferred at a lower level of US$ 50,000 the wife would be entitled to 20 per cent of this amount. Converted into Indian currency it would amount to approximately Rs 5,00,000. The wife was earning a nominal income of Rs 5000. It was held that a person from her social status would require Rs 20,000 per month for meeting routine expenditure. Taking into consideration her own income, she was awarded Rs 15,000 per month as maintenance.

In *Mukesh Mittal v. Seema Mittal*,\(^ {318}\) the court arrived at a presumption that the husband was earning Rs 30,000 by way of rent from eight flats. The husband did not produce his tax returns. The court commented that this factor demonstrates that he was not willing to disclose his true income. But on the contrary, he produced the income tax returns of his wife to prove that she had sufficient income. He also pleaded that the wife is not entitled to maintenance as she is HIV positive, thereby, imputing adultery. It was held that the fact that the wife and the minor daughter are HIV positive cannot be used to deny them maintenance. The wife pleaded that she had contacted the disease through blood transfusion during her pregnancy. She also submitted that the income tax returns, relied upon by her husband, were filed by the husband himself on her behalf and is not a reflection of her own income. The high court upheld the maintenance of Rs 6000 per month to the wife and Rs 4000 per month to the daughter.

In *Sanjay Kapoor v. Meenakshi Kapoor*,\(^ {319}\) the husband approached the high court on the ground that the amount awarded as maintenance was excessive. But upholding the order of Rs 10,000 per month awarded to the wife and child together and litigation expenses of Rs 11,000, the Delhi High Court commented that the district judge was right in disbelieving the husband regarding his averments that his earnings are only around Rs 10,000 per month. The court commented that the husband spends Rs 5,500 per month on house rent, he is the owner of a plot of land, he possesses three FDRs, he is the owner of a Maruti Zen car, and he uses a mobile phone.\(^ {320}\) On this basis, his income was assessed at Rs 25,000.

In *Kiran Sejwal v. Yesh Dev Singh Sejwal*,\(^ {321}\) the husband was residing in the Netherlands and he initiated divorce proceedings at his place of residence. The wife initiated criminal proceedings under Sections 406 and 498A of IPC against the husband, his parents, and relatives. She also filed a petition for restitution of conjugal rights and claimed interim maintenance. She pleaded that the husband was employed as a manager
in a German firm and was drawing more than Rs 1,50,000 per month, and was also running a hotel. His total income was Rs 2,50,000 per month. The husband denied these allegations and also denied that she was his legally wedded wife. He alleged that the woman and her parents had trapped him and his family for greed and sought annulment of marriage. Considering allegations and counter allegations, the background of the families, the status of the parties, the period they had lived together, etc., a sum of Rs 20,000 per month was awarded as interim maintenance to the wife and Rs 10,000 as litigation expenses.

While suppressing income tax returns adverse inference can be drawn, the courts have also held that these are not true indicators of a person’s income and cannot be the sole guide for determining the true income.\(^3\) In *Bharat Hegde v. Saroj Hegde*, it was held that in case of self-employed persons or persons employed in the unorganized sector, tax compliance is an exception and tax avoidance is a norm, and, therefore, in each case the court has to carefully verify whether the income disclosed is truthful and accurate. In this respect, the following observations were made:

Unfortunately, nobody pays proper taxes to the Government. Self employed persons seldom disclose their true income. Prudence and worldly wisdom gained by a judge, before whom citizens of all strata of society litigate, can always be used by a judge to ascertain as to what is going on in society. By no means can the said knowledge be used where the law requires a fact to be conclusively proved. But where the law requires a judge to form an opinion based on a host of primary data, a judge can formulate an opinion pertaining to the likely income from the capital asset of the husband.

The wife pleaded that her husband was the son of an ex-Chief Minister, an industrialist, and co-owner in various properties. The court commented that keeping in view the capital assets owned/co-owned by the husband, his social status, and place of residence it is difficult to believe that he does not have the requisite means to provide his wife a monthly maintenance of Rs 25,000. The husband was also directed to pay Rs 25,000 as cost of litigation.

In *Gaurav Nagpal v. Sumedha Nagpal*, the court upheld the grant of Rs 25,000, which was awarded to the wife as maintenance, on the ground that the amount was not unrealistic or arbitrary. The court commented that there was substantial material to disapprove the income disclosed by husband in his income tax returns. It was noted that the husband had sustainable means and was living a luxurious life. He was residing in a sprawling house while the wife was residing in modest flat along with her parents. The husband was spending around Rs 10,000 per month on his son’s education in a private school. He owned substantial immovable properties, but he did not disclose the details of his assets and income from the HUF property of which he was a coparcener.

In the context of appraising the tax return, it was noted that Sections 56 and 57 of the Indian Evidence Act empowers the courts to take judicial note of all matters of public history, literature, science or arts. Hence, while determining the income, courts can take
into account the social and economic ills, and unethical malpractices prevailing in society. The high court commented that recognition of facts without formal proof is a matter of expediency. The need and wisdom to recognize and accept facts in public knowledge is unquestionable. Relying on *Bharat Hegde* (cited earlier), it was held that the courts in India are conscious of the fact that there is a tendency among parties not to disclose truly, fully, and completely, their income. The amount awarded should be sufficient to enable the wife to live in somewhat the same degree of comfort as was available to her in her matrimonial home. But it should not be exorbitant and so high that the husband is unable to pay and is exposed to contempt or other coercive proceedings.

*S.S. Bindra v. Tarvinder* has introduced another principle of awarding maintenance which is based on percentage of income. The court ordered that 60 per cent of pay and allowance as maintenance to the wife and children, and the husband was allowed to retain the balance 40 per cent. The court discarded the formula that the wife should be retained at the same standard of life which she enjoyed at the time of her severance as being unfair. This would restrict the prayer for maintenance in a mindless manner to what has been made years earlier. It was noted that orders should be passed keeping the present in perspective, and bring about justice between parties. Most often, the courts do not grant exactly what is prayed for, but award an amount which is much less. By that very yardstick the court is also not precluded to grant more, if circumstances warrant the same. The husband had stated that he was drawing a salary of Rs 29,000 per month. But this statement did not inspire any confidence since according to his own admission he was spending around Rs 45,000 per month on himself. The trial court concluded that he is earning a sum of Rs 1,30,000 per month. In order to enable the wife and children to live in the same status in which the husband was living, the trial court awarded Rs 75,000 per month as maintenance and Rs 1,00,000 towards litigation expenses.

While upholding a woman’s right for adequate maintenance, the courts will decline the woman’s claim to a life of luxury. Gradually, the courts are moving away from the concept of a perennially dependent wife incapable of earning a living and have started taking note of the fact that a large number of women are holding responsible positions in the corporate sector and are capable of earning and maintaining themselves. Hence, the woman’s educational qualifications and earning capacity is also kept in view while awarding maintenance.

**Date from which Maintenance is to be Awarded**

Whether maintenance is to be paid from the date of filing or from the date of the order is an issue which vastly impacts the actual amount which a woman will receive since applications are heard several years after they are filed. The earlier norm was to award maintenance from the date of the order, except in exceptional situations. In such a case, the court would use its discretion and record reasons for deviating from the norm. If the husband is guilty of causing undue harassment to the wife, the courts will grant maintenance from the date of application.

For instance, in *Kamal Kishore v. State of UP* the husband had levelled charges of adultery against his wife without proving the same in the court. The Allahabad High Court...
commented that reckless charges of a corrupt life against the wife are levelled without any hesitation by husbands. Such a conduct is incomprehensible and this practice needs to be deprecated. If such charges are levelled and not proved, it cannot be said that the court has fixed maintenance allowance from the date of application without giving appropriate reasons. To discourage such practices, the trial court held that if the charge of adultery could not be proved, then maintenance would be fixed from the date of application. Hence, the wife was awarded maintenance of Rs 350 from the date of application.

In *Ram Nandan Sao v. State of Bihar*, the wife was awarded Rs 500 as maintenance from the date of order. In appeal, the sessions court directed that the amount be paid from the date of application. The husband filed an appeal in the high court contending that the wife is not entitled to maintenance as she is living in adultery and, further, that the amount of Rs 500 was excessive, and that the order directing payment of the amount from date of application was unjust and against the stipulated provisions of law. The court rejected the contentions of adultery and upheld the lower court’s order. However, it held that the sessions court, in revision, had no power to order maintenance from the date of application. The issue of awarding maintenance from the date of application or date of order is left to the discretion of the magistrate.

A contrary view is held in *Nitha Ranjan Chakraborty v. Kalpana Chakraborty*, where there was a delay of seven years in deciding the application. The magistrate awarded maintenance from the date of order, but in appeal, the sessions court reversed it and awarded maintenance from the date of application. But the court did not give a detailed reasoning for the same. While upholding the sessions court order, the Calcutta High Court held that while it was necessary for the court adopting such course to give reasons, the omission to give reason is an act of impropriety and does not render the order illegal.

In *Ameen Khan v. State of Rajasthan*, where a divorce case remained pending for a period of nine years and the minor daughter was suffering as a result of this delay, the court directed maintenance to be granted to the wife from the date of application.

Gradually, taking into account the hardships caused to women and children due to inordinate delays in courts, the judicial approach began to change and, in most cases, the courts started awarding maintenance from the date of application. Over time, this has become a norm, and courts began to hold that if maintenance is awarded from the date of order reasons should be recorded for deviating from the norm.

In *S. Jayanthi v. S. Jayaraman*, the court held that alimony should be decided at the earliest keeping in mind the needs of the wife and maintenance should be granted from the date of application and not from date of order, except in exceptional cases.

In *Deepa v. Nandkishore*, while awarding maintenance from the date of application in a case under Section 125 of Cr.PC, the high court held that since the provision of
maintenance has been enacted for the benefit of the destitute wife and children so as to prevent vagrancy, the circumstances did not warrant a departure from the established norm of awarding maintenance from the date of application. The high court also commented that the trial court had not exercised any discretion and that the discretion of the sessions court in the matter was not sound.

In *Popri Bai v. Treeth Singh*, a case under HMA, the Rajasthan High Court reversed the interim order of maintenance under Section 24 of the Act, which awarded maintenance from the date of order, and held that there is no justification for not awarding interim maintenance from the date of application. The court commented that if the order of the trial court was allowed to stand, it will cause serious prejudice to the wife. In *Fani Bhusan Nanda v. Kshiti Sundari Nanda*, a case under Section 18 of HAMA, it was held that the order of maintenance was effective from the date of application, unless there was contrary direction of the court that it was to be awarded from the date of order.

More recently, in *Shail Kumari Devi v. Krishan Bhagwan Pathak @ Kishun B. Pathak*, it was held that maintenance ought to be granted from the date of application and it is not necessary to record special reasons. Similarly, in *Vinod Kumar Jolly v. Sunita Jolly*, it was held that the normal rule while awarding maintenance under Section 18 of HAMA is to grant maintenance from the date of filing. No reasons have been given by the trial court as to why direction is given to pay maintenance from the date of order and not from the date of filing of the petition. The court commented that if the normal rule is to be deviated, there has to be special reasons for adopting such a course.

While several judgments have endorsed this position, there are still instances where the courts consider that as a normal rule, maintenance should be ordered from the date of the order and only in special situations it can be ordered from the date of application after recording reasons. For instance, in *A. Jairam v. A. Suman*, it was held that interim maintenance can be granted from the date of application only if the same is specifically pleaded. In another recent case, *Gayatri v. Om Prakash*, the Rajasthan High Court held that while granting maintenance from the date of application, the Magistrate ought to record reasons for the same, thereby implying that such an order can be passed only if the facts of the specific case merit it, and if the wife has no other means of income during the pendency of the case. In *Paramveer Singh v. Suresh Kanwar*, it was held that if maintenance is granted from date of application and not from the date of order, reasons are to be recorded by court for the same.

As we can observe from the above discussion, the judicial ambiguity regarding this issue continues. Hence, it is prudent to keep this issue in mind at the time of arguments.

**Non-Compliance of the Order: Defence to be Struck Down**

In the event that the husband refuses to comply with the order of interim maintenance, the court can strike out the husband’s defence, when he is the respondent, or by dismissing his petition, when he is the petitioner (*Ghasiram Das v. Arundhati Das*). In *Bani v. Prakash Singh*, upholding the trial court order of striking down the defence, it
was held that there can be no doubt that the defiant conduct of the husband must be dealt with sternly by dismissing his application, or striking out the defence of the defaulter.

In *S. L. Sehgal v. State of Delhi*,\(^ {342}\) while quashing the petition filed by the husband, the court commented that the multiple proceedings initiated by the husband amounted to abuse of the process of law. By filing one petition after another, the husband had successfully circumvented the order of the trial court directing him to pay maintenance of Rs 250 per month to his wife. It was held that the husband was taking undue advantage of the situation. The court commented that any further indulgence to the petitioner would lead to serious miscarriage of justice, and ordered the husband to deposit the arrears of maintenance.

In *Santosh Sehgal v. Murari Lal Sehgal*,\(^ {343}\) while quashing the appeal filed by the husband, it was held that the failure to pay maintenance to the wife, as awarded by the court, will disentitle the husband from claiming any relief in matrimonial proceedings. It was further held that the appeal against the divorce decree, granted to the husband, can be allowed without giving any opportunity to the husband to defend himself, in the event of his failing to pay interim maintenance and litigation expenses granted to the wife during pendency of the appeal.

In *Mahadevanaika v. Shivakumar*,\(^ {344}\) in a revision petition filed against the order of maintenance, the court granted stay of recovery of 50 per cent of the arrears of maintenance until the disposal of the revision petition, but ordered the husband to deposit the other 50 per cent which was not covered by the stay. But when the husband failed to deposit the said amount, the petition was dismissed by imposing exemplary costs of Rs 5,000. The court commented that the husband used the judicial process only as a ruse to avoid payment of maintenance. The court further commented that the husband, who was economically in a much better position, was taking advantage of his position to harass and deprive the wife and children even of the meagre sustenance that they had secured through the order.

The provision of striking down the defence is available only in civil proceedings and not for proceedings under criminal statutes. The Bombay High Court, in *Vinod v. Chhaya*,\(^ {345}\) (p.197) has held that if the husband defaults in payment of maintenance, the only course open to the court is to issue an arrest warrant under the provisions of Section 125(3) of Cr.PC for levying amount due.

**Wife’s Claim when Husband’s Petition is Dismissed**

When the petition for divorce filed by the husband is either dismissed or withdrawn, the Interim Application and Counter Claim filed by the wife for maintenance does not survive. Any order of Interim Maintenance passed by the trial court will also lapse. The option open for a wife is to file under Section 125 of Cr.PC. A Hindu wife is also entitled to file for maintenance under Section 18 of HAMA.

Before the Supreme Court ruling in *Chand Dhawan v. Jawaharlal Dhawan* (discussed
later), there were conflicting views on this issue between various high courts. The Gujarat, Calcutta, and Allahabad High Courts, had held that the expression ‘any decree’ under Section 25 (provision for permanent alimony and maintenance) of the Hindu Marriage Act, does not include an order of dismissal (Harilal v. Lilavati; Minarani v. Dasarath; Vinod Chandra Sharma v. Rajesh Pathak). But the Bombay High Court, in Shantaram v. Hirabai and Modilal Kalaramji Jain v. Lakshmi Modilal Jain had held that the term ‘any decree’ used in Section 25 of the Act would include an order refusing to grant a matrimonial relief.

This position was overruled by the apex court in Chand Dhawan v. Jawaharlal Dhawan. The Supreme Court clarified that the claim to permanent alimony under Section 25 of HMA is based on the principle that there is a disruption of the marital status. Since the court is seized of the matter of deciding the marital status of the parties, it also acquires the power to invoke its ancillary or incidental power to grant permanent maintenance or alimony. The court also retains this power subsequently, to modify its own order when an application is moved by either of the parties, in view of changed circumstances. Thus, the entire exercise is within the gamut of a marriage that has broken down. But if there is no divorce or any other decree, the wife is entitled to live separately, but her claim for maintenance does not lie within the scope of HMA. The wife’s claim of maintenance has to be agitated under the Hindu Adoptions and Maintenance Act, 1956. Subsequently, in Vishnu Mayekar v. Laxmi Mayekar, the Bombay High Court followed this ruling and held that when a petition for divorce is dismissed, maintenance under Section 25 of HMA cannot be granted. The remedy for the wife lies under Section 125 of Cr.PC or under Section 18 of HAMA.

Rather ironically, the position upheld by the Supreme Court causes more hurdles in the path of women claiming maintenance and also leads to multiplicity of proceedings. There are instances where the husbands withdraw the petition for divorce filed by them when an order of interim maintenance is passed in favour of their wives, only to defeat the women’s claims. Women are then left with no other choice but to initiate fresh proceedings, either under Section 125 of Cr.PC or under Section 18 of HAMA, which causes considerable hardships, monetary burden and delay.

**Execution Proceedings**

Execution of an order of maintenance is next in priority only to securing a favourable order. Without stringent and viable enforcement machinery, the order obtained through a strenuous ordeal and prolonged litigation will remain as a paper decree without any relevance or significance to women’s lives.

When the person against whom a maintenance order has been obtained defaults in payment or does not comply with the order, the claimant will have to initiate yet another legal proceeding to execute the decree or enforce the order. At this stage, the court battle starts all over again, to the utter dismay of women (or children, or parents, as the case may be). The procedures for enforcing a civil and a criminal order of maintenance are not identical. There is a slight variation between the two. The orders obtained, under the HMA and HAMA, are orders of a civil nature, while the order under Section 125 of
Cr.PC is of a criminal nature.

In civil proceedings, the order of maintenance can be executed by attaching the salary, or attachment and sale of moveable or immovable property. The order under Section 125 Cr.PC can be enforced by an arrest warrant and imprisonment. The attachment of salary becomes the most feasible and certain way of ensuring payment of arrears of maintenance for the salaried class. Maintenance can also be a charge on property. But the courts have held that a decree restraining the defendant from alienating the property is not valid (P.M. Devassia v. Ancy). 351

In Rukhsana Kachwala v. Saifuddin Kachwala, 352 the husband agreed to pay a sum of Rs 2,00,000 as divorce settlement, but defaulted in payment. In order to ensure execution of the decree, the court held the plaintiff as decree holders and held that she was entitled for the appointment of a receiver and the sale of the husband’s shop. In Bina Majumder v. Ranjit Majumder, 353 the subsistence of divorce proceedings instituted by the husband, who was a Class IV Government employee, was stayed for non-compliance of the order of interim maintenance and costs of litigation. In execution, the court ordered salary attachment. In Rajendra Prasad Paul @ Rajendra Pal v. State of Jharkhand, 354 the court issued directions to deduct the arrears of maintenance from the husband’s G.P.F. (General Provident Fund) account and deposit the same in the name of the wife and child.

In Abdus Sovan v. Rokia Bibi, 355 it was held that the mere filing of an application for setting aside an ex parte order of maintenance cannot be used as a ground to grant the stay on execution proceeding.

In Mani v. Jaykumari, 356 the Madras High Court has held that future salary can be attached. The husband had challenged the order of attachment on the ground that future salary cannot be attached. But the high court held that under both the Civil Procedure Code as well as the Criminal Procedure Code, the courts have the power to attach future salary. The court cryptically commented that the law cannot expect a destitute woman to approach the court each month for execution of the monthly maintenance which is due to her.

The liability of the husband to comply with the maintenance order does not cease upon the death of the husband. It can be executed against the legal heirs. The Supreme Court in a leading case, Aruna Basu Mullick v. Dorothea Mitra, 357 held that the assets left behind by the husband are liable to be proceeded against in the hands of his legal heirs for satisfaction of the decree for maintenance.

In Nagamma v. Ningamma, 358 it was held that there is no rationality in the contention that a decree for maintenance or alimony gets extinguished with the death of the husband when any other decree, even though not charged on the husband’s property, does not get so extinguished. It is one of the settled principles of interpretation that the court should lean in favour of sustaining a decree and should not permit the benefit under the decree to be lost, unless there are special reasons for it. If the husband has left behind
an estate at the time of his death, there can be no justification for the view that the decree is wiped out and the heirs would succeed to the property without the liability of satisfying the decree. The decree indicates that maintenance was payable during the life time of the widow. To make such a decree contingent upon the life of the husband is contrary to the terms and the spirit of the decree.

In *Pavitra v. Arun Varma (Decd.) Through L.Rs.*, the court commented that the tendency of closing proceedings abruptly, without due application of judicial mind, needs to be abandoned and sincere efforts need to be made for invoking the relevant legal provisions in aid of the poor litigants who are approaching the courts for enforcements of their rights.

In case the order cannot be executed by way of salary or property attachment, it is also possible to obtain an order of imprisonment. The only snag in pressing for civil imprisonment is that the claimant is expected to pay for the cost of this imprisonment. This stipulation renders the remedy, to enforce the maintenance orders passed by the court, out of reach of poor women who are already burdened with complicated litigation to enforce the orders. This is a travesty of justice. In this context, the remedy under Section 125 of Cr.PC appears to be more feasible, especially after the ceiling has been removed since the imprisonment under this provision is governed by criminal law and hence the applicant is not under the burden of bearing the cost of imprisonment. It becomes the responsibility of the state to bear this expense.

But apart from execution proceedings provided for under Section 18 of HAMA the petition can also approach the court in contempt proceedings. In *Amita Devnani v. Bhagwan Devnani*, the Bombay High Court held that non-payment of maintenance amounts awarded under Section 18 of HAMA amounts to Contempt of Court and hence the power of the court for exercising the alternate remedy of imprisonment under the Contempts of Court Act to recover the amount is not ousted. The high court commented: ‘The conduct of the husband is so reprehensible that the same deserves imposition of maximum punishment provided by law. There was no reason for the husband to drag the proceedings for so long without offering even a single rupee till now. The attitude of the husband was that he shall not pay any amount to the petitioner even if it is in utter disregard of the order of the court.’ But while imposing the sentence, the court expressed some leniency and varied the order for 60 days, with directions to the husband to clear the arrears within the stipulated period, failing which the order of civil imprisonment of six months would become operational.

The power of the criminal court to arrest in execution proceedings acts as a deterrent against non-payment of maintenance. But the power is curtailed by the stipulation under 125(3) of Cr.PC which lays down that a magistrate can order imprisonment of only one month. In *Shahida Khatoon v. Amjad Ali*, the Supreme Court held that the language of Section 125(3) is quite clear and it circumscribes the power of the magistrate to impose imprisonment for a term which may extend to one month or until the payment, if sooner made. But for a further breach of the order, the claimant can approach the Magistrate again for a similar relief. This ruling was followed by
various high courts—the Punjab and Haryana High Court in Angrej Singh v. State of Punjab,\(^\text{362}\) the Andhra Pradesh High Court in Abdul Gaffaar v. Hameema Khatoon,\(^\text{363}\) and the Madras High Court in Mahboob Basha v. Nannima.\(^\text{364}\)

The Kerala High Court, in Alora Sundaran v. Mammali Sumathi,\(^\text{365}\) has given a different interpretation to the provision as well as to the Supreme Court ruling in Shahada Khatoon (discussed above). R. Basant J. of the Kerala High Court commented:

The statutory provisions under Section 125(3) of Cr.PC make it very clear that one month’s imprisonment is the maximum imprisonment for each month’s default at each time. This must lead to the inevitable and unmistakable conclusion that each month’s default would be visited with the maximum sentence of one month’s imprisonment. The mere fact that the destitute has not chosen to complain every month and has chosen to complain of the breach in respect of plurality of months in one petition within a period of twelve months, cannot at all deliver to the defaulter any undeserved advantage. On the face of it, the contention appears to me to be illogical, irrational, and unreasonable. It is obviously unacceptable and unsustainable. The policy of law cannot be to compel such claimants to come to court with separate petitions for each month’s default. That would be totally an unreasonable manner of approaching the question.

The Supreme Court was obviously not considering the question whether more than one month’s imprisonment can be awarded for breach of the direction to pay maintenance committed in respect of more months than one. I cannot accept the suggestion only because many Family Courts/Magistrate’s Courts have chosen to follow this interpretation. It would be myopic and puerile to hold that the Supreme Court said so. This position goes against the policy of law and specific stipulations. Precedents cannot be read or understood ignoring the specific language of the statutory provisions. The interpretations which the Petitioner’s (husband’s) counsel wants to place on Shahah Khatoon is unacceptable for the reason that the same suffers from that specific vice.

The court gave the following formula regarding imprisonment:

If there is no payment of maintenance due for ‘n’ number of months, the defaulter in one Execution Petition can be sentenced to imprisonment up to a maximum of ‘n’ months, provided ‘n’ does not exceed twelve.

If there is a breach of payment of maintenance due for one particular month – notwithstanding the fact that such payment was not made for ‘n’ months from the date on which it became due, the defaulter can be sentenced only to a maximum imprisonment for one month and not ‘n’ months. Even when the breach in respect of one particular month continues for any length of time, the maximum sentence for breach of the liability to pay one month’s maintenance continues to be one month only.
Under Section 125(3) of Cr.PC, if the husband defaults in payment of maintenance, application for issuing warrant for recovery must be filed within one year from the date on which the amount became due. Recovery applications for more than twelve months cannot be filed and the amount would lapse if the applications have not been filed within the prescribed time frame.

**However,** if the application has been filed within this time frame and was pending in court, then the amount would not lapse. The applicant can also file interim application for mentioning the amounts which have subsequently become due while the original application was pending in court. The Supreme Court in *Shantha @ Ushadevi v. Shivnanjappa*, has held that such subsequent applications are only supplementary or incidental to the application already filed within the period of limitation. The Allahabad High Court followed this ruling in *Dilshad Haji Risal v. State of UP*, and held that arrears of 41 months, which had become due, are not barred by limitation as the first application was still pending in court.

In *Diksha Rani v. Deep Chand*, despite the imprisonment the husband did not comply with the order. The husband tried to evade service and did not appear in court during subsequent proceedings. But when the wife could not be present, the revision court dismissed her application for default. While quashing this order, in an appeal filed by the wife, the high court of Punjab and Haryana commented: The husband, though aware of the present proceedings pending against him, was deliberately not appearing before the court. The husband is violating the orders of the court. If this approach is allowed, it would effect the administration of justice. The revision filed by the wife was dismissed in default for non-prosecution as she could not appear when the case was called out. This has resulted in injustice to the wife and child and cannot be justified. The technicalities cannot be allowed to stand in the way of administration of justice. The revision court was bound to consider that this was a case where a wife and a young child are fighting for their survival. The lower court was directed to secure the presence of the husband, in a manner considered appropriate, including taking him into custody to ensure that he would comply with the directions passed by the high court.

In *Padmo v. Surat Ram*, it was held that the power to execute the order of maintenance lies with the judicial magistrate. The gram panchayat does not have the power to issue warrants for default in payment of maintenance dues.

Though, the law provides for imprisonment as a deterrent against default in payment, there are cases where a husband may choose the option of imprisonment rather than paying maintenance to his wife and children. Seeing through such manipulations, the Gujarat High Court in *Bhavanaben Shamhjuvhai v. Dinesh Premjibhai Kapadia*, has held that even when the husband has undergone imprisonment, the amount which is due does not become irrecoverable. Warrant for attachment of properties for accumulated arrears of maintenance can be issued. Similarly, in *Rayinkutty v. State of Kerala*, it was held that for non-compliance of the order for payment of a reasonable and fair settlement to a Muslim wife, the husband can be imprisoned. But this will not absolve him of the liability of paying the amount which is due.
Before concluding this section, I feel constrained to elaborately profile three cases which are briefly mentioned above, to highlight the ordeal that women have to endure while enforcing their legal right ofittance of maintenance amounts. The detailed history provides the timeframe of the winding court battle, but the law reporters do not provide an insight into (p.202) the costs incurred in this winding legal battle. That is left to the imagination of the reader.

In the Shantha @ Ushadevi v. B.G. Shivananjappa case, the wife filed for maintenance for herself and her daughter in 1991 and by an order dated 20 January 1993, the trial court awarded Rs 500 per month to her and Rs 300 per month to her daughter. When the husband defaulted, the wife filed execution proceedings under Section 125(3) of Cr.PC for arrears of Rs 5,363 from the date of the order to 31 August 1993. The husband filed criminal revision application before the Sessions Judge, Tumkur, against the order passed by the trial court, which was dismissed on 26 June 1997. The appeal filed by the husband against this order in the Karnataka High Court was also dismissed. Thereafter, the wife filed an Interim Application for arrears of maintenance from 20 January 1993, that is, the date of the trial court’s order till the date of filing the Interim Application, that is, 16 June 1998, for the sum of Rs 46,000.

The husband deposited a sum of Rs 5,365 towards the maintenance from 20 January 1993 till 31 August 1993. But he objected to the wife claiming Rs 46,000 on the basis that arrears beyond the period of one year cannot be claimed due to the stipulation under the first proviso to Section 125(3) of Cr. PC. Upholding this contention, the trial court dismissed the Interim Application filed by the wife on 13 July 2000 on the ground that it is barred by limitation. The wife challenged this order before the Sessions Judge, Tumkur. The criminal revision petition was allowed by the Sessions Judge by an order dated 23 November 2002, and the matter was remanded back to the trial court.

The Sessions Judge observed that since the first Interim Application was within limitation, there was no need of filing a fresh petition during the pendency of the application under Section 125(3) of Cr.PC for maintenance which had fallen due for the period post this application. It is implicit in the powers of the court to make an order directing the husband to make payment of arrears of maintenance up to the date of the decision while disposing of the first Interim Application for recovery of arrears of maintenance. The Sessions Judge commented that it is not required to file a fresh application which may lead to multiplicity of litigations.

The husband challenged this order in 2003 before the Karnataka High Court. On 11 March 2004, the high court allowed the criminal revision and set aside the order of the Sessions Judge and held that the application for claiming arrears of Rs 46,000 was barred by limitation. Aggrieved by this order, the wife approached the Supreme Court by way of a Special Leave Petition which was decided on 6 May 2005, in her favour. The court held that such subsequent applications are only supplementary or incidental to the application already filed within the period of limitation. By then 14 years had elapsed since the woman concerned had first approached the court for maintenance.
In *Dilshad Haji Risal v. State of UP,* the wife Smt Hazara Begum had approached the magistrate’s court for maintenance for herself and her two children under Section 125 of Cr.PC on 20 May 1999. Through an *ex parte* order dated 27 July 2000, maintenance of Rs 1,500 per month for three persons was awarded from the date of the application. The husband did not comply with the order and the wife filed execution proceedings on 28 August 2000 for recovery and a warrant was issued against the husband for Rs 22,500 for the period 20 May 1999 to 20 August 2000. Since the husband did not comply with the directions of the court, the husband was imprisoned for one month. Thereafter, the wife filed another application on 13 February 2004 for execution of Rs 61,500, being the amount payable to her for 41 months, for the period between 21 August 2000 to 20 January 2004. The husband filed an objection to this application on 21 July 2004 contending that the claim for Rs 61,500 was time barred as the application was filed after one year of its becoming due. Also, since he was imprisoned for the amount which was due earlier, this matter could not be re-agitated. He also submitted that he was willing to reconcile with his wife and maintain his wife and children. Overriding his objections, the Magistrate directed that a recovery warrant be issued against the husband for the maintenance amount due for the period of fifteen months from 20 May 1999 to 20 August 2000 for Rs 22,500. The husband approached the Allahabad High Court for quashing this order under Section 482 of Cr.PC.

By its order dated 12 September 2005, the high court allowed the appeal and remanded the matter back to the Magistrate’s court to consider the offer made by the husband to take back the wife and maintain her and, if necessary, uphold the wife’s right to refuse such offer when there is just ground for doing so. If the wife gives adequate reasons for refusing to live with her husband, she would not be deprived of her right to maintenance. The court also commented that awarding a sentence of imprisonment is no substitute for the recovery of the amount of monthly allowance which is due to the wife. The court also held that the application for arrears of 41 months was not barred by limitation when the first application was still pending.

In *Padmo’s case,* the wife had approached the Court of Additional Chief Judicial Magistrate, Theog, on 7 May 1996 for maintenance for herself and her three minor children. On 5 June 1996, the Magistrate referred the matter to the gram panchayat, Basa, Tehsil Theog, District Shimla. The gram panchayat, on 6 June 1997, awarded Rs 300 per month each to the wife and the eldest child, and Rs 200 per month each for the younger two children, a total of Rs 1,000 per month.

Since the husband did not comply with this order, the wife filed for execution of the order and for payment of arrears of Rs 3,400 for the period 7 May 1996 to 7 September 1996. The gram panchayat issued notice to the husband to deposit the arrears of maintenance within ten days, failing which the matter would be transferred to the court of the Judicial Magistrate. Since the husband did not appear before the gram panchayat, the application was forwarded to the Judicial Magistrate, Theog, for execution.

The husband did not file his reply. Thereafter, the matter was referred to the Lok Adalat
on 18 July 1998, with the hope of some amicable settlement. But since the matter did not get resolved, on 3 March 1999, the Sub-Judge took up the matter. After hearing both the parties on 10 May 1999, he sent the matter back to the gram panchayat for execution. He commented that there was no provision in law for the Gram Panchayat to send the file to his court for execution. The gram panchayat did not take any further action in the matter.

So the wife again filed an application under Section 125 Cr.PC in the court of the Additional Chief Judicial Magistrate, Theog, on 9 April 1999 on the ground that since the earlier order passed by the panchayat could not be executed, a fresh order of maintenance may be passed. The husband opposed this application on the ground that since the earlier order existed, a fresh order could not be passed. After recording evidence of the parties, on 17 July 2001, the Additional Chief Judicial Magistrate upheld the husband’s contention and held that the fresh application was not maintainable as the previous order passed by the panchayat still existed and the petitioners have not assailed the same. The wife challenged this order in the high court.

On 12 April 2002, the high court passed the following order: If after issuance of notice by the gram panchayat, the defaulter does not come forward to pay the amount, it is difficult for the gram panchayat to execute the order of maintenance, and the only course left for it is to forward the order of maintenance for execution to the judicial magistrate in whose jurisdiction it is situated. The gram panchayat had rightly forwarded its order of maintenance for execution to the Additional Chief Judicial Magistrate, Thoeg. While he took cognizance of it in his capacity as Sub-Judge, he wrongly passed the order that the gram panchayat had no powers to forward the order of maintenance passed by it for execution to his court. Even while passing the second order dated 17 July 2001, dismissing the second petition, the Additional Chief Judicial Magistrate, has not cared to examine the provisions of law, with the result that the petitioners even after obtaining the order of maintenance in their favour, as far back as on 6 June 1997, could not get a penny as maintenance from the husband and the very purpose of the provision of Section 125 of Cr.PC is defeated. In this view of the matter, the orders dated 10 May 1999 and 17 July 2001 are set aside, and the Additional Chief Judicial Magistrate, Theog, is directed to execute the order dated 6 June 1997, passed by the gram panchayat in accordance with law and the observations made hereinabove. Since the matter is pending for more than four years, the said court is directed to expedite the matter and provide justice and succour to the hapless wife and children, left in the lurch by the husband to fend for themselves.

The high court also directed that a copy of the judgment should be placed before the Honourable Chief Justice for considering the desirability of circulating a copy of this order to all the Judicial Magistrates in the state to avoid such lapses from occurring in future.

At the end of this ordeal, it is left for our imagination to guess whether any of the three women whose ordeal is recorded here were able to secure the amounts which were ordered as maintenance for their bear survival.
Modification of Orders

Maintenance orders are not orders of a final nature. If subsequent circumstances so warrant, either of the parties can approach the courts for modification of the order. In *Sharda Devi v. State of Bihar*, it was held that Section 127 of Cr.PC confers a statutory right to claim enhancement of the original amount awarded under Section 125 Cr.PC subject to the person concerned satisfying the court of the change in circumstances from when the original order was passed.

Increase in expenditure towards the children’s education, woman’s own loss of job or inability to earn, the demise of her parents who were providing financial support to her, a substantial increase in the husband’s income, etc., are factors which the court will consider while ordering enhancement of the maintenance amount that has been awarded to the wife. The court will also bear in mind the inflation and the cost of living index and decrease in the value of rupee, so that there may not be such a situation that while the maintenance and litigation expenses remain static, inflation may erode its money value (*Lata v. Civil Judge, Bulandshahr*).

The wife securing permanent employment or increase in her earnings, wife’s remarriage or living in adultery, the son attaining majority, the marriage of the daughter, loss of job or significant lowering of his own income, his retirement, illness or old age are circumstances which would entitle a husband to approach the court for a reduction in the amount of maintenance ordered, or even for cancellation of the order. Husband’s remarriage is not a condition which would warrant cancellation of the order of maintenance awarded to the earlier wife. But the increase in the number of dependents may be a factor that the courts may consider while hearing the application for modification of the order.

If lump sum amounts are awarded to the wife as divorce settlement, the same cannot be rescinded if the divorced woman subsequently remarries (*Nanigopal Chakravorty v. Ranubala Chakravorty*). Similarly, in *Rohtash Singh v. Ramendri*, and *Sanjeev Kumar v. Dhanya*, the courts have explained that a maintenance order cannot be rescinded on the ground of post-divorce adultery.

In *Rajashree R. Dixit v. Rajesh Nagesh Dixit*, alteration of maintenance amount on the basis of change in employment of husband was held to be maintainable. In *Bibhuti Bhushan Pandey v. State of Jharkhand* the family court had enhanced the maintenance awarded to the wife and daughter from Rs 800 per month to Rs 2,000 per month, based on the wife’s contention that the husband is earning Rs 12,000 per month as a teacher. The husband’s contention was that the enhanced amount was on the higher side as he is earning only Rs 8,301 and he has to maintain his parents and three children from his first wife. The Jharkhand High Court held that the submission is without substance. On account of inflation in expenditure, the wife and daughter are entitled to the enhanced maintenance as ordered by the family court. In *Narayan Das v. Gita Rani Das*, while enhancing the maintenance awarded to the wife, the court held that rise in cost of living, increases in earning of husband, etc., are circumstances which would
warrant an increase in the maintenance amount awarded under provisions of Section 127 of Cr.PC.

In Lalita Rani v. Jagdish Lai, the wife challenged the order which awarded Rs 3,500 per month as maintenance to her and her two children. The daughter, though a major, was still dependent as she was studying in college. The son was in tenth Standard. The wife contended that her husband was working in the public sector and his income had doubled from Rs 10,000 per month to Rs 22,000. She pleaded that the sum awarded is inadequate to meet the needs of maintenance and educational expenses of her children. The high court enhanced the amount to Rs 10,000 and held that reasonable expenses for sustenance and for the care, maintenance, and education of children living with her, constitute important factors which the courts cannot ignore, while the husband’s expenditure had decreased and his earnings had increased. On the other hand the wife had to spend more for maintenance and care of her children. Prices of all essential commodities had doubled in the last seven years since filing of her petition. The trial court attached overwhelming importance to what, perhaps, at best could be one factor, that is, residence of the wife in disputed premises claimed by husband’s mother. This factor could not have clouded the court’s approach in appreciating facts in the proper perceptive. The court cannot ignore the obligation of husband to maintain his wife and children.

In Vinod Kumar Rai v. Manju Rai, the daughter was around 16–17 years of age. The court commented that provisions would have to be made for her marriage in addition to the cost of education and living expenses. The high court held that the amount awarded by the trial court that is, Rs 500 for the daughter and Rs 1,500 for the wife was meagre and increased the amount to Rs 2,500 each, for the wife and daughter. The court also directed the husband to bear the expenses of marriage of his daughter when the time came. The court commented that the unjustified and baseless accusations of infidelity hurled at the wife constitute cruelty which would justify the wife’s demand to live separately and receive maintenance.

In Prem Prakash v. Nirmal, the Delhi High Court held that the plea of the husband to modify the maintenance order on the ground of change of circumstances was rightly rejected by the trial court. An order of maintenance of Rs 5,000 was subsisting for fifteen years. The husband had made several unsuccessful attempts to have the order varied, including approaching the Supreme Court. The husband contended that the wife had remarried and the daughter did not bear his name. There was also discrepancy in the date of birth of the daughter. The high court held that the husband’s conduct was calumnious, in constantly questioning parentage and legitimacy of child, and such conduct can hardly be appreciated. The High Court commented that the trial court rightly agreed with the contention of the wife that the child’s father was shown as the maternal grandfather since there was a threat of constant harassment by the husband. This possibility cannot be ruled out, having regard to the history of the case. The issue of a wrong date of birth was unnecessarily highlighted by the husband and the trial court had rightly held it to be a mistake. As regards change of appellants’ finances, the trial court
was rightly sceptical about his claim since he had not disclosed his assets or produced any documentary evidence whatsoever.

In *Sirivella Rao v. Sirivella Gnanamani*, the income of the husband, working in a petrol pump, was Rs 2,400 per month. The husband had to look after his aged parents and himself. Maintenance granted by trial court was reduced to Rs 400 per month each, to wife and children from Rs 1,500, as granted by the trial court. In *Satish Kumar Singh v. State of Bihar*, the wife and four minor children were living separately and the husband was not maintaining them. The husband submitted that he was ready to accept the wife and the children and maintain them but the wife was not willing to live with the husband. His only source of income was from giving private tuitions. In view of this, the amount of maintenance was reduced from Rs 1,400 per month to Rs 1,000 per month, Rs 300 for the wife and Rs 175 per month for each child.

Remarriage of the divorced wife is a factor to be considered for varying the maintenance order. In *Tapash Kumar Paul v. Soma Paul*, it was held that there was no proof that the wife was living in adultery with another person, which disqualified her from getting maintenance. The wife was driven out of the matrimonial house and the husband had neglected to maintain her. But based on the husband’s earning, the court reduced the amount of maintenance from Rs 1,000 per month to Rs 500 per month. It was held that the wife is entitled to receive this amount as maintenance till the date of her remarriage. The court further commented that Section 127 nowhere lays down that it was the duty of the wife, after her re-marriage, to approach the court to alter or cancel the order of maintenance. The aggrieved person, against whom the order of maintenance is passed, should move the court for alteration, modification, or cancellation of the maintenance order due to change of circumstances. There was no question of refund of Rs 14,000, approximately, obtained by wife as maintenance from petitioner with interest. The wife was expected to live happily with her present husband without any disturbance and the husband ought not to claim the balance amount. In *Gomti v. Ramanand*, the same point was reiterated and the court held that the divorced woman is entitled to maintenance until her remarriage and the burden lies on the husband to prove that the wife has re-married.

**Section C: Right to Matrimonial Home and Property**

Two distinct rights which are implicit in the marriage contract are the right to reside in the matrimonial home and the right to a financial settlement at the termination of marriage are examined here. While maintenance is also an economic right, it is a conditional right contingent upon a person’s need or ability to sustain oneself. A person capable of supporting oneself is not entitled to maintenance. In this context, the right to reside in the matrimonial home and a right to financial settlement, or division of assets at the termination of marriage, are crucial economic rights. While maintenance can be viewed as a sustenance ‘dole’ for basic survival, which the prevailing social conditions necessitate, matrimonial home and property can be construed as ‘rights’ which would economically empower a woman and redeem her from the situation of perpetual dependency.

During the later half of the last century when divorce laws became more lax, most
countries enacted laws which would economically empower women at the time of divorce. But this issue seems to have escaped the attention of legislators and law reformers in our country during the corresponding period.

The right of residence in the matrimonial home is a crucial right of survival for most married women and is implicit within the contract of marriage. But, since this right was not statutorily protected, a husband could, at his whim, drive the wife out of the domestic residence. Devoid of statutory protection, the right hinged upon astute lawyering, sympathetic and sensitive judges, and stray innovative judicial pronouncements. Women’s groups in India had been campaigning for several decades for a specific law which would protect this right. Finally, under the Protection of Women from Domestic Violence Act, 2005 (PWDVA), this right was awarded statutory recognition under the notion of a shared household.

However, the right under the PWDVA is of a limited nature and does not give the woman title or interest in the property. It also does not protect the woman against third parties (for instance, the landlord). It is also difficult to enforce after divorce since divorce severs the marital bond.

Lowe and Douglas (1998: 134) explain that there are two interrelated issues within the notion of the matrimonial home, ownership and occupation. The first is in whom are the legal and beneficial interests in the property vested (p.208) and, the second, what rights of occupation does each party have in the home, irrespective of ownership. While PWDVA addressed the second concern, the first had remained dormant during the campaign.

In order to expand the scope of economic rights upon divorce, there is a need to evolve the concept of matrimonial property. Since marriage is not viewed as an ‘economic partnership’, on marriage a woman does not acquire any rights in her husband’s property and, hence, she is not entitled to claim division of assets at the time of divorce. The only relevant factors for determining property claims are title and financial contributions. Hence, the property acquired by the husband is treated as his exclusive property. Our matrimonial statutes do not award any recognition to a woman’s non-monetary contribution to the domestic household during the subsistence of the marriage. The contribution of the wife in creating family assets, through her unpaid labour by performing her domestic duties, is not considered a relevant factor for determination of her share in these assets.

In this respect, India lags far behind most other countries which award recognition of a woman’s contribution to creating family assets and, hence, have evolved detailed guidelines for determining a woman’s share in the matrimonial property. Since this is an emerging aspect of family law, it is included here for conceptual clarity and legislative interventions.

Right to Matrimonial Home

Concept of Matrimonial Home Under English Law
Concept of Matrimonial Home Under English Law

Since our legal maxims are derived from English common law and Anglo-Saxon jurisprudence, it would be relevant to have an overview of the development of these rights under the English law as it provides some important markers.

The English women had to carry out long and sustained campaigns for their right to own property, for a share in the matrimonial property, and for the right of residence in the matrimonial home. As discussed earlier, until the mid-nineteenth century, married women in England did not have a right to divorce and they had no right to own property. According to the Blackstonian principles then prevailing in England, after marriage, the woman lost her right over her own property. Marriage virtually meant a legal death for the woman. The husband became the custodian of her person and her property, and he could deal with it as per his own whims and fancies.391

During the mid-nineteenth century, through the enactment of the Matrimonial Causes Act of 1857, English women were awarded a limited right of divorce under certain stringent conditions.392 But this enactment did not determine women’s right to separate property even after divorce. So during the later decades, along with the suffragette movement which demanded the right to vote for women, they also raised the demand for legal recognition of their right to own property. As a response to this campaign, the first enactment was passed in 1872 which was titled the Married Women’s Property Rights Act, which awarded rights over their separate property for women who were divorced or legally separated. This was a limited right over their separate property acquired after divorce/separation and did not alter the situation of women while the marriage was subsisting. This was followed by another (p.209) legislation with a similar title, the Married Women’s Property Rights Act, 1882, which slightly improved the position of married women. But from then onwards, a series of legislations were enacted which further strengthened the married women’s right to property. Finally, in 1935, the difference between a married and an unmarried woman was abolished and married women became full owners of their own individual property, even during the subsistence of their marriage. Through this enactment, the Blackstonian principle that women are the property of their husbands and they are not entitled to hold property in their name during the subsistence of their marriage, was finally laid to rest.393

Just when one set of problems were resolved, women were confronted with another. These were difficult years of recession and war. A large number of women had to forsake their traditional role as housewives or non-earning members of their households and enter the organized labour force. This enabled them to earn a separate income during their marriage. They were no longer the dependent wives, but were earning members of their families and, in this capacity, contributed to the family income. But, since the matrimonial home was owned by the husband, he could dispossess her. She had no remedy against such dispossession. After the war, the social and economic climate changed. Property ownership increased, with purchases being made with the aid of mortgages. Property prices escalated and divorce rates spiraled. The combination of these factors resulted in a great deal of litigation around the primary asset, the family home. This brought into focus the injustice caused to women through the application of
strict rules of property ownership and the doctrine of separation of ownership, as between the spouses. Traditionally, the claim depended upon which spouse had paid the mortgage bills, since only payment towards the purchase of the property would determine ownership.

But Lord Denning, a legend in his own time and a champion of women’s rights, pointed out that it may be purely a matter of convenience as to which spouse pays off the mortgage and which one pays the other household expenses (Lowe and Douglas 1998: 135). The credit for evolving a revolutionary concept of the deserted wife’s equity must be attributed to him. He firmly believed that it was his duty to dispense justice rather than merely adhere to legal technicalities. In November 1947, barely three years after he was appointed as a High Court Judge, while he was sitting as Kings Bench judge, he delivered the first historic judgment in a case titled *H v. H.*\(^{394}\) As was the established pattern, the matrimonial home was in the name of the husband. He had lived there with his wife and an invalid son. During the war, the husband left his wife and went to live with another woman. The wife obtained a maintenance order against her husband on the basis that she would go on living in the matrimonial home along with the son. The husband approached the wife for a divorce with the following conditions: ‘I’ll give you the house, if you will give me my freedom.’ The wife declined and the husband initiated proceedings for possession of the house.

The house belonged to the husband and the wife did not even have the status of a tenant. Hence, she had no legal remedy against dispossession by her husband. Invoking Section 17 of the Married Women’s Property Act, 1882 (MWPA), which stipulated that ‘in case of any dispute between a husband and wife as to the title or possession of property, the judge might (p.210) make such order as he thinks fit,’ he protected the woman’s right of residence as against the husband’s title to the property. This was a historical ruling which turned the tide in favour of women and became a legal precedent (Heward 2003: 49-50).

While the right of residence was getting established, at least against the husband, a newer situation arose which brought in further complexities. Between husband and wife, the 1882 Act worked well, but difficulties arose when the interests of third parties were affected. If the husband went bankrupt, his creditors could dispossess the wife from the matrimonial home. The wife had no protection against the creditors. After the war, it had been established that where the husband owned the matrimonial home and was living there with his wife, he could not turn her out. Lord Denning held that a deserter husband could not be placed in a better position than if they were living together by taking advantage of his own wrong, that is, desertion. The husband’s duty was to provide the wife with a roof over her head, and by providing a matrimonial home he gives her the authority to be there. In law, a deserted wife has an irrevocable authority to remain in the matrimonial home. This authority is revocable only by a court.

In *Bendall v. McWhirter*, the husband was the owner of the house, where he lived with his wife and children. He deserted the wife but before he left, he assured her that she could have the house and furniture. Later, he went bankrupt and his trustees in
bankruptcy proceeded to sell the house and divide the proceeds among the creditors. To get the best price they wanted to sell with vacant possession, but the wife refused to leave the house and the trustees in bankruptcy brought an action for possession against her. When the County Court passed an order in favour of the creditors for possession, the wife appealed to the Court of Appeals. In 1953, Lord Denning, who heard the appeal as part of a three-Judge Bench, reversed the order and held that a deserted wife in occupation of the matrimonial home had a personal license, revocable only upon the husband obtaining an order under Section 17 of the 1882 Act. Her right of residence does not come to an end automatically on the husband’s bankruptcy. The trustee in bankruptcy takes subject to equities. Therefore, he takes subject to the wife’s right in equity (ibid.: 50).

From then onwards till 1965, through a series of judgments, he further consolidated the position of the deserted wife. In 1956, the Royal Commission on Marriage and Divorce held: We think it has been right to afford this protection to a deserted wife, to allow her to keep a roof over her head; it would be shocking to contemplate that a husband could put his wife and children into the street, so that he could himself return to live in the house, perhaps with another woman (ibid.: 51).

In a later judgment delivered in 1962, *Hine v. Hine*, Lord Denning ruled that family property had to be treated differently from other forms of property. Expanding the scope of the controversial Section 17 of MWPA, he held that this provision was not merely procedural in nature, but in fact conferred a substantive power upon the judge to reallocate property rights between the parties. It was ruled that the discretion transcends all rights, legal and equitable, and enables the court to make such orders as may be fair and just.

However, this principle was overturned by the House of Lords in *Pettitt v. Pettitt*, which held that Section 17 of MWPA was merely procedural. This view was reaffirmed again in *Gissing v. Gissing*. These decisions dealt a severe blow to the right of a deserted wife and curtailed the power of the courts to reallocate matrimonial property. In *Pettitt v. Pettitt*, it was pointed out that under Section 17 the question for the court was, whose is this and not to whom shall this be given. Following this unanimous ruling, two fundamental rules emerged. First, that English law does not recognize the doctrine of community of property or any separate rules of law applicable to family assets. Consequently, if one spouse buys property intended for common use with the other, whether it is a house, furniture, or a car, this cannot *per se* give the latter any proprietary interest. The second principle which flows from the first, which was stated in *Gissing v. Gissing*, that if either of them seeks to establish a beneficial interest in property, the legal title to which is vested in the other, he or she can do so only by establishing that the legal owner holds the property on trust for the claimant (Lowe and Douglas 1998: 136).

Despite these adverse comments, the ruling protected the deserted wife’s right to reside in the matrimonial home by invoking a notion called ‘constructive trust’. The wife was in occupation of the house through a constructive trust through the contract of
marriage, and a husband could not take advantage of his own wrong by dispossessing the wife from the matrimonial home or by deserting her.

In *National Provincial Bank Ltd. v. Ainsworth*, Lord Denning delivered yet another historical ruling and held that the bank could not claim possession against the wife, who was in possession of the matrimonial home. He ruled that since the wife has a right to remain in the matrimonial home, it is unlawful for the husband to enter into any agreement designed to turn her out. ‘It is a case where I would temper justice with mercy. Justice to the bank with mercy to the wife’, he proclaimed. But the House of Lords overruled this decision in 1965, which made the position of a wife precarious against the husband’s creditors. Lord Denning responded with a comment that the decision had blown the deserted wife’s equity to smithereens.

The public outcry, against this decision of the House of Lords, led to the enactment of the Matrimonial Homes Act in 1967, which specifically empowered the courts to decide the issue of property while dealing with issues of desertion and divorce. But the wife had to register a charge against the husband’s property. Subsequent enactments have strengthened women’s rights, not only to the matrimonial residence but also to matrimonial property. Important among them is the Matrimonial Proceedings and Property Act, 1970.

The necessity of enacting the 1970 Act arose in the context of reforms in family law which were brought in through an enactment in 1969, the Divorce Reform Act, which introduced the ‘breakdown theory’ of divorce. Though a gender neutral term spouse was used, there was a fear that many innocent wives, divorced against their will, would be left with inadequate financial provisions and divorce would cause grave economic hardships to them. In 1973, provisions of both these statutes were incorporated into the Matrimonial Causes Act, 1973.

These enactment stipulated that though the courts must give effect to legal rights of parties, they must also honour the wife’s right in equity to reside in the matrimonial home. The courts began to order the quantum of maintenance on the basis of her continued right of residence in the matrimonial home. In several cases, orders of possession were passed against trustees, in cases of bankruptcy of the husband, and in favour of the wife, who had a prior right of residence.

**Evolution of the Concept in India**

The deserted wife’s right in equity was getting formulated around the time when the Hindu Marriage Act was being enacted, but this campaign did not influence the law making process in India. This is obvious when we examine the provisions of the two statutes which were enacted around that time, the Special Marriage Act, 1954, and the Hindu Marriage Act, 1955. These laws were formulated on the basis of the earlier rights under English law and confined only to traditional matrimonial reliefs such as divorce, separation, annulment of marriage, etc., even though the English law had moved on from there.
Section 27 of the Hindu Marriage Act makes a vague reference to property, but contextualizes it within a limited scope of a Hindu woman’s rights over the customary gifts, received jointly by the spouses, at the time of marriage. The wording is ‘property presented at or about the time of marriage, which may belong jointly to both the husband and the wife.’ While it is possible to stretch the scope of this provision to matrimonial property acquired after the marriage, as was done by the Supreme Court in *B. P. Achala Anand v. S. Appi Reddy* (discussed later), it is an extrapolation and it does not undermine the need for a separate law regarding distribution of matrimonial property on divorce.

On divorce, women are entitled to only a meagre amount of maintenance which is insufficient to procure separate residential premises for themselves and the children under their custody. Women who have secured a job are not even entitled to maintenance, even though during the subsistence of marriage they may have opted out of paid employment to support the family and to have and raise children. A decree of divorce will disentitle a woman of her right to a shelter or matrimonial residence. This becomes a compelling reason for women not to opt for divorce even in situations of extreme domestic violence. The fear of being rendered shelter-less is overwhelming, particularly for women in the urban setting, where housing is expensive and beyond the access of ordinary middle and low income groups.

The only recognition of the right of women to residence is found under the Hindu Adoptions and Maintenance Act, 1956, where maintenance is defined as inclusive of a provision of residence. However, residence does not specifically mean the matrimonial home. But, since residence comes under the ambit of maintenance, the courts seem to think that an enhanced maintenance would compensate the woman for the loss of shelter.

Two legal concepts related to property are relevant in disputes over the matrimonial home, ownership and possession. While ownership implies legal title, the courts are constrained to protect the women’s right to shelter by invoking the principle of possession. The courts have the power to protect this right in lieu of the women’s contribution to the domestic unit, both economically and through services rendered through performing domestic duties. Though the right is not defined under our prevailing matrimonial statutes, due to escalating property prices, injunction against dispossession is emerging as a highly contested issue in matrimonial litigation.

The earlier accepted notion was that since the title is in the name of the husband or his family members (father-in-law, mother-in-law, brother-in-law, etc.), it is the sole prerogative of the person holding the title to permit residence in these premises. The contract of marriage did not include within itself the woman’s right in equity to reside in these premises and it did not protect her against dispossession. Despite the gains made in other areas, here, the notion that a man is the master of his home seemed to prevail until recently. The fact that most women contribute to the matrimonial home either through their own earnings or through their unpaid labour, was overlooked while ascertaining the right of residence and right to property in respect of the matrimonial home. But gradually, this notion gave way to a notion akin to the constructive trust under English law and courts began to recognize the women’s right of residence.
For most middle and lower class families, the dwelling house (or matrimonial home) is their only or primary asset. In urban centres, with escalating property prices, the right to the dwelling home becomes a crucial economic issue in matrimonial litigation. Though statutory provision was lacking, the issue of right of residence and settlement of matrimonial assets emerged as a highly contested issue in urban matrimonial disputes. The matrimonial courts are constantly called upon to adjudicate over this issue during matrimonial litigation.

Tentatively and gradually, the courts started awarding recognition to women’s right to matrimonial residence. Perhaps it is not surprising, given the highly volatile housing situation in Mumbai, that the concern over right of residence in the matrimonial home was first articulated through decisions of the Bombay High Court in the 1960s, 1970s, and 1980s.

In one of the earliest cases on the issue of matrimonial home, Banoo Jal Daruwalla v. Jal C. Daruwalla, it was held that the court does not deal with questions of titles to properties and questions arising between a husband and wife as co-owners of properties, except in respect of joint properties presented at or about the time of marriage. In respect of all other properties owned or alleged to be owned as co-owners between husband and wife, the case would be decided as per the general law of property. But a mention was made to the right of a wife to reside in the matrimonial home by relying upon the observations of Lord Denning, in Bendall v. McWhirter, that it is the duty of the court to ensure that the wife is not thrown out of the matrimonial home. Since it was not possible for the wife to reside in the matrimonial home, the wife was awarded Rs 275 per month as maintenance.

In 1977, in a landmark decision A. v. B, the Bombay High Court introduced the concept of protective injunctions to safeguard women’s rights and held: ‘While passing a matrimonial decree, the court has the power to grant an injunction restraining the husband from entering the matrimonial home….’ Here the premises belonged to the wife who was separated, and the injunction was granted against the husband, restraining him from entering her premises. After facing extreme physical cruelty and also humiliation, the wife had filed a petition for judicial separation and for an injunction restraining the husband from entering the matrimonial home. While granting her judicial separation, the court held: ‘…a woman, who wants to be economically independent... would be apprehensive that it would be dangerous to live with a husband who is physically abusive and accuses her of having extra-marital relations with her colleagues....’

The ruling in Abdul Rahim v. Padma, is yet another milestone. In this case, the right of the wife in the residential premises owned by the husband’s father was awarded recognition. The case concerned a couple in an inter-religious civil marriage. But the husband alleged that later the wife had converted and they had performed nikah. When the relationships between them were strained, the husband pronounced talaq and threw the wife out and restrained her from entering the matrimonial home. Later, he filed a civil suit restraining her entry into the matrimonial home and obtained an ex parte injunction
against her on the ground that she is no longer his wife. In appeal, the high court held that since it was a civil marriage, it could not be dissolved through an oral talaq. But, subsequently, on the premise that the marriage had broken down irrevocably, the court granted a judicial divorce.

The wife challenged the injunction on the ground that it was her matrimonial home and she had contributed towards it from her savings. The court ruled: ‘The wife has a right to stay in the home since the husband had not provided her any alternate accommodation. It is just and fair that the flat be partitioned and the wife allocated a specific portion, thereof, for her residence.’

Later, this right was awarded recognition by various other high courts. In the matter of M/s Bharat Heavy Plates and Vessels Ltd., Vishakapatnam,405 is an interesting case where the employer of the husband was restrained from dispossessing the wife from the company quarters. An employee of a government owned and controlled company and his wife were living together in the company quarters with the apparent consent of the company. The quarter allocated to the couple was their matrimonial home. Soon, differences cropped up between them leading to their estrangement. Finally, the wife went to the court, charging her husband with criminal neglect to maintain her and three minor children and was awarded maintenance. Consequently, the husband left the matrimonial residence and it was occupied solely by the wife and her minor children. As a retaliatory action, the husband terminated the lease of the quarter, exposing the wife and the minor children to eviction, which led the wife to approach the court for protection. Accordingly, an order of injunction restraining the company from evicting the wife and the minor children, pending disposal of the suit, came to be passed. The husband was directed to pay the rent, which was to be adjusted against the maintenance that was payable. Against this order, the company filed a revision petition. However, the same was held to be not maintainable as it neither caused irreparable injury to the company nor occasioned failure of justice. The order of injunction provided for deducting the amount of rent from the salary of the husband and from the amount of maintenance which was due to the wife. Due to this, the court held that neither the company (p.215) nor the husband suffered any monetary loss or irreparable injury in the continued possession of the company quarter by the wife.

The court further commented that the quarter was owned by a legal person and not by a natural person and was meant to be used by its employees. The fact that the company was a state instrumentality, under an obligation to act in accordance with Articles 14 and 21, was an additional ground for holding that there was no failure of justice. It was also held that the husband had an obligation to provide shelter to his wife and children. The husband and the company, acting in different ways, had been recognizing all these years the right of occupation of the quarter by the wife as her matrimonial right. It was held that in these circumstances, the interlocutory order could not be said to occasion any failure of justice. By preventing the state instrumentality from rendering the wife and the children homeless, the court only prevented failure of justice.
These early landmark judgments did not receive wide media publicity and, at times, even lawyers and judges in trial courts were not aware of these legal principles. Even women themselves did not believe that they had a right in law to reside in their matrimonial home and that the husband and his relatives could not dispossess them at their whims and fancies. During this period, issues of dowry harassment and dowry deaths were in the news. When a woman complained of domestic violence, social worker interventions were aimed at advising women not to tolerate violence and humiliation and instead of continuing with the marriage, to opt for a divorce. But women themselves were reluctant, as they were aware that entering the realm of litigation would render them shelter-less. Most women believed that a compromise through acquiescence to the demands of the husband and his family was their only option. They did not believe that they had a legal right of residence in their matrimonial home against the husband’s wishes. So, they agreed to reconciliations on terms laid down by the husband in order to protect their right to shelter.

However, in later years, divorce petitions increasingly brought into focus issues related to matrimonial home and property and the courts were constrained to examine this right. There were a few positive rulings which recognized the right of women to proceeds from the sale of the matrimonial home.

In *Ajit Bhagwandas Udeshi v. Kumud Ajit Udeshi*, the court upheld the wife’s right to occupy a part of the matrimonial home after her divorce since she had no other alternate accommodation. The parties were married for twenty years and had three children. Due to a matrimonial dispute, the husband filed a petition for divorce which was decided, after a long drawn litigation, in favour of husband on the ground of desertion by the wife. The court awarded Rs 1000 as maintenance to the wife and allowed her to reside in one part of the matrimonial home. The husband filed an appeal against the grant of the right of residence to the wife. The Bombay High Court upheld the decision of the family court granting the wife right of residence in part of the matrimonial home. The courts’ ruling was based on the premise of financial contribution. It was proved that though both the parties had contributed while acquiring the matrimonial home, a substantial amount of deposit, which is popularly referred to as *pagdi*, was paid by the wife out of the amount received by her from the landlord of the earlier premises that the couple was occupying. The tenancy of the earlier premises was in the name of the wife’s grandmother. The husband had also taken away her gold ornaments, but at that time he did not purchase any premises. This could also be recognized as the financial contribution of the wife.

While upholding the woman’s right of residence, the court commented that the husband did not occupy the accommodation though he maintained his possession over one floor of the premises. While he was not in need of the said accommodation, the wife had no alternate accommodation and she had contributed substantially towards acquiring these premises. Hence, the Bombay High Court upheld the order and commented that the order awarding shelter to the wife by the family court could not be held to be perverse or unjustified.
In *Sunita Shankar Salvi v. Shankar Laxman Salvi*, the Bombay High Court upheld the woman’s right to the matrimonial home which was in the joint names of the parties. In this case, both the husband and the wife had filed for divorce through separate proceedings. The parties settled the issue of divorce and filed consent terms, withdrawing allegations against each other, and a decree of divorce, by mutual consent was awarded. The dispute over the right of residence in the matrimonial home continued. The wife contended that the flat was jointly acquired and, hence, both have an equal right, title, and interest, in the said flat. She relied upon documents admitted by the husband in support of her contention. After hearing the parties, the family court concluded that the wife’s name was added at the request of the husband but the wife had not paid any consideration or cost for acquisition of the premises. Hence, she had no right, title, and interest, in the said flat and was not entitled to claim any ownership, or for that matter, any right, title, or interest in the said flat. The family court held that the wife’s petition claiming 50 per cent of the share in the flat was devoid of any substance.

Against this decree, the wife approached the high court, which overruled the judgment of the family court and held that though there was no tenancy in the wife’s name, the premises were for the benefit of the family. The wife was also occupying the premises along with the husband as a member of the family. The husband had also admitted, unambiguously and unequivocally, that at his request the wife’s name was added as co-owner and the admission would operate as an estoppel against him. He was precluded from contending contrary to his admission in the form of admitted documents of title. From the very fact that the name of the wife was joined as one of the owners in the title deed, it would have to be presumed that the wife was entitled to an equal share in the said flat. The court commented that the family court was not justified in refusing to recognize the wife’s 50 per cent share in the right, title, and interest, in the flat. In order to execute this decree the court gave an option for either of the parties to purchase 50 per cent share of the opposite party. And if neither of them was in a position to make an offer of purchase, the premises would be sold and the sale proceeds would be divided equally between them.

In *Mala Viswanathan v. P. B. Viswanathan*, the wife filed an appeal against the order of the Additional District Judge, Alipore, restraining her entry into the matrimonial home. The Calcutta High Court upheld the right of the wife to reside in the matrimonial home in the following words:

> When a question relating to grant of injunction restraining one of the spouses from entering into the matrimonial house comes before the court, the court has to deal with the same with utmost care and caution. Once a person becomes part of the house by reason of marriage, her right to reside in matrimonial house cannot be denied. Marriage confers a right to reside in the matrimonial home on both parties to the marriage as well as their offspring. Such right is a joint and indivisible common right. Such right cannot be taken away from one, by the other. The marriage carries a liability and right to maintenance of one or the other. One half of one cannot deny the other half’s right in the matrimonial home. Maintenance
includes residence. The court has to be very careful in denying such right by granting injunction restraining the wife from entering into the matrimonial home, of which she is a part of. An injunction can be granted only when an exceptional case is made out. It can be granted sparingly in a case where clear case for it is made out and such a grant will not result in helping one to oust the other from the matrimonial home.

Further, the court commented that the interest of the wife needs to be protected while granting such orders to the husband.

In another important case, Madhavi Dudani v. Ramesh Dudani, the Bombay High Court recognized the wife’s right to shelter upon divorce and directed the husband to purchase a residential premises comprising of a hall, kitchen, and one bedroom, for the exclusive use of the wife and two daughters. The husband had disputed the validity of marriage on the ground that the wife was not a Hindu prior to her marriage and had not converted to Hinduism. Hence, a marriage between a Hindu and a non-Hindu could not be considered as valid under the Hindu Marriage Act. This contention was overruled by the high court.

While these high court rulings brought in some respite to women, there was no clear direction from the Supreme Court regarding the wife’s right of residence in the matrimonial home. But finally in 2005, in B.P. Achala Anand v. S. Appi Reddy, the Supreme Court upheld the wife’s right to reside in the matrimonial home, even against the landlord. This ruling pronounced by the Bench comprising of R.C. Lahoti CJ, G.P. Mathur J. and P.K. Balasubramanyan J. incorporated into the Indian law the age old dictum of the English law, ‘deserted wife’s right in equity’ discussed earlier.

The husband had deserted the wife and had left the matrimonial home, which was a tenanted apartment and, thereafter, he stopped paying the rent for the apartment. Since he faulted in the payment of rental dues, the landlord initiated proceedings for eviction. Since the wife would be affected by any order of eviction and rendered shelter-less, she approached the court to be imploed as a party to the proceedings. The Karnataka High Court granted her request and directed her to pay the dues. The case proceeded further and, finally, it was held that the landlord could not evict the tenants from the part of the premises occupied by the wife. Against this decision, the landlord filed an appeal in the high court. The high court ruled in favour of the landlord and held that there was no relationship of landlord and tenant between him and the woman concerned.

The appeal against this order provided the Supreme Court an opportunity to expand the scope of women’s rights to their matrimonial home. In its opening comments, the ruling reiterates the power of the judicial law marking in the following words, ‘Unusual situations posing issues for resolution is an opportunity for innovation. Law, as administered by courts, transforms into justice. The law does not remain static. It does not operate in a vacuum. As social norms and values changes, laws too have to be re-interpreted, and recast.’ It also borrowed the following quote from Lord Denning, ‘Law does not stand still; it moves continuously. Once this is recognized, then the task of a
judge is put on a higher plain. He must consciously seek to mould the law so as to serve the needs of the time.’

(p.218) Since there were no Indian legal precedents which address the issue directly, the court referred to the legal principles under English law and approvingly quoted Lord Denning: ‘A wife is no longer her husband’s chattel. She is beginning to be regarded by the law as a partner in all affairs which are their common concerns. Thus, the husband can no longer turn the wife out of the matrimonial home. She has as much right as he, to stay there even though the house does stand in his name... Moreover, it has been held that the wife’s right is effective, not only as against her husband, but also as against the landlord. Thus where a husband who was statutory tenant of the matrimonial home, deserted his wife and left the house, the landlord could not turn the wife out so long as she paid the rent and performed the conditions of the tenancy.’

Expanding the scope of Section 27 of the Hindu Marriage Act, which empowers a matrimonial court to make relevant orders regarding the joint property of the parties, the court ruled that this section can be invoked to pass orders regarding the separate property of the parties or even tenanted premises.

The court empowered the wife to intervene in any proceedings filed by the landlord against her husband and commented that a deserted wife, who has been or is entitled to be in occupation of the matrimonial home, is entitled to contest the suit for eviction filed against her husband in his capacity as tenant, if he is not interested in contesting the same, as it would prejudice the deserted wife, who is residing in the premises. It was ruled that the deserted wife in occupation of the tenanted premises cannot be placed in a position worse than that of a sub-tenant contesting a claim for eviction on the ground of subletting. Having been deserted by her husband, she cannot be deprived of the roof over her head where the husband has conveniently left her to face the peril of eviction, attributable to default or neglect by him. The court held that the position of the wife is akin to that of an heir of the husband. Since the husband had lost interest in protecting his tenancy rights, the same right would devolve upon the wife so long as she continues in occupation of the premises.

The decision amounted to judicial law making. The Supreme Court clarified that it was using its powers of law making under Article 142 of the Constitution, while responding to the demands of social and gender justice, and in order to do complete justice. The principles proclaimed in this ruling would be binding until a suitable legislation is enacted. The judgment is path breaking and which substantially expanded the scope of women's right to the matrimonial home. But the woman herself did not gain from it as, pending proceedings, she had obtained a decree of divorce by mutual consent and there was no agreement between the parties regarding her right of continued residence in the tenanted premises as part of the husband’s obligation to maintain her.

There have also been important judgments in respect of women’s right to reside in the matrimonial home, as against the husband, which have protected the wife by an ouster order against the husband. Significant in this realm is an unreported case decided by the
Bombay High Court in 1998 (A.F. v. A.F. M.J. Suit No. 3264 of 1994 dated 14 August 1998 (unreported)). The parties belonged to the lower economic background. There were six children of the marriage, five daughters and a son. The one room tenement (p.219) was initially in the name of the husband’s mother, was later transferred to the husband’s name. The husband who was an alcoholic and drug addict threatened to transfer the tenancy and render the wife and family shelter-less. When he was arrested on account of some petty crime, the wife bailed him out on condition that he transfers the premises to her name. He conceded, and entered into an agreement to this effect. The wife and children were subjected to extreme cruelty and abuse. The girls were living under the constant fear of sexual abuse by a drunken father. When the series of police complaints and NGO interventions did not yield any results, a case was filed for an injunction restraining his entry into the premises along with a prayer for judicial separation under the Indian Divorce Act in the High Court of Bombay. The rights of the wife and children were protected, both through an initial ad-interim and interim order, as well as a final order. The orders were ex parte since the husband refused to attend court proceedings. And the woman faced extreme difficulties in enforcing this order. Violence and abuse continued, but, finally, proceedings under Section 498A (cruelty to wives) resulted in his conviction for three years, and the wife and children could live in peace. This was an extreme case of physical and sexual abuse. In order to do justice and protect the rights of basic survival and dignity, even in the absence of a statutory provision, the courts are empowered to pass protection orders, in the interest of justice, using its own inherent powers.

Protection of Matrimonial Residence Under the Domestic Violence Act, 2005

While there have been no statutory provisions within the matrimonial statutes, the recently enacted Protection of Women from Domestic Violence Act, 2005, provides independent relief to women by providing for protective injunctions against violence, dispossession from the matrimonial home, and alternate residence. Now a victim of domestic violence can seek protection under the provisions of this Act. The Act also provides the scope for claiming economic protection, including maintenance. The wide definition of domestic violence, physical, mental, economical, and sexual, brings under its purview the invisible violence suffered by a large section of women and entitles them to claim protection from the courts.

While the Act does not create any new rights which were not available to women prior to this enactment through statutory or judge made laws, it provides a single window and simple procedures for claiming rights which were scattered under different statutes and legal provisions. The litigation forum is the magistrate’s court which is easily accessible by women. In addition, simultaneously, the provisions of this Act can be invoked in any proceedings which are pending in any other civil or criminal court.411

The campaigns by women’s groups, prior to the enactment and media publicity it received after the enactment, has helped to bring about awareness regarding the woman’s right to reside in the matrimonial home. Since the Act gives a statutory recognition to the principle which was advanced through judge made laws, many more
women are staking their claims to residence in the matrimonial home and for protection orders restraining the husbands from dispossessing them and causing any harm to them. A judge called upon to provide relief to a woman under the new Act is bound by not just the provisions of the Act, but the ideological framework which underscores the enactment that a husband is bound to provide his wife a roof over her head, and that she has a right to live in that house without the fear of violence.

(p.220) After this enactment, it is no longer possible to hold that the matrimonial home is the exclusive domain of the husband, and the woman has no right to reside in it against her husband’s wishes. Even if the woman is not residing in the premises, it is possible for her to obtain an order of re-entry along with a protection order, residence order, and an order of maintenance for herself and her children.

The Act widens the scope of protection against violence beyond the category of wives and extends it not only to mothers, daughters, and sisters, but even to women in informal relationships. Aged women, unmarried girls, and widowed/divorced sisters, can now seek protection from their relatives under this Act. An entire gamut of women, whose marriages are suspect due to some legal defect on the ground that essential ceremonies were not performed or that the man or the woman has an earlier subsisting marriage, are able to seek relief under this Act. The invalidity of a marriage can no longer be used as defence by the man to dispossess the woman, or deny her maintenance.412

In Vandana v. T Srikanth,413 the Madras High Court provided a broad interpretation to the notions of ‘shared household’ and ‘domestic relationship’ under the Act, as defined under Section 2(s) and Section 2(f), respectively. In this case, the husband had contested the right of the aggrieved wife to reside in the shared household under Section 17 of the PWDVA because the parties had not lived together in the shared household for even a single day after their marriage. The husband disputed the very fact of marriage itself. But the court, upholding the right of the aggrieved wife to reside under Section 17, held that the wife has a de jure right to live in the shared household because of her status as a wife in the domestic relationship. This ruling awarded judicial recognition to the concept that the contract of marriage encompasses within it, a right of residence.

In India, most couples, after marriage, live in a joint household, shared with the husband’s parents and siblings. The question that has surfaced in judicial discourse is whether such dwellings can be construed as the ‘matrimonial home’ or ‘shared household’ of the woman, and whether she is entitled to obtain an order of injunction restraining the husband and his family members from dispossessing her. This has become a highly contested issue while determining the rights of residence of women in such households. While there is some recognition of the right of residence against the husband, especially if the wife is in possession of the premises, there was no recognition of the right of residence against the husband’s family members where the couple is living within a joint family unit. It was hoped that the enactment would strengthen this right and broaden its scope.

Rather unfortunately, the first ruling of the Supreme Court pronounced in 2007, in S.R.
Matrimonial Rights and Obligations

Batra v. Taruna Batra, has constrained the scope of this stipulation and has held that the shared household under the Act constitutes only the premises owned by the husband or the premises where he holds an HUF interest in the family property. The Supreme Court, while examining the definition of the shared household under PWDVA, held that a shared household indicates a house belonging to or taken on rent by the husband, or a house which belongs to the joint family of which the husband is a member. Since the house belonged to the mother-in-law, the daughter-in-law could not claim any rights in the said premises. Further, it was held that the claim for alternative accommodation can only be made against the husband and not against the in-laws, or other relatives. This might prove detrimental to the rights of women living in joint family households owned by the parents-in-law in which the husband himself has no legal right to reside by way of title or interest.

Subsequently, as can be predicted, this plea was taken by several husbands to vacate the initial protection orders passed by lower courts. Various high courts, following the decision of the Supreme Court, struck down the orders granting protection to women in their matrimonial home and women were deprived of their rights of residing in joint family households.

For instance, in Hemaxi Atul Joshi v. Muktaben Karsandas Joshi, the Bombay High Court, relying upon the above ruling, held that shared household indicates the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. The husband had filed a petition for divorce and the wife had filed a corresponding petition to protect her right to reside in the matrimonial home, and sought an injunction against her dispossession. Prior to filing of proceedings for divorce, the parties had shifted out of the joint family household into a separate apartment. The wife staked her claim of residence in the premises owned by her mother-in-law and not against her husband. The court rejected her claim on the ground that merely because the wife stayed in the house of her mother-in-law along with her husband for sometime, she did not accrue a legal right of residence in the said premises. It was not the property in which the husband had a right. The right is available to the wife only against her husband and not against any other member of his family.

Abha Arora v. Angela Sharma is another similar case of the wife claiming a right of residence against her mother-in-law, relying upon the notion of a shared household. The mother-in-law had initiated proceedings to restrain the entry of the daughter-in-law into the premises owned by her. The daughter-in-law failed to obtain a counter injunction in her favour for her re-entry. Subsequently, the mother-in-law sold the premises and made an application to the court for permission to withdraw the proceedings filed by her. The daughter-in-law opposed this on the ground that her rights under PWDVA would be defeated if the mother-in-law is allowed to withdraw her suit. But the high court rejected this plea and held that since the property is owned by the mother-in-law, the daughter-in-law cannot claim the right of residence, as the same is not a shared household under the provisions of PWDVA. The high court commented that the daughter-in-law was not residing in the suit property but was residing and working in the
UK, and was earning a substantial income. The proceedings filed by her were dismissed for default, as she did not follow up the suit. Hence, there was no reason for preventing the mother-in-law from withdrawing her suit and compelling her to proceed with it.

In *Neetu Mittal v. Kanta Mittal*, the wife filed proceedings against her in-laws for an order of permanent injunction under Order 39, Rule 1 and 2 of CPC, and also invoked the relevant provisions for her right to residence (p.222) under PWDVA. While the wife admitted that she had been living separately with her husband, she pleaded that this accommodation is not adequate. Her relationship with the in-laws was not cordial and the couple were living separately due to the settlement arrived at, at the police station, between the parties. Hence, it was held that her staying with the in-laws would be detrimental to their health and interest, and their right to live with dignity. The trial court order was affirmed by the high court. Relying upon the *Batra* case, the court commented that the wife’s claim of residence is only against her husband and not against her in-laws.

The facts of *M. Nirmala v. Dr. Gandla Balakotaiah*, are slightly different. Here, the wife had filed an application under Order 39 read with Section 151 of CPC seeking an injunction against her husband from dispossessing her. She also invoked Section 19(f) of PWDVA. She contended that the property was purchased in 1997 out of her own and her family’s funds, but stood in the name of her husband. While she resided in the premises, the husband had left the home and was now trying to dispossess her. The husband denied this contention and pleaded that the premises were purchased from his own funds and through a bank loan and relied upon relevant documents to prove his case. He also stated that he recognized the right of the wife for shelter and was ready to pay for an alternative accommodation. The trial court dismissed the wife’s petition, but directed the husband to pay a sum of Rs 3,500 per month towards rent. The wife challenged this order in the high court on the ground that she was entitled to the possession of the matrimonial house as per Section 19 of the Domestic Violence Act. The high court upheld the order of the family court on the ground that she could not prove her contribution towards the purchase of the premises.

As can be seen, within a few years of the new enactment a constrained scope of the provision of the shared household is beginning to emerge, which would drastically curtail the rights of women. This has become a routine ploy to deprive women of their right of residence. In some cases, the courts have seen through these strategies and have declined to apply the *ratio of the Batra case*, based on facts and circumstances of the particular case.

In *Nidhi Kumar Gandhi v. The State*, the wife had filed for re-entry into the matrimonial home from where she and her minor daughter had been dispossessed. The husband resisted her claim by stating that the premises belonged to his father and that he was not residing in the said premises. The wife contended that he shifted his residence only after she had initiated proceedings against him. In view of this, interim orders were passed in her favour. The husband challenged the orders, relying upon the *Batra case* and pleaded that the premises were neither owned nor rented by him, and it was not the joint family property and, thus, could not be construed as a shared household. In view of
this, the sessions court varied the residential order passed by the magistrate’s court. In appeal, the Delhi High Court restored the orders of the magistrate’s court and observed that it was premature on the part of the Sessions Judge to apply the ratio of the Batra case without any evidence having been led to determine whether, in fact, the husband’s father owned the premises and whether the husband had no right to live there. The high court commented that it is inconceivable how at an interlocutory stage, in view of the mandate under the Act to provide urgent relief, a final determination on this aspect could be made. Further, it was held that the rights of the husband’s family are not affected by the order of restoration and the wife’s occupation of the premises.

In *P. Babu Venkatesh, Kandayammal and Padmavathi v. Rani*, the wife had been beaten and thrown out of the matrimonial home at midnight. She approached the courts for an urgent residence order against her husband and in-laws. The trial court, taking into consideration the urgency of the case, passed ad-interim reliefs in her favour permitting her to re-enter the matrimonial home. Since the in-laws had locked the house, she was permitted to break open the locks and enter the premises. The husband and in-laws filed an appeal and submitted that the divorce petition filed by him is pending. Further, the house was in the name of his father and referred to the Batra case that a wife cannot claim from her in-laws. The wife, however, contended that he had alienated the house in the name of his father during the pendency of the case. The court commented that if the contention of the husband is accepted then every husband will resort to transferring his property in favour of someone else when a matrimonial dispute arises, and then plead that the premises is not the shared household, and, therefore, the wife is not entitled to seek a right of residence. The court further observed that the pendency of the divorce petition has nothing to do with the present application. While upholding the order to break open the locks, the court commented that the wife cannot be made to wait in the street and that husbands will prevent the wives from reaping the benefits of the order by simply locking the premises and walking away.

In *Razzak Khan v. Shahnaz Khan*, it was the woman’s second marriage and, subsequently, there was a divorce. Thereafter, she filed for residential orders under Section 18 to 20 of PWDVA. The wife contended that she lived with her husband and his two brothers in their ancestral house. The lower court granted her the protection order and maintenance for her and the minor son, the sessions court modified the relief and directed the Protection Officer to provide alternative accommodation to her in the ancestral house of her husband and even granted maintenance to the foster son. It was her husband’s contention that she was working as a clerk and comfortably living in her parental house, while he was a mechanic and was not getting regular salary and was a heart patient, and, further, that after divorce it is not proper for her to live in the ancestral house. The high court after perusing the definitions of aggrieved woman, domestic relationship, and shared household, concluded that even a divorced woman is entitled to these reliefs under the Act, hence, the fact that she was a divorced Muslim woman and her staying at her husband’s place is haram cannot be accepted, and upheld the orders of the lower courts in her favour.
In Shammi Nagpal v. Sudhir Nagpal, Director of Hotel Taj, President, Indian Hotels Company Ltd. and Commissioner of Police, the wife had filed for an injunction against the husband and his company for restraining them from creating any third party rights in respect of the suit premises and to hand over and restore vacant and peaceful possession to her. She contended that the suit premises were her matrimonial home which had been allotted to her husband by his company. While she had gone abroad for a short visit, the husband, in collusion with his company, terminated the lease and took away all her belongings. She was informed about it through email after a day. When she returned to Mumbai, she could not enter the suit premises as the locks had been changed.

The court observed that the family members cannot claim exclusive possession or right in the residential premises allotted by the company as a condition of service. However, the husband’s act of surrendering the suit premises to his employer, upon termination of the service occupancy agreement in her absence, was not bona fide and deserved to be condemned. The company offered to allow her to occupy the premises for a further period of six months until she could make her own alternate arrangements.

The cases discussed above reveal that the right of residence in premises owned by a third party (including the in-laws) is not unconditional, as was initially projected in the media soon after the enactment. The courts will examine the right on a case to case basis. The conduct of the parties concerned is relevant for determining the rights. Also, the orders are summary in nature and therefore temporary. The final determination of the rights will happen in the course of civil proceedings.

Notion of Matrimonial Property and Rules for its Division

Historical Origins of the Doctrine of Property Division

As we have observed, the major struggle for women in England had been to acquire the right to own property during the subsistence of their marriage and to fight the legal provision which merged their property with that of their husbands. Hence, under the English common law tradition, property of the spouses remained separate and marriage did not create any rights in the property of the other spouse. In contrast, the European family laws or the continental legal system adopted the notion of community of property. Under this doctrine, marriage itself alters the rules of property ownership and maintenance, and entitles both the spouses rights and interests in each other’s property. All property acquired during the subsistence of marriage by either of the spouses or jointly by them, is pooled into a community of property over which both spouses acquire equal interests and rights of control. Upon divorce, this property becomes divisible between the spouses on an equal basis. Under the legal premise of differed community of property the property remains the separate property of spouses during the subsistence of marriage and is thrown into a common pool only at the time of divorce, when it becomes divisible.

Under the separate property regime, the marriage has no impact upon the title or rights over the property, and the property and assets are governed by the general rules of
property laws. Hence, the property does not become divisible at the time of divorce. The woman's financial claim is confined only to maintenance and, more recently, to a right of residence in the dwelling house.

While the Portuguese (and other European powers such as the French, the Dutch, etc.) introduced the continental system in their colonies, the British introduced the common law system. Hence, the family laws of Goa, which are based on the Portuguese family law, adopted the system of community of property, whereas British India adopted the English tradition of separate property. This system continued in the post-Independence period. The notion of community of property has not been introduced into the Indian family law system.

(p.225) Some states in the United States and most provinces of Canada, commonwealth countries such as Australia, New Zealand, Malaysia, Singapore, etc., followed the English common law traditions of separate property, but in the 1970s, gradually shifted to the system of community of property.

The introduction of various statutory provisions for easy divorces created severe economic hardships to women as they lost the bargaining power for negotiating settlements. Earlier, in fault based divorces, women could defend the frivolous litigation initiated by their husbands as the husbands were mandated to prove the allegations, and if they failed, their petition was likely to be dismissed. In this context the husband was ready to bargain in order to obtain the wife's consent for divorce and, during these negotiation, women could strike some economic bargains as divorce settlements. With the introduction of no-fault divorce, this power was taken out of women's reach as the husbands did not have to prove any matrimonial fault, but could merely plead breakdown of marital relations. This created a great deal of hardship to women in terms of their right of residence and the right to matrimonial assets.

Research studies confirmed that divorce has a major detrimental effect on the standard of living of women. The reason for the differential is primarily that the earning capacity of divorced women is less than that of men—they are more likely to have interrupted their careers to have children and, hence, earn lower amounts than men, and they are less likely to be able to resume (or remain in) full-time employment to make up the shortfall when their marriage breaks down. Even after their children have grown up, they are likely to remain less well off because they are unable to build up sufficient funds for their retirement. Hence, from the 1970s, greater significance is being attached to the financial consequences of divorce upon women and children.

This has led to the introduction of the notion of division of property upon divorce to ensure justice and equity to women at the time of divorce. This concept has been introduced within the family laws of several countries, which have adopted various models of property distribution. While some rely upon the premise of equality, others function from the premise of dependency. The first question which arises while adjudicating over property disputes is what constitutes matrimonial property, and the second and equally important question is the rules which govern the division. This section
addresses these two concerns.

The four basic concepts which are invoked while prescribing the rules for division of property at divorce are title, fault, need, and contribution. Title indicates legal ownership and this concept favoured the husband as he usually held the title to the property accrued during the marriage. The notion of matrimonial fault was used to deny women accused of cruelty or adultery their entitlements. The right of maintenance, a lump sum settlement, or the right to reside in the matrimonial home was based on the woman’s dependent status within marriage due to which the need for economic support was located. The theory of contribution was the latest, which was evolved to award recognition to the non-monitory contribution of women to the household within the context of a partnership of equality. While title has ceased to be a determinative factor under most matrimonial laws in Western countries, need and to a lesser extent, fault are still relevant in evolving a conceptual framework for the creation and implementation of various distribution factors. The sequencing of the four categories is often used to suggest a progression from the simple common law emphasis on title to the more complex understanding of the function and purpose of the distribution system.

Development of the Doctrine of Distribution of Matrimonial Property in Various Countries

**England and Wales**

After the introduction of the Divorce Reform Act, 1969, which introduced the breakdown theory, there was a fear that many innocent wives, divorced against their will, would be left with inadequate financial provisions. This led to the passing of the Matrimonial Proceedings and Property Act, 1970, which was re-enacted as Part II of the Matrimonial Causes Act, 1973.

The 1973 Act was amended by the Matrimonial Homes and Property Act, 1981, which gave the divorce courts the express statutory power to order the sale of any of the spouses’ property. More importantly, the Matrimonial and Family Proceedings Act, 1984, extended the court’s powers by enabling it to impose a clean break (that is, a once-and-for-all settlement between the spouses with no continuing financial ties) upon a spouse, and altered the way the powers to be exercised. Two of the most important changes were:

1. To require the court, when deciding what orders should be made, to give first consideration to the welfare, whilst a minor, of any child of the family under 18; and,
2. To impose a duty upon the court to consider whether it is appropriate to exercise its powers that the financial obligations of each party terminate immediately, or as soon as possible.

The 1984 Act also ended the obligation of the court to attempt to place the parties in the position that they would have been, had the marriage not broken down. Subsequently, the Pensions Act, 1995, extended the court’s powers to enable it to make orders directing that all or part of any lump sum or pension arising on a spouse’s retirement be
paid to the other spouse (Lowe and Douglas 1998: 778–9).

The Matrimonial Causes Act, 1973, was further amended by the Family Law Act, 1996, principally to reflect the changes to the substantive law of divorce, and the new policy that the parties’ financial and other arrangements for the future are to be settled before a marriage is brought to an end, rather than thereafter.

The matrimonial courts now have the statutory power to make an order against either spouse with respect to any one or more of the following matters:

1. Unsecured periodical payments to the other spouse;
2. Secured periodical payments to the other spouse;
3. Lump sum payments to the other spouse;
4. Unsecured periodical payments for any child of the family;
5. Secured periodical payments for any child of the family;
6. A lump sum payment for any child of the family;
7. Transfer of property to the other spouse or for the benefit of any child of the family;
8. Settlement of property for the benefit of the other spouse or any child of the family;
9. Variation of any marriage settlement.

Orders within the scope of points 1–6 are collectively known as financial provision orders and those within the scope of points 7–9, as property adjustment orders (Lowe and Douglas 1998: 779–80).

Where a court makes a secured periodical payments order, a lump sum order, or a property transfer order, it can further order a sale of property belonging to either or both spouses. After 1996, the courts also acquired the power to make financial provision orders (periodical payments and lump sum) directing that a share of a spouse’s pension be ear marked and paid to the other on retirement.

The Family Law Act, 1996, emphasizes on mediation as a process by which the parties might reach agreement on financial and other disputes arising on marriage breakdown. An integral part of the new procedures is the holding of an early financial dispute resolution (FDR) appointment where the spouses, in the presence of a district judge, will be encouraged to address the outstanding issues between them with a view to arriving at a settlement. Negotiated settlements may work to reduce hostility and acrimony between the parties. Further, it makes sense for the parties to reach an agreement to save the costs of a full court trial, which can be extremely steep (Lowe and Douglas 1998: 801–2).

While this discussion, in a nutshell, summarizes the position of statutory law, the following landmark cases reflect how the law of division of property has progressed in England.

The notion of division of property was introduced in a very tentative manner during the
1970s in *Wachtel v. Wachtel*,\(^4^{23}\) when Lord Denning introduced the one third rule of property distribution as a reasonable starting point. He refrained from applying the rule of equal distribution on the basis that it may be appropriate in future, but is not appropriate in the present case. Although he did not state that this rule should be a presumption in subsequent cases, courts routinely applied this principle in claims by wives for division of matrimonial property.

In 1982, in *Preston v. Preston*,\(^4^{24}\) the concept of need was introduced and it was held that an appropriate approach would be to look at the wife’s reasonable requirements and attempt to ascertain what capital sum she would need to achieve a clean break and live comfortably for the rest of her life. This gave rise to the Duxbury calculation, named after a subsequent case *Duxbury v. Duxbury*,\(^4^{25}\) which was essentially an actuarial calculation made on the basis of the wife’s reasonable requirements, normally calculated on her monthly expenses with reference to her age. Based on these factors, a capital sum, which was deemed as appropriate, would be ordered to be paid to the wife by way of a clean break. The Duxbury calculation was such that the capital would slowly diminish until the projected end of the wife’s life when she would be left with no capital.

This approach was criticized for being discriminatory against women. But courts continued to apply this principle and it was taken to an extreme in *Thyssen-Bornemisza v. Thyssen-Bornemisza*.\(^4^{26}\) This case introduced the millionaire’s defence, which was essentially that on the basis that the court would adjudicate on the wife’s reasonable requirements, there would be no need to make a thorough investigation into the husband’s assets as he was so wealthy that he could afford whatever the wife’s reasonable needs were assessed at.

In the case of *Gojkovic v. Gojkovic*,\(^4^{27}\) where there had been a long cohabitation but a relatively short marriage and no children, it was considered relevant to examine whether the wife had made a substantial contribution to the business. It was a hotel business, and it was deemed that the wife’s reasonable requirements would include the transfer or purchase of a hotel for her to run. Hence, she was awarded a greater proportion of the total marital assets, in excess of (p.228) merely her reasonable requirements because she had contributed financially to the marriage.

This approach seemed to discriminate against the wife and mother, who had not directly contributed to the financial well-being of the family. Another problem with this approach was the rather illogical result that if a wife was older her needs would be less, thus, a long marriage would afford her a smaller proportion of the assets. At the same time, as the husband’s needs were not assessed, he would be left with the lion’s share, even though he was of a comparable age to the wife.

The principle of *Preston* was followed in the UK until the House of Lords decision in 2000 in *White v. White*,\(^4^{28}\) which established equality as a reasonable starting point in the division of matrimonial assets. It was held that the factors set out under Section 25 of the Matrimonial Causes Act, 1973, should be measured against a yardstick of equality. In this case, the wife received slightly over one-fifth of the total matrimonial assets. On appeal,
the Court of Appeal increased the amount to approximately two-fifths of the total assets. The wife was a partner, but it was held that she was entitled to more than her partnership share in recognition of the contribution she had made to the family as wife and mother, over and above her partnership role in the farming business. The House of Lords upheld the decision of the Court of Appeal and gave a detailed analysis in relation to equality, the financial resources, and financial needs of the parties, and the Duxbury paradox discussed earlier. Also considered was the parties’ wish to leave money to their children, which was deemed to be a natural parental wish in a case where resources exceed the financial needs. It was held that a judge is entitled to have in mind the wishes of a wife that her award should not be confined to an accommodation and a diminishing fund of capital, earmarked for living expenses, which would leave nothing for her to pass on to her children. The most important aspect of this decision was the now much-used statement coined by Lord Nicholls, that a judge ‘... would always be well advised to check his tentative views against the yardstick of equality. As a general guide, equality should be departed from only if, and to the extent that, there is a good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.’

Three landmark cases, which came up in subsequent years, are discussed here to ascertain the legal principles which the courts now adopt while deciding the issue of division of property.129

In the first case, *Miller v. Miller*, it was a short marriage of three years with significant assets which were acquired during the course of the marriage. The husband argued that since the duration of marriage was short, the wife’s award should be less. The wife argued that she had given up her employment and adjusted her lifestyle according to the standard of the marriage and, therefore, her award should be substantial. It was held that the wife was entitled to some share of the assets, including the considerable increase in the husband’s wealth during the marriage. Had the yardstick of equality been applied to all the assets which accrued during the marriage, the wife would have received substantially more. However, since the substantial growth was attributed to contacts and capacities the husband brought to the marriage and since the assets were business assets, generated solely by the husband during a short marriage, the norm of equality was sidestepped. A distinction was made between matrimonial and non-matrimonial property in cases of marriages of short duration.

In *MacFarlane v. MacFarlane*, the marriage was of sixteen years and there were three children. Both parties were qualified professionals and, until shortly before the birth of their second child, earned similar incomes. Thereafter, the wife remained at home to care for the children while the husband continued a professional career with a salary increasing considerably year after year. In this situation, the family had insufficient capital to achieve a clean break, but the husband’s income was substantially more than the parties’ budgeted household expenditure. It was held that the wife should be entitled to a share of the future earnings which had been made possible by her past contribution to the husband’s career. The court further held that, in exceptional cases, periodical
payments should be used by the recipient to accumulate capital, particularly in view of the inability of the parties to satisfy the wife’s demand for a clean break. It was held that the wife, having given up her own highly paid career for the family, was not only entitled to a generous income provision, including sums which would enable her to provide for her own old age. She was also entitled to a share in the very large surplus on both the principles of sharing and compensation. This was to continue for her lifetime, and the burden was on the husband to justify a reduction if he wished to make an application to this effect in the future.

The third case, Charman v. Charman, concerned a long marriage of twenty-eight years and there were two adult children. The matrimonial assets were built up during the course of the marriage, from nothing to over £130 million. The husband argued that he had made a special contribution, which was conceded by the wife who sought 45 per cent of the matrimonial assets. The wife was awarded 36.5 per cent of the assets (£48 million). The judge based his departure from equality, both on the special contribution by the husband and on the greater risks inherent on the assets retained by him. The House of Lords relied upon the rulings in Miller and MacFarlane. The three main principles which were relied upon in this case were: need (generously interpreted), compensation, and sharing.

It was held that the yardstick of equality of division, identified by the House of Lords in White, had filled the vacuum, which had arisen from abandonment of the criteria of reasonable requirements, but it had now developed into the equal sharing principle. Under this, property should be shared in equal proportions unless there was a good reason to depart from such proportions.

It was further held that each of the three distributive principles identified by the House of Lords in Miller could be derived from Section 25 of the MCA:

1. The principle of need required consideration of the financial needs, obligations, and responsibilities of the parties, the standard of living enjoyed by the family, the age of the parties, and any physical or mental disability of either spouse;
2. The principle of compensation related to prospective financial disadvantage which some parties faced upon divorce as a result of decisions taken for the benefit of the family during the marriage; and,
3. The principle of sharing was dictated by reference to the contributions of each party to the welfare of the family, to the length of the marriage and, in an exceptional case, to the conduct of the party.

Lord Nicholls suggested the possibility of ‘an increased recognition that by being at home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money earning qualifications and skills.’

United States and Canada

In the United States and Canada, family laws are state laws or provincial laws, and each state or province enacts its own laws. The states follow the tradition of English common
law or the Continental or European law, depending upon the history of their colonization.

The states/provinces following the common law tradition of English law started adopting the continental model of division of property in the 1970s on the basis of equality. With the introduction of the no-fault divorce, it became necessary to move away from the earlier notion of maintenance, which indicates a continued dependency on a theory of clean break, by dividing the assets that accrued during the subsistence of marriage.

The earlier notion of status marriages with the notion of women’s dependency, which required the courts to order maintenance, was no longer found to be relevant within the new scheme of equal partners. The language of the statutes became gender neutral and the law functioned from the premise of complete equality between the spouses. Within this framework, obligations ended with divorce and any ongoing economic obligation which is recognized as appropriate, such as child support or payment of existing marital debts, is considered a shared and equal responsibility.

Different states in the United States adopt a variety of specific distribution factors that are typically noted in common law state statutes, or court opinions in states with general statutory directives. These factors include:

1. The length of the marriage;
2. The property brought to the marriage by each party;
3. The contribution of each party to the marriage, often with the explicit admonition that appropriate economic value is to be given to contributions of homemaking and child-care services;
4. The contribution by one party to the education, training, or increased earning power of the other;
5. Whether one of the parties has substantial assets not subject to division by the court;
6. The age and physical and emotional health of the parties;
7. The earning capacity of each party, including educational background, training, employment skills, work experience, and length of absence from the job market;
8. Custodial responsibilities for children;
9. The time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

Increasingly, some consideration is given to the desirability of awarding the family home, or the right to live there for a reasonable period, to the party having custody of any children. In addition, other economic circumstances may be considered. These include, vested or unvested pension benefits, future interests, the tax consequences to each party, and the amount and duration of an order granting maintenance payments.

If a written agreement was made by the parties before or during the marriage concerning (p.231) any arrangement for property distribution, such agreements are often presumed binding upon the court unless inequitable. Some statutory systems that
enumerate various factors explicitly end with a general catch-all for judicial discretion that allows consideration of such other factors, as the court may, in each individual case determine to be relevant.

This tendency to limit the discussion of rights and objectives to those of the spouses reflects an important social dimension and is consistent with the contemporary partnership model of marriage. This individualistic approach, coupled with the undeniable fact that more resources are necessary when an adult has to care for children in addition to herself, means that the allocation of private resources at divorce has a profound economic and social impact because it affects the future ability of a custodial parent to care adequately for her children (Fineman 1991: 42).

The Canadian statutes generally provide for an unequal division, but do so cautiously and under the banner of judicial discretion. Each spouse is generally entitled to half of by whatever name it goes by – all family assets, family property, matrimonial assets, marital assets, or matrimonial property. McLeod and Malimo (2006) comment: ‘An equal division of property does not always result in a fair division, for a host of reasons. One party may have taken on all the debts, in another case, a party may have incurred gambling debts and hid them in the mortgage on family loan. A gift or inheritance may bring havoc upon the fairness of an otherwise “equal” division’.

The law is not uniform, the terminology is not uniform, and, also, the criteria is not uniform. Each province uses different terminology in the statute books. For instance, lawyers in British Columbia speak of determining and distributing family assets, while in Ontario the term used is equalizing family property.

Every statute begins with the presumption that each spouse owns half of any matrimonial property, but the first task is to determine what constitutes family assets. Once it can be determined what is within the pool of family assets, a presumption of equal division will apply. From that general theory to which all Canadian provinces subscribe, the court can usually deviate, if equal division is patently unfair.

As eloquently stated in the Marital Property Act, 1980, of New Brunswick, child care, household management, and financial provision, are joint responsibilities of spouses and are recognized to be of equal importance in assessing the contribution of the respective spouses to the matrimonial property as well as to the management, maintenance, and improvement of matrimonial property. The contribution of each spouse to the fulfilment of these responsibilities entitles each to an equal share of the matrimonial property, and imposes on each spouse, in relationship to the other, the burden of an equal share of marital debts.

The Ontario Family Law Act, 1990, stipulates equal division of family property. The first battle is to determine what is and what is not a family asset and, therefore, subject to the cleave of the judicial knife. The Ontario statute uses an esoteric term to describe family assets, any interest, present or future, vested or contingent in real or personal property. The following are the exceptions to this rule:
1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage;
2. Income from property referred to (above), if the donor or testator has expressly stated that it is to be excluded from the spouse’s net family property;
3. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages;
4. Proceeds or a right to proceeds of a policy of life insurance, as defined under the (Ontario) Insurance Act, that are payable on the death of the life insured;
5. Property, other than a matrimonial home, into which property referred to (above) can be traced; and,
6. Property that the spouses have agreed by a domestic contract is not to be included in the spouse’s net family property.

Section 5(6) of the Ontario Act has a unique clause which excludes the following from equal distribution:

1. A spouse’s failure to disclose to the other spouse debts or other liabilities existing at the date of marriage;
2. That debts or other liabilities claimed in reduction of a spouse’s net family property were incurred recklessly or in bad faith;
3. The part of a spouse’s net family property that consists of gifts made by the other spouse;
4. A spouse’s intentional or reckless depletion of his or her net family property;
5. That the amount a spouse would otherwise receive ... is disproportionately large in relation to a period of cohabitation, that is less than five years;
6. That one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family.

The Alberta statute, the Matrimonial Property Act, uses the words, ‘the court shall not distribute the property equally between spouses when it appears to the court that it would not be just and equitable to do so, taking into consideration the matter in judicial discretion in Section 8.’ Section 8 defines certain circumstances and gives scope for judicial discretion by adding, ‘a fact or circumstances that is relevant.’ This allows unequal distribution and provides the scope for judicial reapportionment on the basis of fairness.

A similar provision is also found in Section 65 of the Family Relations Act, 1996, of British Columbia which is titled ‘Judicial Reapportionment on the Basis of Fairness’ and which lists the date when property was acquired or disposed of, as well as the general clause ‘any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property, or the capacity or liabilities of a spouse.’

So, overall, judicial discretion plays an important role while determining the actual distribution of property between the spouses.

**Australia and New Zealand**
Though, both Australia and New Zealand belong to the common law tradition, the legal provisions of distribution of property vary a great deal between these two countries. New Zealand enacted the Matrimonial Property Act, 1976, which empowered the courts to divide matrimonial property between the spouses at the time of divorce and laid down elaborate guidelines in respect of this. The basic presumption was equality. In 2002, this Act was renamed as the Property Relationships Act, 1976, to award legal recognition to de facto couples and partners of same sex relationships. Under the provisions of the revised Act, property is referred to as relational property as opposed to the earlier term matrimonial property and includes the rights of de facto couples and same sex relationships. The Act was further amended in 2005 to include civil union couples.

Australia follows the common law approach to family related issues, which is essentially non-interventionist during the subsistence of marriage. Marriage has no legal impact on a spouse’s ownership of property. Anything owned before marriage or acquired in any manner during it, remains the property of the owner and is under his or her management and control while the marriage subsists. Detailed provisions defining the nature of family assets or entitlements, and predetermining shares on death or divorce, are quite foreign to the Anglo-Australian legal system. The Family Law Act (FLA) enacted in 1975, contains no definition of what is or is not matrimonial property, other than its unhelpful reference to property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion. It also has no presumptions or rules as to distribution (Harrison 1992).

The Act confers wide powers on the court to adjust property after a marriage breakdown in a manner it considers appropriate, provided it is satisfied that, in all the circumstances, the particular order is just and equitable. The discretion is not completely unfettered, as issues of contribution to the property and needs of the parties (both defined in the Act) must be taken into account, although there is no obligation to specify what weightage is to be given to the various criteria when shares are determined.

The Australian system for dividing the matrimonial assets on divorce is a separate property regime. On separation, the starting point when dividing property is that each spouse retains ownership of the property legally theirs. This is, however, only a starting point. Under the financial provisions of FLA, the family courts have the discretionary powers to alter parties’ property interests on marriage breakdown if it is just and equitable to make the order. Exercising this power requires the courts to consider the parties’ respective contributions to the property and other factors under Section 75(2), including their future financial needs. When dividing the property, the court is directed to take account of the financial and non-financial contributions made to the property and to the welfare of the family. Non-financial contributions, in particular, include any labour that may have increased the value of the property, as well as contributions made to the welfare of the family through unpaid work at home and care of the children [Section 79(4)].

In theory, the task of dividing property based on the parties’ respective contributions appears simple. However, in practice, there are clear difficulties involved in comparing
contributions which are fundamentally different. In the case of non-financial contributions, there are difficulties involved in placing a monetary value on the contributions. There is a move to restrict judicial discretion in evaluating contributions by introducing a starting point of equal sharing in the value of the matrimonial property – a starting point that is based on the principle of equal contribution by the parties to the property of the marriage.

Having determined the respective shares of property based on these contributions, the court is directed to make an adjustment which would take account of other factors including the future needs of each of the parties. The estimation of future need is based on factors or circumstances of a broadly financial nature, such as the age and health of the parties, employment prospects, and financial resources, responsibility for the care of children post-separation and divorce, the duration of the marriage, and the extent to which it has affected the future earning capacity of the parties. In all, there are fifteen largely prospective factors for consideration covering what each party is likely to need and what each is able to pay to support the other. In practice, this second stage in achieving a just and equitable settlement is frequently employed to take into account the future financial needs of women and children. Women with dependent children can be at a considerable disadvantage compared to men in terms of their financial circumstances and their income earning potential following marital dissolution (Sheehan and Hughes 2001).

While simplified here, the detailed financial provisions that govern the allocation of property on divorce are inherently complex, and there is ample scope for disagreement amongst the judiciary and the parties themselves as to the interpretation of these provisions. This is not surprising, given that the law confers such wide discretion in settling property matters. In addition, the law guides the parties’ actions at a time in their lives when they are under considerable emotional and financial stress, when mutual consideration for one another’s welfare and due recognition of their respective contributions to the marriage may no longer be the norm.

In such an environment, dividing property on divorce is a difficult task, and one which is made even harder for the sizable minority of women and men who settle their property matters without formal legal representation. There is, therefore, a potential for discordance between the provisions of the law described above, and the application of these provisions by women and men who ‘bargain in the shadow of the law’ (Mnookin and Kornhauser 1979).

The study conducted by the Australian Institute of Family Studies found that property division failed to show equal or adequate consideration of indirect contributions to the marriage economy by women (McDonald 1986). Mothers had usually withdrawn from the paid workforce to care for young children and, consequently, were often in a parlous financial position when the marriage came to an end. The economic arrangements made during marriage did not help women after separation, when they lost the benefit of the main income earner but retained responsibility for a large proportion of child-related
expenses. Their interrupted job histories and child care responsibilities also did not equip them for regular paid employment.

In New Zealand, married couples were covered by the equal-sharing rules in the Matrimonial Property Act, 1976. The Act classified property under two headings—matrimonial and separate—and provided that matrimonial property would, in general, be divided equally. The Act divided matrimonial property, in turn, into two further categories:

The family home and chattels (including the family car and furniture) would be divided equally unless:

1. The marriage was for less than three years (a marriage of short duration);
2. There were extraordinary circumstances that would have made equal sharing repugnant to justice;
3. In which case, the home and chattels were divided according to the parties’ contributions to the marriage partnership.

Other matrimonial property (property such as family businesses, investments, and insurance policies, including superannuation benefits) was divided equally unless the parties’ contributions to the marriage partnership were clearly unequal, in which case it was divided according to the parties’ contributions to the marriage partnership. This was called balance matrimonial property.

The presumption that the property should be split fifty–fifty was stronger for the family home and chattels than it was for other matrimonial property.

In the assessment of the different contributions made to the marriage, financial contributions did not rate any more highly than contributions of other kinds, such as caring for children or performing domestic tasks.

The separate property (all property not classed as matrimonial property) remained the property of the person who owned it and was not divided. It included:

1. Property that the parties owned before they married and that they kept separate during the marriage;
2. Any gifts and inheritances that the parties received during the marriage and that they kept separate

Separate property also included all property acquired out of separate property, and the proceeds of selling any separate property.

But if an increase in the value of one party’s separate property, or any income or gains derived from the property, was caused wholly or partly by the application of matrimonial property, then the increase, or the income, or gains, was matrimonial property, not separate property.
Similarly, if an increase in the value of one party’s separate property, or any income or gains derived from the property, was caused wholly or partly by the actions of the other party, the increase, or the income, or gains, was treated as matrimonial property.

In the case of a marriage of less than three years, equal sharing did not apply to:

1. The family home or a particular family chattel, if it was owned wholly or substantially by one spouse at the date of the marriage, or,
2. The family home or a particular family chattel, if it came to one spouse after the marriage began, by succession, by survivorship, as a beneficiary under a trust, or by gift from a third person, or,
3. The family home and all the family chattels, if the contribution of one spouse to the marriage was clearly disproportionately greater than that of the other.

In these cases, each spouse’s share in the property in question was determined according to the contribution that each spouse made to the marriage.

In the case of matrimonial property other than the family home and chattels, each spouse was entitled to share equally in the property unless his or her contribution to the marriage had clearly been greater than that of the other spouse, in which case, the shares were determined according to each spouse’s contribution to the marriage.

In giving effect to the division of the property, the court could make various orders in relation to the property, generally or to a specific item of property, such as ordering property to be sold or, in the case of the home, ordering that one party has the right to occupy it.

The court considered the interests of any dependent children. In determining the amount and value of the property, the court took into account any outstanding debts. If the spouses had entered into a valid matrimonial property agreement, matrimonial property was divided according to that agreement rather than the Act. This is mandated to as contracting out of the Act. However, in making the agreement the spouses were mandated to follow strict requirements (including each party receiving independent legal advice), or else the agreement was invalid.

In 2002, there were major changes to the division of property laws. The Matrimonial Property Act, 1976, was renamed as the Property (Relationships) Act, 1976, and the property of de facto couples (including same-sex couples) was brought within the purview of the Act, and was subjected to the same equal-sharing rules which earlier governed property of married couples. Further, in April 2005, civil unions were established as a legally recognized form of relationship, and civil union couples are now treated the same as married couples under the Property (Relationships) Act.

Just as the old equal-sharing rules were limited in the way they applied to marriages of less than three years (marriages of short duration), the reformed laws also apply only to civil unions and de facto couples, who have lived together for at least three years. Prior
to these reforms, *de facto* couples were not covered by the equal-sharing rules that applied to married couples, but instead by the ordinary rules of property ownership. It was, therefore, presumed that property owned jointly by the couple would be divided equally, and that property that was owned exclusively by one partner would not be divided.

**Singapore and Malaysia**

The Republic of Singapore and the Federation of Malaysia were administratively connected and share a common legal tradition inherited from the British. While Malaysia became independent in 1957, Singapore evolved as the State of Singapore in 1959, with the powers of internal self-government while the powers of foreign affairs and defence were controlled by Britain. In 1965, Singapore severed its links from Britain and evolved as an independent state. One of the first tasks undertaken was to enact a Women’s Charter in 1961 for empowerment of women. The family law reforms in Malaysia were introduced through the Law Reform (Marriage and Divorce) Act, 1976. Due to the common legal traditions, the legal precedents of Singapore can be relied upon in Malaysia. Both Singapore and Malaysia have separate family laws for Muslims. Family courts were set up in Singapore in 1995.

The laws related to marriage and family relations are located in Section 46 of the Women’s Charter which stipulates as follows:

1. Upon the solemnization of marriage, the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children.
2. The husband and the wife shall have the right separately to engage in any trade or profession or in social activities.
3. The wife shall have the right to use her own surname and name separately.
4. The husband and the wife shall have equal rights in the running of the matrimonial household.

This provision was adopted from Section 159 of the Swiss Civil Code and provides a moral framework for regulation of matrimonial relationships in Singapore. The second part of Section 46(4), which was a logical progression, contained the provision of matrimonial property, ‘... *And in the ownership and management of the property*’ had to be deleted as it was vehemently opposed (Leong 2008:25). But in 1996, Section 112 was added to the Women’s Charter which empowered the courts to order the just and equitable division of matrimonial assets. This amendment changed the law which was based on the common law tradition of separation of property, with a limited power to make some adjustment to settlements upon divorce, to the concept of differed community of property. Under the differed community of property regime, while the marriage subsists, the common law notion of separation of property prevails and the spouses gain interest in the other’s property only by the general rules of property law. But upon termination of marriage, (p.237) the civil law of community of property gets invoked and the property is divided equitably between the spouses, irrespective of the role each spouse discharged during the course of their marriage. In particular, whether it was a
financial or a non-financial role, at the time of divorce, the courts are empowered to divide the property equitably between them.

From the time when this power was first used by courts in *Koo Shirley v. Mok Kong Chua Kenneth* in 1989, the body of case laws has grown dramatically. In a study conducted on the divorce settlement, it was highlighted that women were able to secure adequate economic settlements:

No homemaker wife has been given less than 35% of the matrimonial assets, except in two cases involving ‘huge money’. Indeed homemaker wives who served their roles for 20 years or more have received 50% ... The next most common proportions were where one spouse received 10% more than the other. With these two categories forming the vast majority of decisions given in recent years, it may be suggested that an order of division of matrimonial assets in Singapore is likely to be of equal division or within a narrow range from equal division (Leong 2007: 696–8).

The Malaysian Court of Appeal, in 2003, in *Sivanes Rajaratnam v. Usha Rani Subramanium* relied upon the decision in *Koo Shirley v. Mok Kong Chua Kenneth* (mentioned above) while deciding the question of division of matrimonial assets upon divorce under the Malaysian family law. The court commented that while it would be dangerous to rely uncritically on decided cases from other jurisdictions, as far as the decisions of Singapore courts are concerned, this may not necessarily be so as the two share a common tradition.

In Malaysia, Section 76(1) of the Law Reform (Marriage and Divorce) Act, 1976 (LRA), stipulates that the court shall have the power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage, either by their joint efforts or the sale of any such assets, and the division between the parties of the proceeds of sale.

Abdullah (2006: 212–4) in her book, *Family Law for Non-Muslims in Malaysia* discusses the following two cases (among others) to elaborate the legal provisions regarding the distribution of matrimonial property upon divorce.

In *Ching Seng Woah v. Lim Shook Lin*, it was held that the matrimonial home and everything which is put in it by either spouse, with the intention that their home and chattels should be a continuing resource for the spouses and their children, to be used jointly and severally for the benefit of the family as a whole. It matters not, in this context, whether the assets are acquired solely by the one party or the other, or by their joint efforts. While the marriage subsists, these assets are matrimonial assets. Such assets should be capital assets. The court further ruled that the earning power of each spouse is also an asset.

*Koay Cheng Eng v. Linda Herawati Santoso* concerned a marriage between a Malaysian husband and an Indonesian wife who were married in the United Kingdom in
1980. After six years of marriage, the husband filed for a divorce against the wife. While deciding the issue of division of matrimonial assets, the court held that the wife’s entitlement to half the matrimonial assets in Malaysia as is derived under Section 76 (1) and (2) of LRA. The court considered the wife’s contribution towards the household, that is, purchase of furniture, kitchen appliances, groceries, etc., as contribution towards acquiring the property and held (p.238) that the wife is entitled to half of the assets in Malaysia and in the United Kingdom. In addition, the court considered the Employees Provident Fund (EPF) contributions as matrimonial assets acquired during the marriage. The court commented that the wife had entered into the marriage with the intention of growing old with the husband. On his retirement they would both enjoy the benefit from the money set aside in EPF contributions. Therefore, with the breakdown of the marriage, the husband should not be allowed to solely benefit from the EPF. Hence, it was held that the wife is entitled to half the amount remaining in the husband’s EPF account at the time of divorce and such money should be paid to the wife when the same is payable to the husband.

Countries Governed by Islamic Law

In countries governed by Islamic laws, generally, marital assets are divided inequitably, with women receiving the smaller share. Such inequitable distribution results, in part, from the under valuing of women’s contributions in at least two distinct ways. First some systems (for instance Iran) link division of marital property with fault rather than comparative contribution of each spouse and if the wife is judged to be responsible for the divorce, she may not be given her share. By treating a woman’s right to her share of matrimonial property conditionally, this system fails to recognize a woman’s right to her share of matrimonial assets as absolute and presume that only a man’s right to such property is absolute. Second, when dividing marital assets the courts and others tend to focus on women’s direct financial contributions through wages and to undervalue or fail to recognize altogether their contributions through unpaid domestic labour.

In some legal systems, while granting divorce the courts, acting on their own discretion, may determine the division of matrimonial property, for instance, the Central Asian Republics, Fiji, Gambia, Malaysia, Singapore, Tanzania, and Yemen. Under some systems (for instance Cameroon, Iran, Philippines, Senegal), the assets are divided according to the spouses’ chosen matrimonial property regimes (communal/joint or separate).

In Fiji, unemployed wives are not recognized as having contributed to the marriage. Senegal’s Code de la Famille envisages a woman’s ownership of assets which she acquired through her paid profession. In such systems, the husbands benefit from a wife’s contribution of her labour and time to the family and any family business, yet these benefits are given no value when a marriage ends.

In Malaysia, even assets acquired individually by one party may be divided as long as the party which actually purchased the asset receives a greater share. Though, this may seem just and equitable in theory, it leaves for an insensitive judge to undervalue a woman’s contribution and, accordingly, award her with very little. However, a woman’s household and familial efforts are sometimes taken into account in countries such as Iran,
Malaysia, and Singapore.

Opting for a joint property regime, where all marital assets are considered to belong to the spouses equally, does not necessarily solve a woman’s problems, especially where polygamy is practiced. Usually the husband remains in the marital home and controls the assets, hence, lack of division results in the wife leaving the marital home with nothing. Also, courts do not always divide joint property equally on divorce (p.239) and a woman may have problems proving her contribution towards its acquisition (Cameroon, Senegal). Since women return to their natal homes after separation or divorce, they usually lose their share of the matrimonial property as it is controlled by husband or his family members (Central Asian Republics). This tendency for property to remain with the husband and his family can make the enforcement of a court settlement that favours the wife difficult.

Since the South Asia region does not recognize the notion of matrimonial property, Pakistan and Bangladesh do not have any laws regarding property division.

In Nigeria there is no concept of division of property. The suggestion for division is dismissed as Christian and/or Western imposition which, in any case, would be unfair to co-wives.

In Iran, since 1993, a husband wishing to divorce his wife is required to pay wages to her for the housework during the subsistence of marriage, provided she is not found to be at fault in the divorce proceedings. In 1995, it was made compulsory for divorcing husbands to pay the determined wages for housework, along with the wife’s other rights, such as mehr and nafaqa, before the divorce could be registered.

In Singapore, after the 1999 amendments to the Administration of Muslim Law Act, 1966 (ADMLA), the definition of matrimonial assets was clarified and the factors that the courts could take into account, while deciding the division of these assets, was also elaborated. The factors that are to be taken into account are under Section 52(8)(a) of ADMLA:

1. The extent of contribution made by each party in money, property, or work, towards acquiring, improving, or maintaining the property.
2. Any debt owing, or obligation incurred, or undertaken by either party, for their joint benefit or for the benefit of any child of the marriage.
3. The needs of the children, if any.
4. The extent of contribution made by each party to the welfare of the family, including looking after the home, or caring for the family, or any aged or infirm relative, or dependent of either party.
5. Any agreement between the parties with respect to the ownership and division of the property made in contemplation of divorce.
6. Any period of rent free occupation or other benefit enjoyed by one party in the matrimonial home to the exclusion of the other party.
7. The giving of assistance or support by one party to the other party (whether or not of a material kind), including the giving of assistance or support which aids the
other party in the carrying on of his or her occupation or business.

8. The income, earning capacity, property, and other financial resources, which each of the parties has, or is likely to have, in the foreseeable future.

9. The financial needs, obligations, and responsibilities, which each of the parties has, or is likely to have, in the foreseeable future.

10. The standard of living enjoyed by the family before the breakdown of the marriage.

11. The age of each party and the duration of the marriage.

12. Any physical or mental disability of either of the parties – the value to either of the parties of any benefit (such as a pension) which, by reason of the dissolution of the marriage, that party will lose the chance of acquiring.

Section 52(14) of the Amendment to ADMLA 1999, defines matrimonial assets as:

1. Any asset acquired before the marriage by one party or both parties to the marriage which had been substantially improved during the marriage by the other party or by both parties to the marriage.

2. Any asset of any nature acquired during the marriage by one party or both parties to the marriage.

However, this does not include any asset (not being the matrimonial home) that has been acquired by one party at any time by gift or inheritance, and that has not been substantially improved during the marriage by the other party or by both parties to the marriage.

In Tanzania, Section 144(2)(a) of the Law of Marriage Act (LMA) does not define matrimonial property but directs courts to order the division of matrimonial property/asset acquired through joint efforts, when names do not appear in title deed and when a wife cannot prove direct financial contribution, it is left to the discretion of judges. Because LMA does not indicate what should be considered as assets/property acquired through joint efforts, so usually, only financial contribution gets recognized.

In an important case, Bi Zawadi Abdullah v. Ibrahim Iddi (Dar-es-Salaam Registry, unreported) it was held that the domestic duties of a spouse do not constitute contribution within the meaning of Section 114 of the Act and, thus, do not entitle a spouse to a share of the matrimonial assets. In this case, the court refused to equate housework and child bearing with the husband’s paid work in evaluating what constitutes matrimonial property.437

But in an earlier case, Bi Hawa Mohamed v. Ally Sefu (Civil Appeal No. 9 of 1983, Dar es Salaam Registry, unreported), held a more sympathetic view of women regarding their domestic duties of a wife as contribution, entitling the spouse to a share in the matrimonial property. Defining domestic duties, spouses are to be treated as working, not only for their current needs but also for their future needs, both the extent of contribution and such future needs are to be assessed from family assets acquired during the marriage in keeping with extent of contribution.
In this case, the husband argued that he had given money to the wife to start a business which she had squandered away. If she had invested the same in starting a small business, her situation would not be so bad. It was held that she was an irresponsible wife and, hence, she was left with very little money for a financial settlement.\(^{438}\) It seems that generally courts are more amiable to arguments by the male parties than those by female parties over property entitlements.

**Need Versus Contribution in Division of Property**\(^{439}\)

When the concept of a 'no fault divorce' and the partnership model of marriage based on equality was introduced it was felt that the earlier concept of title as well as need and fault would cease to have any relevance while arriving at matrimonial settlements. The earlier status, based model of marriage, was replaced by an egalitarian or equality model under which obligations of spouses ideally end with the marriage and any outgoing economic obligation, such as child support or payment of existing marital debts, are considered shared and equal responsibilities. But, since marriage is not a partnership between equals, these assumptions end up being unjust and inequitable to women who do not fit into this neat formula of a partnership model.

\(\text{(p.241)}\) The movement from the strict common law system, based on title, to the modern notion of a partnership, based on equally valued though different in kind, contributions to a marriage cannot be assumed to have benefited all categories of women. It cannot be assumed that the circumstances that generated arguments for a distribution system focussed on need are no longer in existence. But the material circumstances of divorcing women and children are being detrimentally ignored by supplanting a focus on contribution as the primary distributive concept. According to Fineman (1991a: 270), the ascendency of contribution may represent a convenient model of conceptual progress to legal academics and law reformers, but for many divorcing spouses, as well as the practising professionals to whom they turn for advice, adverse material circumstances, and the needs they generate, have not been left behind.

She argues that one source of controversy about property distribution rules is the existence of two competing, and perhaps incompatible and unrealistic, political visions of contemporary marriages. The first is the more modern view that marriage as an institution has been transformed so as to be more consistent with the formalistic notions of equality between the sexes. The second is the more traditional policy stance that the family is the appropriate, perhaps solitary, institution to resolve the problems of dependency or need that inevitably arises in the context of families. Highly sceptical of the contribution model, which is based on the assumption that marriage is a partnership between equals, she argues for a “need” based framework (ibid.: 265).

The dominance of equality means that it will also provide the preferred method of valuing contributions and, thus, further avoid the need for anything resembling detailed fact finding or consideration of individualized circumstances on the actual amount of contribution. The equality norm is formally embodied in provisions which establish an initial presumption that all property of the spouses is to be equally divided upon divorce.
This equality paradigm is consistent with the organizing concept of marriage as an equal partnership. Equality has significant symbolic importance, and the partnership model is argued as not only reflecting the preferred or correct vision of women, but also as secondarily addressing need. The dependent woman, through an ideological fiat, is considered to be benefitted in being brought up to partnership status and made an equal (ibid.: 272–3).

Marriage is considered a union, a partnership of equals. This view mandates that if a partnership ends, the accumulated assets should be divided in a manner consistent with the model under which they were acquired. If two parties are morally or legally equivalent for one purpose, that they must be morally or legally equivalent for all purposes is an erroneous assumption.

Equality standards, in the distribution of property at a conceptual level, may be linked to broader ideals of placing equal value and promoting freedom of choice in marriage roles. Making equality the ongoing concept of underlying divorce may be considered part of a series of conscious symbolic choices about how to best ensure a more just society. But, when equality rhetoric is translated into specific rules governing distribution, the results must be measured and assessed in more than symbolic terms. Symbolic expression may be important, but Fineman argues that care should be taken so that when translated into legislation having a direct impact on the lives of many people, the results also meet the standards of fairness and justice (ibid.: 276).

Need has no role to play in a true partnership of equals. The dependency image, in contrast, (p.242) anticipates that a woman has been victimized to a certain extent in a marriage. She is viewed as having sacrificed career goals and ambitions for the marriage. At divorce, she is dependent and that dependency will continue. She, therefore, has needs which should be compensated in addition to her contribution to the marriage. This fact cannot be overlooked while applying the principle of equality while dividing family property.

The need based model and the equality model represent polar ends on the spectrum of transformations that have occurred in the way society views marriage and the position of women within it. The need based factors may warrant a deviation from the equality ideal. Unfortunately, in the statutory schemes and case laws of many countries discussed above, the need factors are neither sufficiently developed nor sufficiently clear to offset the partnership model with its easily grasped contribution factors. The wholesale acceptance of the partnership model means, however, that the burden of production, proof, and persuasion, will be placed upon the one who would argue that the rule of equality concept is inadequate, given her specific circumstances (ibid.: 271).

There are a variety of situations experienced by women at divorce that will not conform to a simplistic application of the contribution conceptualization of the equal partnership model. This failure to adequately accommodate these differences in women’s material circumstances has led to a system of rules of property distribution applied to all women, but based on the experiences only of some.
The care of children produces dependency, not only for the children, but for the primary caretaker. It must be recognized that this dependency does not end when the child reaches eighteen or any other magic age (ibid.: 271). Some family relationships tend to last. This is particularly true of the primary caretaking parent who is attached to her children. The obligations that such a parent may feel are not legal, but moral or emotional. A parent who desires to assist a newly adult child may not be dictated to do so by law, but that does not mean that the law should be insensitive to (or unsupportive of) her sensibilities when assessing the most socially useful allocation of property at divorce.

Women who are not mothers but choose to be unemployed during marriage may be considered overcompensated by the imposition of the partnership model. They will be overcompensated to the extent that they do not contribute wages to the accumulation of assets, nor do they contribute by providing a non-monetary service, such as childcare, for the family unit. Mothers who are gainfully employed (and, therefore, are not considered poor), however, may be undercompensated because the need factors will be interpreted too narrowly to remedy the needs generated by their post-divorce situation but may not compensate these women for the double burden they have undertaken during the subsistence of their marriage. The cost to women of deviating from the traditional housewife model is extremely high. When the concept of contribution is simplified and employed solely in an effort to make the housewife an equal partner, other circumstances are ignored. In fact this concept works to the disadvantage of the non-housewife woman. Such a woman not only pays with her time and effort while she is doing two jobs, for example, but also at divorce, she may be viewed as not in need of assistance because she is not a ‘traditional’ housewife. There is a danger that the contribution concept might, in fact, be used against women who are not in traditional roles.

Commitment to the equality ideal, typified by the partnership metaphor as the appropriate analytical construct to guide divorce policy, does not permit us to face the fact that women’s and children’s needs in this society have continued to be undervalued and ignored. Fineman argues that the equality rhetoric now associated with the marriage relationship must be challenged as inappropriate for resolving difficult questions in situations such as divorce, where they stand in inherently unequal positions (ibid.: 278).

An equality view of marriage denies reality for many women who assume, during and after the marriage, more than a partner’s share in the conduct and burdens associated with household and child care. The partnership metaphor slips easily into equal sharing of property, children, debts, and so on at divorce. The metaphor has symbolic content that is preserved only at significant cost to many women who must suffer equality in this one area while the rest of the society and culture continues to treat them unequally (ibid.).

While women in many Western countries, where the equality model has been adopted and property is divided on the basis of contribution, may suffer due to the equality model, in India, the primary determining factor continues to be need, which gets translated into a traditional remedy of maintenance claims at a basic minimal survival level. As we have observed in the first section on maintenance, guilt continues to overshadow
maintenance claims and the amounts awarded range from conservative to meagre and far less than what a divorced woman would require to sustain herself and her children in the same standard of living as her husband. Hence desertion and divorce renders multitudes of women destitute. To remedy this, property settlements have to be incorporated within matrimonial laws through legislative reforms. The reforms would have to take into account both, need and contribution so that the problem faced by women in Western countries are not replicated. The principles have to also take into account specific Indian realities such as prevalence of joint families as against the nuclear families of the West and the legal incident of a Hindu joint family property. The principles adopted have to be not just equal but also equitable and just which would remedy the problem of poverty and destitution among divorced women.

Section D: Custody and Guardianship of Minors

Historical Evolution of the Notion of Guardianship

The legal terms, guardianship and custody are used in the context of children and imply certain legal responsibilities towards them. Guardianship implies the proprietary rights over the child’s person and property. Custody implies the responsibility of raising a child. While the father was favoured in issues of proprietary rights, the mother’s role as caretaker of her children had been granted due recognition for well over a century.

Among the ancient systems, both Roman as well as the Muslim law recognized the fact that minor children or children of tender age need care and protection. It is within the context of this social need that a notion of guardianship and custody first evolved. The ancient Hindu society was organized on the basis of the joint family system which was more inclusive. Within this social organization, there was sufficient protection for all minors and dependents. The minors were always deemed to be in the care and protection of the Karta as well as the elders in the joint family. Within this social structure, even an orphan child was awarded protection. Hence, the notion of guardianship and custody did not evolve under the Hindu law. Even under tribal customs the minor children were deemed to belong to the clan or tribe.

The Muslim law lays down detailed rules regarding the guardianship of minor’s property, but there are very few rules regarding the guardianship of minor’s person. This is because the Muslim lawgivers correctly surmised that (p.244) the guardianship of a minor’s person is more a matter of custody. Paras Diwan comments that though Muslim society is essentially patriarchal, a rule was laid down that custody of children of tender age belonged to the mother (Diwan and Diwan 1993: ix). The English law recognized this principle of Islamic law only after a protracted struggle extending over almost two centuries, and that too by legislation. It is rather unfortunate that in the early days of the British rule, some text book writers and judges could not decipher the distinction between guardianship and custody under Muslim law, and either undue prominence was given to paternal rights or the mother was dubbed as the guardian of her children of tender age.
Hizanat (care and control of the child) is a well developed concept under Muslim law. The Fatwa Alamgiri declares: Of all persons, the mother is best entitled to the custody of her infant children during marriage and after its dissolution. The term hazina is applied to the woman to whom belongs the right of rearing her child. Of all persons, the first and foremost right to have the custody of children belongs to the mother and she cannot be deprived of her right so long as she is not found guilty of misconduct. The mother’s right of hizanat can be enforced against the father or any other person. But the right of rearing the children is not absolute; it is a right to which obligations are attached. If she is not found suitable to bring up the child, or her custody is not conducive to the physical, moral, and intellectual welfare of the child, she can be deprived of it.

Statutory Provisions

The Guardians and Wards Act (GWA), 1890, is one of the earliest statutes enacted by the British which addresses the issue of guardianship. The Act was of common application, though legal principles under the personal laws could also be invoked. Later, during the post-Independence period, when laws governing family relationships of Hindus were codified, a special Act was enacted, that is, The Hindu Minority and Guardianship Act (HMGA), 1956, and Hindus were taken out of the purview of the general law and were placed under this special law governing the Hindus. Despite this, the principles evolved under the GWA have to be applied while deciding cases under the HMGA as the following cases illustrate:

- The Supreme Court, in Surinder Kaur Sandhu v. Harbax Singh Sandhu,\(^440\) while awarding custody to the mother ruled that Section 6 of HMGA, 1956, cannot supersede the principles evolved under GWA that the welfare of children is paramount.

- The Patna High Court reaffirmed this principle in Bimla Devi v. Subhas Chandra Yadav Nirala,\(^441\) and held that from a reading of Section 2 and Section 5(b) of HMGA, 1956, it becomes clear that the 1956 Act is to be treated as a supplement to the 1890 statute.

Hence, principles evolved under the GWA and HMGA can be read interchangeably. So, though HMGA is applied to Hindus and GWA to non-Hindus, custody and guardianship issues of both the Hindus and non-Hindus are decided on the basis of same legal maxims.

Court Parens Patriae of all Minors

Some of the earliest statutes enacted by the legislature in British India concerned protection of minors. The provisions, scattered under various British Charters and Regulations, regarding care and custody of children were subsequently consolidated into the GWA in 1890.\(^442\)

(p.245) The Indian courts were considered to be the supreme guardians of all minors during colonial rule. As supreme guardians, the courts exercised parental jurisdiction in respect of all children, irrespective of their religion. This notion prevailing under the English law was introduced in India, first through various British Charters and
Regulations, and, subsequently, incorporated under the GWA. The courts were entrusted with the same power as the Court of Chancery in England. This power is presently exercised by the district court and the high court under its inherent jurisdiction. The duty of protection and preservation of infants and their property devolves on the guardian judge, the representative of the sovereign state (Babu Gyan v. Sudan).443

When the child is brought before the court, the court assumes charge and endeavours to ensure the well-being of the child in the same manner as a natural parent would have done. This function is discharged by the guardian court by appointing a suitable person as the guardian of the child. When a guardian is appointed under the Act, the control of the person and property is vested in the court, the guardian being its nominee. Following the English doctrine, parens patriae, the Act invests its powers in an individual to look after the child. The guardian acts under the superintendence and supervision of the court.

Only a minor is eligible for protection under the Act, but the Act does not define a minor. The Indian Majority Act of 1875, defines a minor in negative terms, that is, a minor is a person who has not attained majority. Since the age of majority is eighteen, it can be construed that a person below this age would be eligible for protection under this Act.444 Once a guardian is appointed the period of minority extends by a further three years, until the child attains twenty one years. Hence, the courts will refrain from appointing a guardian in respect of a child who is nearing majority (Apagappa Ayyangar v. Mangathai).445 The court will appoint a guardian only if it is satisfied that appointment of guardian is necessary for the well-being of the child. The courts have also adopted a view that in the absence of a father, if the mother is fit and competent, there is no need to formally appoint her as a guardian, since she is the natural guardian of the child.

A person should be willing to be appointed as a guardian. A de facto guardian (a person who has already assumed guardianship of the child), a testamentary guardian, or a guardian under a deed of instrument, may be declared as a legal guardian by the court in order to avoid any future disputes. Declaring a person as a guardian indicates judicial recognition of his/her status as a guardian. Appointment as a guardian is not a question of private or civil right. Any existing or previous relationship, wishes of the parents, and character and conduct of the person to be appointed as a guardian, are relevant factors. The courts may also consider the wishes of the child. While all these can be contributory factors, the only principle which is mandatory is the welfare of the minor.

Once a guardian is appointed, the minor becomes the ward of the guardian and a fiduciary relationship is established between the guardian and ward, which is of a juridical nature. This is a relationship of utmost trust, akin to the one that subsists between the natural parent and child. The guardian must look after the child’s general well-being, health, and education. If appointed as a guardian of the minor’s property, the guardian must not profit personally from it. (p.246) If the guardian is found unsuitable, the court has the power to deprive the person of the guardianship through a court order.
Custody Disputes and Women’s Rights

Challenges to the Notion of Paternal Rights

While a guardian could be appointed for a minor who is an orphan or who has lost his/her father, it was presumed that as a natural guardian the father has a superior right over his children and this right is undisputed. On the other hand, paternal obligations and responsibility towards children were not given due importance. It was more a question of a father’s right over his children than his obligations towards them. Even the obligation to maintain the children was not recognized. Under English law, it was a moral (and not a legal) obligation and this was confined only to legitimate children. There was no obligation to maintain the illegitimate children. Though both Muslim and Hindu laws recognized that maintenance of children is a personal obligation, under Hindu law, the obligation was not absolute. But Hindu law recognized the paternal obligation to maintain both legitimate and illegitimate children.

There has been a shift in modern times and today there is an obligation to maintain both legitimate and illegitimate children. The obligation to maintain children is imposed on both parents. Alongside the obligation to maintain and educate children, the modern law of many countries also imposes criminal liability for deliberately neglecting them. A Bombay High Court judgment has gone to the extent of stating that a father who does not maintain his children does not have the welfare of his children at heart and, hence, he is not eligible for (the right of) access to the child.

A statute enacted for the protection of minors who were orphans, came to the rescue of women who were separated from their husbands. Soon after married women were awarded the right of legal separation and divorce, the contentious question of custody started forming a significant aspect of this statute. The GWA was based on the principles of English family law and subscribed to the doctrine that the father is the natural guardian of the child. After the enactment of the Matrimonial Causes Act, 1857, separated and divorced wives started approaching the courts seeking custody of their children and in the process challenged the principle of natural guardianship of their husbands. It is in this context that the principle, the best interest of the child is paramount started gaining recognition as opposed to the paternal rights of the father. By the mid-twentieth century, the principle became one of the primary pillars of the family law in England.

The earliest judicial pronouncements of the English courts acknowledged the undisputed primacy of the father. Even immorality or misconduct could not dislodge the premise that as a natural guardian, he has the primary right to custody of his children. For instance, in 1849, the English courts in Warde v. Warde held: ‘Mere immorality of the father is not sufficient to deprive him of custody.’

The GWA incorporated the tension then prevailing in England. While Section 19 stipulated that father is the natural guardian of the minor, Section 17 prescribed that welfare of the child is paramount. There is an internal inconsistency between these two sections. Hence it was left for the courts to firmly establish the superiority of Section 17 over that of Section 19 and render the doctrine of the welfare of the child is paramount as a non-
negotiable mandate in deciding custody of children as against the stipulation under Section 19 that the father is the natural guardian of the minor.

(p.247) Initially, the courts acknowledged the superior right of the father, as these cases demonstrate:

1. In 1914, in Annie Besant v. Narayaniah,446 the Privy Council declared that the father has the paramount right to the custody of the children. He cannot be deprived of this right unless it is clearly shown that he is unfit to be their guardian.
2. In 1924, in Sukhdeo v. Ram Chandra,447 the court held: An immoral father has just as good a right to his own children as a moral one, and in many cases, he is just as likely to see that his children are properly brought up even if he himself does not live properly.
3. In 1940, in Mst Alita Tawaif v. Parmatma Prasad,448 an errant father was given custody of the child as against the mother who was a tawaif (courtesan).

But gradually, courts began to concede that despite being a natural guardian, the father’s rights over his children are not absolute (Captain Rattan Amol Singh v. Kamaljit Kaur).449 In the 1970s, the courts went further and ruled that if the father is unfit to be the guardian of the minor, or is not in a position to look after the well-being of the child, the court is competent to remove the child from his custody and hand over the child to the mother or anyone else appointed by the court as guardian (Kamalamma v. Laxminarayana Rao and Budhulal Shankarlal v. An Infant Child).450

While acknowledging the rights of the mother, the courts held that retention of custody with the mother is not unlawful and proceedings cannot be initiated against her for wrongful confinement. The courts also began to chastise the husband for removing the child from the custody of the wife. The courts also conceded that even an affluent father could be deprived of custody of the child and affluence of the father and his family is not a criterion which could tilt the balance in favour of the father (Surinder Kaur Sandhu v. Harbax Singh Sandhu).451 The courts have further held that even if the father is affectionate towards the child and is found to be not unfit, this cannot be a criteria to deny the mother, who might be equally affectionate, caring and competent, the custody of the child. Some recent rulings on this issue are discussed below:

1. In 1987, in Elizabeth Dinshaw v. Arvand M. Dinshaw,452 where the father had taken away the child from the custody of the mother who was living in U.S.A., the Supreme Court observed that the conduct of the father in taking the child from the mother, to whom it was entrusted by a competent court, was most reprehensible. The explanation given by him about his father’s illness was far from convincing not justifying the gross violation and contempt of the order of the court. The court also observed that the child’s presence in India was the result of an illegal act of abduction. The conduct of the father had not been such as to inspire confidence that he is a fit and suitable person to be entrusted with the custody and guardianship of the child. The Court held: ‘Whenever a question
arises before a court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sole and predominant criterion of what would best serve the interest and welfare of the minor.’ The court restored the custody to the mother.

In 1993, in Vinodchandra Gajanan Deokar v. Anupama Vinodchandra, B. N. Srikrishna, Justice of the Bombay High Court held that a father can be denied access until he displayed evidence of reform and paid the interim maintenance arrears. The father had refused to comply with the order of interim maintenance to the wife and the child. Observing that fresh air and plenty of love would hardly be sufficient to sustain life, the court held that the necessity of daily sustenance would have to be provided by the father if he loved the child. The court commented that the father had acted with a spirit of vengeance and a vein of sadism. Accordingly, the court denied access to the father unless and until he displayed evidence of contrition, penitence, and reform, and paid the arrears of interim maintenance. This judgment goes a long way in countering the premise of paternal right, not only of custody and guardianship but also of access to the child and turns it into a paternal obligation.

Again, in 1993, in Om Prakash Bharuka v. Shakuntala Modi, the Gauhati High Court held that the fact that the father loves his children, and is not otherwise unfit, cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife, who may also be equally affectionate towards her children and otherwise equally free from blemish, and who, in addition, because of her profession and financial resources may be in a position to guarantee better health, education, and maintenance for them.

In 1997, in Anjali Anil Rangari v. Anil Kripasagar Rangari, the Supreme Court held that it cannot be disputed that the mother is also a natural guardian under Section 6 of the HMGA, 1956. Accordingly, the Court held that the custody of the children with the mother was neither unlawful nor were they wrongfully confined by the mother.

**Doctrine of Child of Tender Age or Hizanat**

If the principle that in a patriarchal system, the father, as head of the family, is the natural guardian could be used to award custody to the father, a corresponding principle of the patriarchal family system that the mother is the natural care taker of children of tender age, could be used to substantiate the mother’s claim to custody. In case of infant children, courts are generally inclined towards the mother. It is generally accepted that mother is the best suited person to look after a child of tender age and that there is no substitute for mother’s care and affection. Initially the English law subscribed to the notion of the supremacy of paternal rights and the tender age doctrine did not find a place within battles over child custody. The courts did not hesitate to handover a child at the breast of the mother to the father (*King v. De Mannerville*). The Talford Act of 1839 was the first statutory modification recognizing the mother’s preferential claim to the custody of children up to the age of seven. The Custody of Infants Act, 1873, raised the age of the tender age child to sixteen. The Guardianship of Infants Act, 1886, popularly known as Mothers’ Act gave statutory recognition to the doctrine of child of
tender age. Thereafter, the English courts began to give a serious consideration to this principle. In a leading case, *In re A. and B.*,\(^457\) while granting custody of the two minor children to both the parents the court held: ‘It is important for children that they should be brought up in their tender age on terms of affection with (p.249) each other and that they should know both the parents.’

In 1926, in *W. v. W.*,\(^458\) the court laid down that the child of tender age should ordinarily remain with the mother. In *Allen v. Allen*,\(^459\) the trial court awarded custody of an eight-year-old girl to the father as against the mother who was found guilty of adultery. In appeal, it was held: ‘It would not be right to snatch the female child from her mother and force her to make a new start with her father and step mother.’

The Indian courts had no difficulty in propounding this principle. Both Muslim law as well as HMGA recognized this principle. The Muslim law, under the notion of *hizanat* lays down that the custody of a son of seven years and a girl of thirteen years should be with the mother. Similarly, HMGA lays down that a child under five years should ordinarily reside with the mother.\(^460\) But the converse does not hold true, and it cannot be construed that the custody of any child above the specified age will ordinarily be with the father. The principle of the welfare of the child has to be applied in all cases.

The Punjab Chief Court,\(^461\) as far back as in 1917, in *Ahmed v. Rehmatan*,\(^462\) held that the custody of a child of tender age should be with the mother even if she had remarried. Similarly, in 1926, the Lahore High Court in *Zainab Bibi v. Abdul Kareem*\(^463\) awarded custody to a Muslim mother who had remarried. In *Samuel v. Stella*,\(^464\) the court awarded the custody of a female child of thirteen years, who was delicate in health, to the mother.

More recently, the courts have expanded the scope of the notion of *hizanat* and have read principles of Declaration of the Rights of the Child, 1959, adopted unanimously by the United Nations General Assembly, into it as the following case illustrates. The courts also have expanded the notion of best interest of the minor is paramount.

1. In *Mumtaz Begum v. Mubarak Hussain*,\(^465\) the husband had retained the custody of a son who was only a few months old after throwing the mother out of her matrimonial home. The court proceedings dragged on for four years and custody was denied to the mother on a technical ground that she had not filed the petition under the GWA. In appeal, while awarding the custody to the mother, the high court relied upon the Declaration of the Rights of the Child, 1959. The court also relied upon a judgment by Rizvi J. of the Lahore High Court in *Bavi v. Shah Nawaz Khan*,\(^466\) where the stipulation of *hizanat* was explained as follows:

The principle of Muhammadan law as regards *hizanat* is fundamentally based on the principle that it is for the welfare of the minors. ... The child needs motherly love and affection, more than anything else. The environment in which he is being now brought up is unsuited to his mental growth and development. The father hardly finds time even to talk to him, leaving the house in the morning and returning quite late in the evening.
when the child would be in bed. His stepmother, who has a (tiny infant) of her own, would also, definitely, have little time for him. The child’s grandparents, admittedly, being physically handicapped, also cannot do anything for him.

The court explained that in Principle 2 of the Declaration, there is a mandate for enactment of laws for special protection of the child (p.250) to enable him to ‘develop physically, mentally, morally, spiritually and socially in a healthy and normal manner’ and stipulated that ‘the best interests of the child shall be the paramount consideration’. The court further commented:

When personal laws are divinely sanctioned, a presumption will naturally arise that such laws have a humanistic content because when great seers, saints, and prophets, found any faith, they act as benefactors of the mankind as a whole. No personal law claiming divine sanction can afford to deny paramount consideration to the welfare of the child. It is not difficult, therefore, to see why the Declaration was unanimously adopted by the United Nations General Assembly in 1959.

2. In *Mohd. Ayub Khan v. Saira Begum*,467 the husband vehemently opposed the application for interim maintenance, even for minor children, tooth and nail. Hence, the application for interim maintenance was rejected by the trial court. The wife approached the sessions court which set aside the trial court order and remitted the matter back to the trial court to decide the issue of interim maintenance. Finally, the trial court awarded Rs 300 for each of the minor children as maintenance. The husband pleaded that he has divorced his wife and, hence, she was not awarded any maintenance. The husband did not comply with the order of maintenance and did not pay any money to the wife either at the time of divorce or at any other time, even towards the maintenance of the three children. While these proceedings were pending, the husband realized that the eldest son had turned 7. He took shelter under the Shariat law and filed an application under Section 9 read with Section 25 of the GWA for custody of the eldest son. The husband pleaded that the wife was not looking after the child well and the upkeep, maintenance, and education, of the child was not possible at the maternal grandfather’s place. After interviewing the child, the trial court has remarked that the child was being well brought up by the mother and the grandfather, and was living happily with his two brothers and attending school regularly. Against this trial court order rejecting his petition for custody, the husband approached the high court. The court commented:

The father failed to prove his entitlement to custody of the child. On one side he was contesting the litigation under Section 125 of Cr.PC and on the other was projecting himself to be a caring father, who was interested in the future well-being of his son. A person refusing to pay maintenance to his own child cannot claim he is interested in betterment of very same child. The interest of child is of paramount consideration. While claiming that he is interested in the well-being of his children, he has claimed custody of only
one child. If the father was really interested in the betterment of his children, he would have conceded to share his income with his children. But instead, he dragged the wife from court to court while opposing her application for maintenance. After filing this petition, he agreed to deposit some money for the maintenance of the elder son, but not for the other two children. Finally, he deposited Rs 6,000 in court. But this cannot be projected as a ground for awarding custody to the father. The principle of best interest of the child must prevail.

### Allegations of Immorality and Women’s Right to Custody

While women won the battle against the concept of natural guardianship of the father by using the doctrine of child of tender age and took benefit of the fact that she is the primary care taker of children of tender age, the battle against the notion of immorality was far more difficult. Prostitutes, tawaifs (courtesans), women presumed to be of loose moral character, women found guilty of adultery in matrimonial disputes, and women who had remarried, were routinely denied custody of their children. But the same yardstick of moral character was never applied to husbands, as already discussed earlier. This is because of the differing standards of morality which is applied to men and women in a patriarchal society. Sexual morality is perceived to be the single relevant factor that could be used to deny women custody. At the initial stage, the issue of the women’s conduct and character became a crucial ingredient while deciding issues of custody. Hence, allegations of immorality and sexual misconduct were routinely hurled against women in custody battles. A wife who had committed a matrimonial fault like adultery was not awarded custody of her child. In 1862, in *Seddon v. Seddon*, the English courts proclaimed: It will probably have salutary effect on the interests of public morality that it should be known that a woman, if found of guilty of adultery, will forfeit all rights to the custody of, or access to her children (as cited in Diwan and Diwan 1993: 440).

In the Indian context, initially a woman who had committed a matrimonial fault was denied custody of children. In *Skinner v. Orde*, the Privy Council held that upon conversion, the mother loses her right of custody to her child. In *Venkamma v. Savitramma*, the court held that a mother who was leading an immoral life was not entitled to custody of her child. But the same principle was not applied to husbands and the courts did not hesitate to give custody to an errant or immoral father. In *Kaulesra v. Joral*, custody was given to an immoral mother as there was no other suitable person.

But one witnessed a lenient approach towards women who did not have the means to support their children or women who had been accused of adultery. In 1934, the Allahabad High Court, in *Haidri Begam v. Jawwad Ali*, ruled that the mere fact that the mother does not have adequate means is not sufficient to deny her custody, particularly when there was no allegation of adultery. In *Madhu Bala v. Arun Khanna*, the courts held that in order to deny custody to the mother on the ground of adultery, a very strict standard of proof has to be applied. Later cases have held that even remarriage or accusations of adultery cannot be the governing principles to deprive the mother of her right of custody and guardianship as the following two cases illustrate:
In *Chethana Ramatheertha v. Kumar V. Jahgirdar*,\(^4^7^4\) the wife filed an appeal against the order of the family court, Bangalore, directing her to hand over the custody of her minor daughter to her husband on the ground that she had remarried. The Karnataka High Court reversed the order of the family court and allowed the custody of the daughter to be retained with the mother. The Court held:

Even while the parent had not disqualified himself or herself from being the natural guardian of a minor child, it may still be found that the minor’s interest is better served if the custody of the child is with the other parent. The remarriage of the mother after divorce does not suffer from any disqualification or drawback. The mother is well educated and can support the child financially. The paramount consideration in appointing any person as guardian of a Hindu minor is the welfare of the minor.

In *Sadhana Randev v. Santosh Kumar*,\(^4^7^5\) the father sued for custody of his children, levelling allegations of unchaste behaviour against his former wife. Despite the allegations, the court upheld the right of the mother for custody of her children. The Allahabad High Court held (p.252) that the deciding factor was the welfare and wishes of the minor and ruled as follows: Regardless of whether or not the mother was having relations with anyone (an accusation which was never proved), she should not be disqualified from being the children’s guardian and retaining custody on that ground. The children’s preference is to stay with their mother, and the emotional value of the motherly instinct are far more important than any allegations of immorality raised by the father. Though the children had passed the age of 13 years, they can not be turned over to their father against their wishes.

**Mother as the Natural Guardian:** **Gita Hariharan**

In the case of *Gita Hariharan v. Reserve Bank of India*,\(^4^7^6\) the Supreme Court was called upon to decide the constitutional validity of the provision that the father was the natural guardian of a minor.

The issue before the Supreme Court was whether the mother could be the natural guardian of her minor child. As per Anand CJ and M. Srinivasan J., the definition of guardian and natural guardian do not make any discrimination against the mother and she being one of the guardians mentioned in Section 6 would undoubtedly be a natural guardian as defined in Section 4(c). The Supreme Court held that the words ‘after him’ in Section 6, meant that if the father was absent for any reason whatsoever, such as desertion, the mother would be the natural guardian and that it did not mean after the lifetime of the father. The third judge on the Bench, Banerjee J. held that: ‘Be it noted that gender equality is one of the basic principles of our Constitution and in the event the words “after him” is to be read to mean a disqualification of a mother to act as a natural guardian during the lifetime of the father, the same would definitely run counter to the basic requirement of the Constitution, since the Constitution and the statute would have to be in accordance therewith and not *de hors* the same.’
The court spelt out certain situations—(1) when the father is indifferent towards the child, (2) if the child is in the exclusive custody of the mother, (3) due to physical or mental incapacity the father is incapable of acting as the guardian, (4) when it is decided mutually between the parents that the mother will act as the guardian—the mother could be deemed as the natural guardian, even during the lifetime of the father.

A point to note is that only when the father has abdicated his responsibility or, by consent, agreed to elevate the mother to the status of a natural guardian, would the judgment come into effect. However, in keenly contested custody battles, this judgment will not be relevant.

Custody Rights of Other Relatives

More recently, where the mother has died in unnatural circumstances and the father is facing criminal charges, the courts have been inclined to grant custody or guardianship to maternal relatives. Applying the principle of best interest of the child is paramount, the courts have upheld the right of custody of the relatives as against the right of the father.

In *Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi*, the mother had died under tragic circumstances and the father was facing criminal charges under Section 498A of IPC (cruelty to wives). After her death, the children left the father’s house and went to live with their maternal uncle, Kirtikumar, who filed for guardianship of the minor children on the ground that the father was unfit to be the guardian. The children were presented before the court in chamber proceedings and their wishes were ascertained. The court found the children intelligent and more mature than other children of their age. Both the children were bitter about their father and narrated various episodes showing ill treatment of their mother. They categorically stated that they were not willing to live with their father and were happy with their maternal uncle. Assessing their state of mind, the court was of the view that it would not be in the interests and welfare of the children to hand over their custody to the father. While acknowledging that the father being a natural guardian has a preferential right to the custody of his minor children, the Supreme Court held that keeping in view the facts and circumstances of the case as well as the wishes of the children, the court was not inclined to hand over custody to the father. The custody was retained with the maternal uncle. The father was permitted to meet the children on holidays on prior notice. It was pointed out that the father was at liberty to move the court for modifying the order, if he won over the love and affection of the children.

In *Shakuntala Sonawane v. Narendra Khaire*, there was marital conflict between the parents of the minor child and the wife had returned to her parents’ house when she was pregnant. On the very day of the birth of the child, the husband had filed a divorce petition in the family court at Bandra, Mumbai, on the ground of cruelty and desertion. During the pendency of the proceedings, the custody of the minor child remained with the wife, who was staying with her parents. In February 2000, the wife died under tragic circumstances. The mother, Shakuntala Sonawane, (the maternal grandmother of the minor child and the Petitioner) alleged that the daughter had been set on fire by the
husband, the respondent in this petition. The contention of the Respondent was that she had committed suicide. The minor grand-daughter was looked after since her birth by the Petitioner. While awarding custody of the child to the maternal grandmother, the Bombay High Court held: ‘Even if a natural guardian is alive and stakes his/her claim, the court can still proceed to appoint some other fit person as the guardian under the provisions of the Act, after ascertaining the welfare of the minor’.

In Nil Ratan Kundu and Anr. v. Abhijit Kundu (2008) 9 SCC 413, the mother of the child had died due to an unnatural death and the father was charged under Section 498A of IPC for cruelty and was arrested. The minor child was in the custody of maternal grand parents. After his release, he filed for custody and guardianship and was awarded custody by the family court of Calcutta and the Calcutta High Court on the basis that the father is the natural guardian of the child. But in appeal the Supreme Court set aside the orders of the lower court and held that while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. The court ruled that the welfare of children is controlling consideration governing custody of children and not right of their parents. If the child is old enough to form intelligent decision, wishes of the child should also to be considered in custody cases. Both courts were duty bound to consider allegations against the father under the criminal offence of Section 498A, IPC and have neglected to (p.254) consider the important factor of ‘character’ of the proposed guardian.

In Athar Hussain v. Syed Siraj Ahmed, AIR 2010 SC 1414, the Supreme Court upheld the order of the Karnataka High Court which awarded custody of the minor children to the grandparents. The mother of the minor children had died and the children were being brought up by grand parents and were attached to them. The custody was awarded to the father by the family court, Bangalore, but the high court in appeal reversed the order and the parents were permitted to retain custody until the issue of guardianship was finally decided. The court explained that interim custody and guardianship are two entirely different issues which are independent and distinct from each other. While the father remains a natural guardian under Section 19 unless declared unfit, interim custody is to be guided by the sole factor of welfare of the children. The court commented that welfare of the children demands that their custody which is presently with their maternal relatives should not be disturbed till the final settlement of their guardianship issue by the family court. Irreparable injury would be caused to the children if they, against their will, are uprooted from their present settings.

Issues of Custody in Matrimonial Disputes

In contemporary times, the most bitter and acrimonious battles over custody take place during matrimonial litigation. The old maxim, father is the natural guardian, has given way to the newer maxim, best interest of the child is paramount. This is the primary pillar on which the issue of custody has to be decided. The best interest maxim overrides the stipulations in different personal laws and is applied universally in all custody litigations.
Even a wife, who has committed a matrimonial fault, can be awarded custody of the child if the court comes to a conclusion that it is in the best interest of the child, as the cases already discussed earlier reveal. To deprive a child of tender age of its mother’s love and care would not be in the best interest of the child, has been the well-established legal doctrine. The courts have held that the aim of the litigation is not to punish the guilty but only to ensure the welfare of the child. A matrimonial court and counsellors attached to it, as well as lawyers appearing in the matter, must ensure that the child is always the centre of all negotiations over custody and that this principle is never undermined. Since the child remains unrepresented in matrimonial disputes, it is the duty of the court to ensure that the child’s interests are not harmed or negated. Courts do not view the child as an object to be tossed around between the warring parents.

But the doctrine, best interest of the child, is more complex than it appears on the surface. When the father is wealthy and the mother has no independent source of income, where would the best interest of the child lie? The courts have ruled in several cases that just because a mother does not have the financial resources, it does not mean that she should be denied custody of her children. The superior social status of the father, or even the character and conduct of the mother (including her matrimonial faults), cannot be factors tilting the balance in favour of the father. The only determining factor would be the care and concern shown towards the child as the following case reveals.

In *Ravi Shankar v. Uma Tiwari*, the couple was divorced thirteen years prior to the father filing for custody of the child who was all along in the custody of the mother on the ground that his greater wealth would permit him to better provide for the welfare of the child. (p.255) The Madhya Pradesh High Court held that in a case where the father claims custody of a minor child, he must show from his conduct that he is interested in the betterment and upkeep of the minor. The father must demonstrate through action that he would look after the welfare and security of the minor, which would be the paramount consideration of the court. In this case, for thirteen years since his separation, the husband had done nothing to take care of the minor or look after her interest, either by monetary or any other means. The court held that the father could not claim custody of his child purely on the basis of financial status. Financial security can only be one of the components to be considered while providing for the overall welfare of the child. The court dismissed the husband’s plea and retained the custody with the mother.

A similar view was also expressed by the Bombay High Court in *Ashok Shamjibhai Dharod v. Neeta Ashok Dharode*. It was held that the affluence of the father, or his parents, or relatives, is not a relevant factor for determining the issue of child custody.

While non-working mothers are haunted by the fear of lack of resources, working mothers are faced with another set of anxieties. Would a woman who is employed and spends most of her waking hours outside of the home be in a better position to look after the child? Recent cases have resolved this issue. It has been held that a mother cannot be denied custody merely because she is gainfully employed. This principle has now evolved into an established rule.
In modern day custody battles, neither the father, as the traditional natural guardian, nor the mother, as the biologically equipped parent to care for the child of tender age, are routinely awarded custody. The principle, best interest of the child takes into consideration the existing living arrangements and home environment of the child. The courts are usually hesitant to remove the child from a familiar environment and hand her/him over to the non-custodial parents. Each case will be decided on its own merit, taking into account the overall social, educational, and emotional needs, of the child.

The simple principle followed by the courts once a legal battle commences is usually to award interim custody to the parent who already has the physical custody of the child and award visitation rights to the other parent. This is usually over weekends and school vacations so that the studies are not disrupted. It is important to remember that access to the non-custodial parent or the right of visitation is the right of the child to see the parent, and not that of the parent to impose on the child.

The routine manner in which access is granted to fathers becomes a cause of concern to most women. While they struggle to make ends meet and are raising their children against great odds, the fathers can easily win the children over by showering them with gifts. While the mothers have the responsibility, the fathers are left with the pleasant task of recreation with the child. Hence, courts must ensure that the father’s economic responsibility towards maintenance of children forms a part of the terms of custody and access. In this context, the judgment of B.N. Srikrishna, J., in Vinodchandra Gajanan Deokar v. Anupama Vinodchandra,481 (discussed earlier) is an important marker, where His Lordship denied access to the father who had not paid interim maintenance and held that until the father displayed evidence of contrition, penitence, and reform, and paid the interim maintenance arrears, he will not be entitled to visitation rights.

In another case which has been litigated over a very long period, Gaurav Nagpal v. Sumedha Nagpal,482 while upholding the wife’s right to custody, the Supreme Court commented that simply because the father loves his children, and has not been proved to be otherwise undesirable, it does not necessarily lead to the conclusion that welfare of children would be better promoted by granting the custody to him. Children are not mere chattel, nor are they toys for their parents. The court does not give emphasis on what parties submit but exercises its jurisdiction for the welfare of minor. The term welfare must be construed literally and must be interpreted in its widest sense. Though, provisions of relevant statutes may be taken into consideration, in matters of custody, the court is entitled to exercise its power of parens patriae. The court also commented that the father had played a fraud upon the wife by concealing the fact of his earlier marriage, wherein his wife committed suicide within six months of marriage. The husband’s argument that the child was living with him for a long time overlooks the fact that by flouting various orders, leading even to initiation of contempt proceeding, he has managed to retain the custody of child. The court commented that he cannot be a beneficiary of his own wrongs.

In the proceedings under the Hindu Marriage Act, the court could make, from time-to-
time, such interim orders as it might deem just and proper with respect to custody, maintenance, and education of minor children, consistently with their wishes, wherever possible.

Custody orders are not permanent orders and can be varied if the changed situation so demands. Even consent orders passed in petitions for mutual consent divorce can be subsequently varied. In Vikram Vir Vohra v. Shalini Bhalla, AIR 2010 SC 1675, the Supreme Court upheld the order of the trial court and the Delhi High Court, permitting varying the order of access arrived in the divorce petition filed by the spouses jointly in a petition for divorce by mutual consent and permitted the child to be taken to Australia. The court commented that the mother’s autonomy on her personhood cannot be curtailed by a court on the ground of a prior order of custody of the child. Every person has a right to develop his or her potential and the right to development is a basic human right. The mother cannot be asked to choose between her child and her career. Since the mother and the child are attached to each other, separating the child from his mother will be disastrous to both. The mother was required to give an undertaking that she would abide by the order to access the husband.

The courts would view any violation of the undertaking seriously. For instance, in David Jude v. Hannah Grace Jude, AIR 2003 SC 2925, the mother was allowed to take the minor child to U.S.A. on an unconditional undertaking that she would bring the child back whenever the court required her to do so. But subsequently, she flouted the undertaking and did not produce the child before the trial court and despite several notices, did not herself remain present before the court. She also flouted the several notices issued to her by the Supreme Court in contempt proceedings. The Court held that her attitude in not appearing before the court was defiant and contemptuous and she was held guilty of contempt and was awarded three months of simple imprisonment and a fine of Rs 50,000.

The custody battle takes a harsher toll on women due to their emotional vulnerability and financial dependence. While fathers are left free of all responsibilities, the mothers unilaterally bear the emotional, social, and financial obligations, of the children due to their own socialization process. At times, when the economic burden and prolonged litigation become unbearable, women succumb and give up custody, rather than face the daily emotional turmoil for themselves and their children.

The issue of custody becomes even more complicated in situations where the children are citizens of a foreign country and the issue becomes one of conflict of laws. In this context, the Supreme Court ruling in Sarita Sharma v. Sushil Sharma helps to shed light on the judicial approaches to dealing with the complexity. The children were citizens of USA. The mother was awarded custody but was restrained from removing the children from the jurisdiction of the concerned court in USA. The mother flouted the order and brought the children to India. The husband had an arrest warrant issued against the wife. In a habeas corpus writ petition filed by him, the high court granted custody to the father and allowed him to take the children back to USA. In appeal, the Supreme Court set aside the high court order and commented as follows:

\[483\]
The decree passed by the American court, though a relevant factor, cannot override considerations of welfare of minor children. The father resides in USA with his mother aged about 80 years. He appears to be in the habit of taking excessive alcohol. It is doubtful whether the husband will be able to take proper care of the children. Welfare of a female child lies with mother. The mother is not found wanting in taking proper care of children. Considering all aspects, it was not proper for the high court to have allowed the habeas corpus writ petition directing the mother to hand over the custody of children to the father and permit him to take them away to USA. Since the husband had an arrest warrant issued against the wife in USA the Supreme Court commented that the chances of the mother returning to USA with the children would depend upon the joint efforts of both the parties to get arrest warrant cancelled by explaining the circumstances to the concerned court in USA.

But in two other cases, Shilpa Aggarwal v. Aviral Mittal, 2010 Cri.LJ 844 and Dr. V. Ravi Chandran v. Union of India, 2009 (14) SCALE 27, which were decided subsequently, where the children were foreign nationals and the mothers had brought the children to India, the Supreme Court directed that the children should be taken back and subjected to the jurisdiction of their respective countries. The Court further ruled that the best interest of the children lies in sending the children back as the court concerned with the issue of custody would be best suited to decide the principle of welfare of the child. In both these cases the mothers lost out and had to send the children back to the custody of their fathers and it was left for the mothers to agitate the issue of custody in the respective courts in a foreign country.

**Traumatised Children and Access Rights**

In cases where due to domestic violence the mother is either forced to leave the matrimonial home or is thrown out of the matrimonial home, the children and the mother are most vulnerable due to the sudden separation. If the woman is unable to get physical custody of the children either through the intervention of the police or social work organizations, she is compelled to approach the courts. In these situations, it is important to ask that the children be immediately produced in court and to interview them in a non-threatening and non-intimidating environment in order to ascertain their genuine wishes. When the children are called to court and asked to decide as to which parent they prefer to reside with, the children are not in a position to speak against the parent with whom they may be residing. In these circumstances, the courts must play a proactive role to ensure that the children feel secure and are not threatened by either violence against themselves or their mother.

The principle of best interest of the child gets further complicated in cases of domestic violence where the children have either witnessed incidents of violence against their mother or have themselves been victims of violence. Children remember and relive these moments of abuse and the litigation process contributes to keeping the memory of violence alive. Greater sensitivity in settling issues of access in these situations should be exercised, so that the child is not further traumatized. The courts instead of allowing
routine access to the father, must make an attempt to rebuild the child’s relationship with the father through short supervised access hours. In this way, the child’s wishes can be ascertained and access hours can gradually be increased, depending upon the child’s comfort level.

An area that has come to light very recently is the issue of incest or sexual abuse of children by fathers and other male relatives. Many times, this occurs within families where there is already a matrimonial discord. At times the children are abused as a punitive measure against the wife. While a gradual awareness regarding this issue is beginning to surface within the context of criminal law, the relevance of this issue in family litigation and, in particular, while dealing with issues of custody and access, is yet to evolve. Some cases which have come up in the context of criminal law are listed here with the view of creating judicial awareness even within the context of family law.

In the case of Pooran Ram v. State of Rajasthan, when the father looked at the teenage daughter lustfully, the mother commented and the father became revengeful. A few days later, at night, he gagged the daughter with her dupatta and raped her. The next day the daughter informed the mother and when the mother confronted the father, he beat her ruthlessly. Later, a complaint was filed. In his defence the father pleaded that there was a matrimonial dispute between him and his wife and due to this she had filed a false complaint against him. The trial court disbelieved his contentions and convicted the accused for seven years. In appeal, the court commented: The accused is a psychologically sadistic person and needs psychological treatment.

The courts do not always treat these cases as cases of urgency. The prolonged litigation results in causing injustice to the victim girl. In 1992, the Bombay High Court reduced the sentence of a father, who had been convicted of raping his seven-year-old daughter, from life imprisonment to ten years. The high court while reducing the sentence commented sympathetically:

The appellant is a hutment dweller and his poverty has placed him in the difficult position of having to sleep huddled up in a tiny area. Even though his wife had left him, he used to work the whole day and send the children to school, arrange for their meals from the hotel, provide them with toys and pocket money, and cook the night meal for them. The rape was a momentary lapse, due to his pathetic situation (Abdul Wahid Shaikh v. State of Maharashtra).

This note of sympathy and concern gets even shrill when the parties belong to more affluent strata of society. In the case of Sudesh Jhaku v. K.C.J. & Ors, a high-ranking government official was charged with indulging in oral sex and finger penetration with his six-year-old daughter. The police refused to charge the father with the offence of rape and instead registered the complaint under Section 377 – unnatural offence. The wife filed a writ petition in the Delhi High Court to bring the offence under the scope of Section 376 (rape). The court rejected this argument and held that insertion of objects, etc., amounts only to violation of modesty.
The last, N.N. v. P.N. Misc. GP. 37/1999 decided on 4 March 1999 Bom (unreported) is an unreported judgment of the Bombay High Court in a child custody case. The parties belonged to the affluent section of society. The case concerned molestation of a three-year-old by the grand father. The wife opposed the husband’s petition for custody. The interim custody was awarded to the mother but access was granted to the father at his residence every week for four hours. The comments by the judge concerned are an eye opener regarding judicial understanding of child sexual abuse:

Prima facie, I am of the view that the allegations which the Respondent (wife) has made against the father of the Petitioner do not appear to be true. I just could not imagine that the grand father, who must be of around sixty years of age, would indulge in such a heinous and pervert act to the children of such tender age. A doubt has lurked in my mind. The Respondent had at the first instance alleged that her minor daughter was molested but later she again added that both the children were molested. The children could not speak even a word with me when I affectionately patted them and asked them their names. Both of them did not even offer to utter a word. I was of course asking them in Hindi thinking that their mother tongue was Hindi. However, both the parents told me to talk with them in English. It was indeed a great surprise that children of three and four years of age were speaking in English. Thereafter, I spoke to them in English, just putting a question to them asking their names. It is not as though they were looking scared or afraid or anything as even their parents were present. It is, therefore, extremely doubtful to imagine that both of them, the girl of three and the boy of four, would have told their mother about the so called and alleged molestation on them by their grandfather. I wonder what language they would have used to describe a situation of the molestation.

These comments clearly indicate the scepticism and stigma with which sexual abuse cases are met, even in the present day. Without any semblance of an investigation into the mother’s claims of abuse, her allegations were brushed aside as an impossibility. Courts must make a concerted effort to identify instances of sexual abuse, especially when perpetrated against children, however heinous or unbelievable they may seem. Turning a blind eye to sexual violence, especially when perpetrated by a family member, can easily place a child within easy access, or even within the custody of his or her abusers.

Issues of custody, guardianship, and access, can no longer be viewed as parental rights. The determining principle is welfare of the child is paramount. The courts must exercise their power with great prudence and caution, so that it does not result in violation of the basic human right of children, the right to life, which includes the right to live without fear and trauma.

Conclusion
This chapter examines three distinct rights which flow from the marriage contract. While the laws of marriage and divorce are gender neutral, the issue of rights and obligations is clearly marked with gendered assumptions. Maintenance and matrimonial property concern economic rights of women and deal with entitlements to shelter and sustenance.
The third issue also concerns entitlements, but not of economic nature.

(p.260) Motherhood is a gendered status not just in its biology but also in its social construction. Within its confines, a woman’s role as the primary caretaker of her children creates an economic dependency. But this socially prescribed role has no economic value attached to it. Women’s biological status as a mother, the social construction of the gendered role, and the dependency motherhood creates for women, are factors which come into play while determining women’s rights to custody and guardianship of the children.

Historically, children were viewed as the property of the father. He was their natural guardian, they carried his name, the sons inherited his property or were deemed joint holders of the property along with him, as in the notion of coparceners or HUF property. Producing children (more specifically sons) was a pious obligation cast upon a Hindu father. The soil and seed doctrine of the ancient Hindu law viewed the mother merely as a carrier of her husband’s seed. While motherhood was desired, aspired, and revered, a woman’s claim over her children was not recognized by law. This notion prevailed across all personal laws. The section on child custody traces the struggle women had to wage for being recognized as natural guardians of their children, along with the fathers. But while claiming equal rights over children in matters of guardianship, the social construct of the specific notion of ‘motherhood’ and the constraints it imposes upon women also needs to be recognized in custody battles, beyond the gender neutral term ‘parenthood’.

If the notion of equality and gender neutrality creates one set of problems for women, when gender is contextualized, it foregrounds another. Within a framework of clearly defined gendered roles, what gets contextualized is the woman’s sexuality, sexual purity, and subordinate status within the marriage. As discussed in Chapter 1 of the first volume, while tracing the history of personal laws, the patriarchal social structure rests upon notions of women’s sexual purity and control of women’s sexuality. A sure way of ensuring this is to chastise women for their sexual misconduct by denying them their rights. If the entitlements flowed from the husband to the wife, then the wife’s capacity to be entitled to these claims rests on her sexual purity. We can clearly see this trend, both in issues of maintenance as well as child custody. It must be conceded that the premise of gender neutrality was evolved to counter these gendered assumptions. But rather ironically, both the premises become inadequate while addressing women’s concerns.

The claims of women to custody are located within two statutes, the Guardians and Wards Act (GWA) and the Hindu Minority and Guardianship Act (HMGA). Here, women had to challenge the patriarchal assumption of natural guardianship of fathers while staking their claim. Gradually, the mother was awarded legal recognition as the parent best suited to care for children of tender age. This recognition is based on gendered assumptions and is attributed to their biology and to nature. But women were content, as this assumption helped them to win custody battles against their husbands, as their role as nurturers of their children began to be recognized in court battles. Later this concept was expanded further and was converted into the best interest principle.
Indian courts have also read the United Nations Declaration of the Rights of the Child into domestic statutes in the context of custody and guardianship. By invoking this principle, due weightage is given to the physical, emotional, and moral well-being of the child. Further, since most women are in a lower economic category than their husbands, economic status of the parties is not a determinant. Today, the best interest doctrine applies over the doctrine that the father is the natural guardian of the child. This often overrides marital fault (p.261) and the economic constraints of the party who has been granted custody. This principle is applied uniformly across all personal laws. This has been a hard earned victory.

However, women find themselves at a disadvantage, as the economic support which is awarded to the child is meagre. Being the primary caretaker of the child creates dependency and hampers job options for women. Motherhood is so intrinsically linked to womanhood that most women are unwilling to give up their claim of child custody. For women, it becomes an issue of emotional bonding beyond mere rights and entitlements. Most women view themselves and their children as a composite family unit and a bond which cannot be severed at the time of divorce. Hence, generally, women will opt to forsake economic advantages during divorce settlements to obtain sole custody of their children. It is not that fathers do not wish to obtain custody of their children, but the reasons for doing so are different from those on which the mother stakes her claims.

While the principle best interest of the child works well for women while determining issues of custody, it poses problems when access to the non-custodial father is awarded on a routine basis. Once the basic framework of awarding custody has been evolved, the courts apply these principles in a mechanical manner without contextualizing the specificity of the situation or the special needs of children. Courts presume that access to the father is in the best interest of the child, even when facts prove otherwise. For instance, even when divorce petitions contain allegations of cruelty, physical abuse, neglect of the child, or child battery, these allegations are not contextualized while determining the right of access. Granting access to the husband in such situations may not be in the best interest of the child.

There is also the lingering discomfort that from his vantage economic position, the father can adversely influence the child against the mother or win over the affection of the child by showering expensive gifts and, thus, communicate a wrong message to the child. In most situations, the father becomes the indulgent parent, while the mother as the primary caretaker of the child is reduced to the role of a strict disciplinarian, which at times children begin to resent. The lowering of the economic standard of the wife, in the post divorce phase, as compared to the more affluent lifestyle of the father, becomes a point of constant tension and worry to single mothers, who are the primary caretakers of their children. For the fathers, the issue of access becomes a lever to settle scores with the divorced wife. But courts are unwilling to examine the issue more minutely while deciding the claims of custody and access.

Worst are the cases where the minor has been subjected to incest or has developed a fear psychosis due to the domestic conflict. Even without providing counselling to deal
with the trauma, or monitoring the child during access hours, courts routinely grant access to the father. At times, the access is overnight or may extend to half the school vacations. While these may cause serious harm to the child’s emotional and psychological well being, courts remain oblivious to it, even while applying the best interest principle as the unreported cases discussed reveal.

In order to save their children from this emotional stress, there are instances where the mothers have taken drastic steps of absconding and becoming fugitives. For instance in the custody battle, in *Hema Ravishanker v. K. R. Ravishankar*, the mother was awarded custody and the father was awarded access. Since the couple lived in two different cities, the ten-year-old child would have to travel and stay overnight with the father. The child refused. The child also suffered from chronic asthma attacks and the mother was concerned that the tension would induce an asthmatic attack. In appeal against the interim order, the child was interviewed where the child mentioned certain incidents of sexual molestation by the grandfather. The judges disbelieved him and held that the child was tutored and this was a mere afterthought, since this fact was not pleaded earlier. Since she did not comply with the order of access, the wife was held for contempt. In subsequent proceedings the custody was reversed and was granted to the father. At this point the wife absconded with the child. Since then the mother and child have not been heard of.

Non compliance of an order of access is viewed very sternly and the woman runs the risk of being prosecuted for contempt of court and may also lose custody of the child as a measure of reprimanding her, as the above case reveals. These are extreme situations which require more sensitive handling in order to save the children from these drastic measures. The courts cannot abandon their commitment to the principle of welfare of the minor, even in situations which pose challenges to their authority. Right of access is not paramount and cannot override the best interest principle.

There are several instances where the children are taken out of the mother’s custody and are either taken out of the country or taken to another state, and women are deprived of both custody and access. Most often, women give up the legal pursuit as it becomes impossible for them to continue the legal battle. There are many ways in which their rights can be frustrated. Unfortunately, most women lack the financial resources to follow up these cases to their logical end and haul up their husbands for contempt of court in the same manner in which the husbands are able to do when their wives flout the orders of access. So they give up the court battle half way.

In the Indian scenario, when a man claims custody of his children, he need not assure the court that he is capable of being the primary caretaker of the child. All he needs to assure is that there is a female member in the household, for example, a mother or a widowed or unmarried sister, who would play the role of the primary caretaker. It almost appears that the man claims custody of the child to satisfy the urge of mothering of his female relatives. In such cases, in an attempt to deprive the mothers of custody, frequently, allegations of mental instability are made against women to project them as unfit mothers.
This is a cause of extreme anxiety for women because they run the risk of losing not just the custody, but even the right of access. Within a set up of a joint family, the custody battles become the battlefield for the entire joint family.

When we examine the economic entitlements of women in the Indian context, we are confronted with a glaring void as Indian matrimonial statutes do not provide for division of property upon divorce. Hence, lowering of economic standard in the post-divorce phase is a major concern for most women during divorce proceedings. Under the legal regime of separate property, the property acquired by either spouse during the period of marriage continues to be the individual property of the spouse that acquired it. While superficially it appears to be a just and equitable premise, when we probe further into the ascribed gender roles within marriage, it is a given premise that the man is the primary breadwinner of the family, and in order to facilitate this process, a woman is expected to sacrifice her career and dedicate herself totally to the task of looking after the well-being of her husband. In addition, she must also take on the task of home making and child bearing and child rearing. Even if she is required or permitted to work, it would be only to augment the family income and, hence, her earnings are treated as a supplementary income of the family. The courts would penalize a woman for pursuing her career at the cost of her primary role as the caretaker of the family and this in itself can constitute a ground for divorce (Suman Kapur v. Sudhir Kapur). At times, the choice for women is either to remain married or hold on to the job. This is a concern confined not only to the private domain of marriage and family, but spills over to the public domain of employment, as we have noticed in the Air Hostess case, Air India v. Nergesh Meerza, in Chapter 2 of the first volume.

Rather ironically, while this is expected of the woman, this role has no economic value attached to it. Women’s contribution to the domestic household during the subsistence of their marriage does not get any recognition under the matrimonial statutes. The property acquired by the husband is treated as his exclusive property. Since marriage is not viewed as an economic partnership, a woman is not entitled to claim division of property at the time of divorce. The contribution of the wife in creating these assets by performing domestic chores is not considered as a relevant factor.

Since only non-working women or women who are unable to sustain themselves with their own earnings are entitled to maintenance, most working/professional women lose out on their economic rights. They are perceived to be independent women who are not in need of financial support.

When property is bought by securing bank loans, since the husband is the primary earning member, he will have the title to the property. In most cases, women are not even aware of these assets. The situation is even more complex as the notion of Hindu Undivided Family (HUF) property still prevails. The husband may have a share in the HUF assets or businesses conducted in the name and title of the HUF, but the wives will not have access to this information. Determining the husband’s share in such property and then dividing it between the spouses is a daunting task which most courts do not venture into in the course of a matrimonial litigation. There is no clear mandate for
Matrimonial Rights and Obligations

matrimonial courts to order sale of matrimonial property, partition of joint family property or for judicial reapportionment on the basis of fairness in divorce settlements.

Within the separate property regime that is followed in India, there is no acknowledgement for the non-financial contribution of the wife through household labour. She does not acquire any right, title, or interest, in the assets acquired by the husband during the subsistence of the marriage. In the event of dissolution of the marriage by the husband dying intestate, the widow is eligible for a share of her husband’s property, according to the rules of the personal law governing them. The personal laws of most communities accord the wife a status no higher than that of the children, thus, completely ignoring her contribution to the household and family in the form of unpaid work. She is treated as a beneficiary, with no claims over the deceased husband’s estate, and could be willed out of his estate should he wish to do so (Shankaran 2008: 265).

A woman can claim a share only in property which is purchased in their joint names. This is as per the rules governing general property laws. Even the provisions of Section 27 of HMA that addresses the issue of property is clad in quaint and obscure language as property (p.264) presented on or about the time of marriage and, hence, property acquired by their own individual efforts and not given to them at or about the time of marriage to be held jointly, would not be property covered by Section 27 of HMA. In Kamalakar Ganesh Sambhus v. Master Tejas Kamalakar Sambhus, even though the wife established that she had contributed half the amount towards the construction of the house property, the court held that this could not be the subject matter of an order under Section 27 of the Hindu Marriage Act, and set aside the order of the family court on these grounds.

In recent times, the right of residence in the matrimonial home is protected by the PWDVA. While this is an important development, for a woman who wants to opt out of the marriage this is a very small consolation. Here, too, women have lost out if the matrimonial home stands in the name of the husband’s parents or collateral relatives as the cases discussed above reveal. There is no concept of a deserted woman’s rights in equity or the notion of constructive trust through which Lord Denning had protected the rights of deserted women, not only against the husband but also against his creditors. Hence, under the Indian statutes, divorced women are not protected from eviction from the landlords. In the path breaking ruling of the Supreme Court, in B.P. Achala Anand v. S. Appi Reddy, the court awarded legal recognition to the woman’s right of residence and placed her in the position of a sub-tenant, awarding her the right to be a party to a litigation which would deprive her right of possession of the matrimonial home. But, while important proclamations were made in this ruling regarding women’s right to the matrimonial home, the woman concerned did not benefit from it as she had already been divorced and because the terms of divorce settlement did not include a provision regarding the dwelling home. Hence, the apex court ruled that she had no right to the matrimonial home.

This position was affirmed by the Supreme Court in another ruling, Ruma Chakraborty v. Sudha Rani Banerji, where a divorced woman and her children were evicted from
their home, which was rented in the husband’s name, on the pretext that their right of tenancy was terminated with the divorce in which the wife’s right to residence in the matrimonial home had not been negotiated. The court stated that although the right to matrimonial home exists for a deserted woman, the same cannot be extended to a divorced woman.

These judgments reflect the societal prejudices against women’s right of property ownership. In 1980, the International Labour Organization (ILO) calculated that women do two-thirds of the world’s work, for 5–10 per cent of the income, and own one per cent of the assets. Professor Shivaramayya (1999: xiii), in his pioneering work on matrimonial property, has attributed the low ownership of property by women in the world to the social and legal failure to recognize marriage as an economic partnership. According to him, the disproportionate holding of assets occurs primarily for three reasons:

1. Law and policies of the states do not recognize domestic work as productive work – even Marx does not;
2. Nature and nurture burden women with bearing and rearing of children. They are frequently forced to give up their careers to look after their homes;
3. Even when women take up jobs, they are confined to relatively low-paid ones.

(p.265) When the theory of a no-fault divorce was introduced in the 1970s, most countries following the common law tradition, including England, introduced the concept of division of matrimonial assets at the time of divorce. England started off tentatively with the rule of one third allocation, or a need based settlement, but has gradually moved to the principle of equal distribution. In USA, Canada, and New Zealand, the principle governing property distribution is equal division. But judges also have the power to use discretion to ensure fairness. In Australia, in the absence of clear guidance judicial discretion plays a greater role. Other countries such as Malaysia and Singapore have also altered their laws more recently in the 1990s to include the notion of property settlement upon divorce.

The tendency in most countries seems to be to move away from dependency and need, to a theory of clean break, after which the parties are free to move on in life. Maintenance signifies dependency, which has no place in the gender neutral terminology of divorce theories that are prevalent in most countries. So, even when maintenance is awarded, it appears more like a property settlement. But this theory of equality is more a rhetoric than a reality, and several studies have brought out the poverty divorce brings upon women, despite the claim to property distribution.

There are several studies conducted in the United States and Australia in the 1980s, to assess the impact of the no-fault divorce and property settlement on women which are discussed in the section on matrimonial property, which confirm this. In particular, single mothers and older women living alone post-divorce can experience a drastic fall in living standards, with many becoming (and remaining) poor, along with their children. This economic vulnerability of women post-separation can be attributed to a combination of social and economic factors, many of which operate independently of marriage. These
factors include women’s weaker position in the labour market and their relatively lower earnings compared with similarly situated men. While this comment was made in a study to assess the impact of divorce upon Australian women (Funder 1986; McDonald 1986) the analysis is equally relevant for other countries.

Other factors relate more specifically to the roles that women adopt during and after marriage. For example, during marriage the couple may decide that the husband’s income earning capacity will be promoted while the wife assumes greater responsibility for caring for children and home making. Given the needs of children and men’s usually higher earning capacity, this arrangement can work well until the marriage ends. Upon divorce or separation, the costs of this division of labour during the marriage, such as loss of immediate earnings and reduced ability to earn in the future, place these women in economically precarious circumstances post-separation and divorce (Funder 1992).

The linkages between a woman’s claim of child custody and the dependency it creates while evolving a framework for property division, poses a challenge to the equality model of marriage as partnership and needs further deliberations while evolving a blueprint based on justice and equity. A feminist legal argument in these countries has been that equality model is inadequate and does not take into consideration the needs of women who have the additional responsibility of caring for their children which diminishes their chances of getting back into the job market. Here the more recent arguments has been that in addition to contribution, the need or dependency should also be kept in view while arriving at property settlement terms. In contrast, in India, we still subscribe to the notion of a dependent wife (p.266) where need and fault play a greater role while awarding maintenance. Within this framework the contribution gets totally excluded from judicial assessment and the courts do not have the power to settle the husband’s property in favour of the wife in divorce proceedings. In addition, as Prof Sivarammaya has commented, the existing laws which address issues of property settlement are disparate, chaotic, and scattered (1999: 20).

What is rather ironic in this entire discussion on property claims is that while maintenance is inherently problematic, as it does not take into account a woman’s non-financial contribution to the marriage through housework and child care, taking the need factor totally out of the purview of divorce settlements has not been of great value to women. The English case law discussed in this section also bring out the factor that need alone does not suffice, and for wealthy women the premise can be derogatory.

In the Indian context the discussion is confined to the limited scope within the statutory provisions of maintenance despite its derogatory connotations (reflecting women’s subordinate status within marriage) as it remains the only avenue for women to stake their claim of financial entitlement upon divorce. For most women, this entitlement forms the central core of their matrimonial dispute. It is far easier to come to an amicable agreement regarding divorce and custody while maintenance remains a disputed question. The widely contested nature of the maintenance provision makes it a complex terrain of matrimonial litigation, with several substantive and procedural aspects woven into it, and encompasses both civil and criminal procedures.
Curiously, the core of this economic dispute does not revolve around questions of financial arrangements of the family unit, but hinges upon issues of sexual mores. In the context of unequal power relations prevailing within patriarchal normative marriages, women’s economic rights are determined in the context of sexual norms and codes. Within this paradigm, it really does not matter whether women are promiscuous, or men bigamous. The end result is the same, denial of economic rights of women. As can be observed, the norm of monogamy can be flouted with impunity by husbands and, to add insult to injury, later during litigation, the fact of a bigamous marriage can be used as an armour to defeat women’s claims. This plea is advanced so routinely, that the Supreme Court in Vimala v. Veeraswamy,\textsuperscript{494} was constrained to hold that when a husband pleads that the marriage is bigamous, the previous marriage would have to be strictly proved. In a similar manner, the Bombay High Court dismissed the plea of bigamous marriage, in Rajlingu v. Sayamabai,\textsuperscript{495} as a mere afterthought.

This leaves us perplexed as to how a matrimonial misconduct or guilt can be flagrantly invoked by a husband to defeat the woman’s economic claim, without any adverse criminal or civil consequences visiting him during court proceedings. This type of flouting of a legal mandate and its subsequent invocation to gain a financial edge against a vulnerable person can take place only within a blatantly sexist social order.

Despite the progressive interpretations and innovative legal maxims, the path to justice has not progressed in a linear trajectory. For example, the Bombay High Court ruling delivered by M.H. Kania J., way back in 1976. While deciding the rights of a woman in a bigamous marriage, his Lordship had held that since the Hindu Marriage Act is a social legislation, it could not have been the intention of the legislature that even in a case (p.267) where a Hindu woman was duped into contracting a bigamous marriage, she should be deprived of her right to claim maintenance (Govindrao v. Anandibai).\textsuperscript{496} In stark contrast is the Supreme Court ruling in 2005, in Savitaben Somabhai Bhatiya v. State of Gujarat,\textsuperscript{497} where the right of maintenance was litigated under Section 125 of Cr.PC, a provision enacted to ensure social justice and prevent vagrancy. Here, Arijit Pasayat J., and S.H. Kapadia J., commented that however desirable it may be to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected in Section 125 of Cr.PC, there is no scope for enlarging it by introducing any artificial definition to include woman not lawfully married in the expression wife. The court further commented that it is inconsequential that the man was treating the woman as his wife. It is the intention of the legislature which is relevant and not the attitude of the party.

Chinnappa Reddy J., a former judge of the Supreme Court commented in this context:

The court could probably extend the meaning to be given to the word wife in Section 125(1) to any woman who has gone through a recognized form of marriage, notwithstanding the subsistence of an earlier marriage. A further question may require consideration as to whether a common law wife is also entitled to maintenance under Section 125 of the Cr.PC (Reddy 2008: 122).

Confronted with contradictory viewpoints regarding the criterion for determining the legislative intent of a beneficial provision, what are the crutches that trial court judges
have at their disposal while delivering constitutional justice. A.K. Sikri J. and Aruna Suresh J. have attempted to provide an answer: ‘Where alternative constructions are possible the court must give effect to that which will be responsible for the smooth working of the system for which the statue has been enacted rather than the one which would put hindrances in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.’

In this tussle between the old world, feudal value systems reflected in the ancient Hindu law, the law of the Smritis, along side pluralistic traditions validated by customs, at one end, and the newer statutory provisions of the modern codified Hindu law, at the other, what are the avenues for harmonious constructions of legal principles? How do we revisit the provisions of the ancient Hindu law in the context of its modern day distortions, within the statutory framework of contemporary Hindu law, while delivering justice? The same bench, comprising of A.K. Sikri J. and Aruna Suresh J. have provided certain tools of interpretations in this respect: ‘The principles of Hindu Personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against destitution. There is clear evidence to indicate that the law of maintenance stems out of the secular desire and so as to achieve the social objectives for making bare minimum provision to sustain the members of relatively smaller social groups. Organically and originally the law itself is irreligious. Its fountain spring is humanistic. In its operational field although it lays down the permissible categories under its benefaction, which are so entitled either because of the tenets supported by clear public policy or because of the need to subserve the social and individual morality measured for maintenance.

Beyond protection of individual rights, the courts also have a mandate to evolve the science of jurisprudence as it was brought to our notice by S.B. Sinha CJ., Ramesh Madhav Bapat J. and N.V. Ramana J. of the Andhra Pradesh High Court, in the following words: ‘The interpretation of law is not merely for the determination of a particular case but also in the interest of law as a science. As such, interpretation of law must be in accordance with justice, equity, and good conscience, and more so, in furtherance of justice. If the court prima facie comes to the conclusion that the plaintiff/petitioner is entitled to interim maintenance, it can award interim maintenance in the interest of justice, without being fettered by orthodox prejudices, by showing liberal readiness to move with times.

This call to move with the times and blend the ancient with the modern in pursuit of justice is the call of duty. The judicial oath mandates this. The primary aim of the courts is to do justice as P.N. Bhagwati J. and Ranganath Misra J., had succinctly pointed out: ‘The role of the court is not that of silent spectator or of a passive agency. When a dispute is brought before the court where maintenance of a neglected wife or a minor child is in issue, the court must take genuine interest to find out the truth of the matter. If the
magistrate had asked proper questions to the witnesses when they were before him and deposing about the marriage, the relevant evidence would have come up before the court. It was the duty of the lawyer appearing for the appellant also to have played his role properly at the right time. Due to this judicial and procedural lapse, a case for a pittance of maintenance, filed in 1971, had to be sent back from the Supreme Court to the magistrate’s court for retrial in 1985.498

Within this framework of the call of duty and judicial mandate, I am constrained to end this section with the framework provided to us in 1978 by yet another Bench of the Supreme Court comprising of legal luminaries, V.R. Krishna Iyer J. and D.A. Desai J.: ‘The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause – the cause of the derelicts.’499

Notes:
(1) This is a legal term indicating that it is a supplementary, subsidiary, or additional relief, but cannot be the main relief in a matrimonial petition.

(2) See section titled ‘Locating Women’s Claims within the Constitutional Domain’ of Chapter 2 Constitutional Law and Citizenship Claims of the first volume for further discussion on special provisions for women and children under Article15(3) of the Constitution.

(3) AIR 1978 SC 1807

(4) Article 39(a) directs the state to provide adequate means of livelihood to men and women.

(5) AIR 1987 Ker 110

(6) AIR 1975 SC 83

(7) This section was re-numbered as Section 125 after the Cr. PC was re-enacted in 1973.

(8) (1991) 2 SCC 375

(9) I (2008) DMC 22 SC

(10) II (2008) DMC 838 SC

(11) Blackstone’s Commentaries, Vol III, 94

(12) Blackstone’s Commentaries, Vol I, 430

(13) See ‘Muslim Women’s Right to Maintenance’ later.
(14) For further discussion on this issue see section titled ‘Interim Maintenance’ in Section B of this chapter.

(15) See the comments of the Jharkhand High Court, in Ehsan Ansari v. State of Jharkhand, II (2007) DMC 751 Jha, where the prayer to amend the petition, a relief which is permissible under civil law but prohibited under Criminal law, was allowed. While allowing the prayer, the court commented that proceedings under Section 125 Cr.PC are not strictly criminal they are more in the nature of civil proceedings.


(18) Vide Mah Act 21 of 1999, Section 2 (w.e.f. 20 April 1999).


(20) I (2003) DMC 440 P&H

(21) See section titled ‘Rights of Women in Informal Relationships’ for further discussion on this issue.

(22) See the discussion on execution proceedings later.

(23) The amendment does not have a retrospective effect. In Shail Kumari Devi v. Krishan Bhagwan Pathak @ Kishun B. Pathak II (2008) DMC 363 SC, the Supreme Court has held that maintenance above Rs 500 per month can be awarded only from the date from which the amendment came into effect, and not from an earlier date.

(24) See section titled ‘Muslim Women’s Right to Maintenance’ later for further discussion on this provision.

(25) See section titled ‘Rights of Women in Informal Relationships’ later where this issue is discussed in detail.

(26) (1947) All ER 847

(27) Manby v. Scott, (1600) Smith’s Leading Cases

(28) AIR 1970 J&K 150

(29) AIR 1960 Cal 575

(30) AIR 1985 Bom. 88

(31) AIR 1986 Guj 6

(32) 1990 Cri.LJ 2430 AP
AIR 1986 Raj 13

(34) II (1997) DMC 212 Cal

(35) AIR 2005 Ori 3

(36) (1956)2 Mad.LJ 289

(37) II (1999) DMC 411 Ker

(38) 1993 Cri LJ 238

(39) II (2003) DMC 275 Ori

(40) 1980 Cri.LJ 354

(41) 1993 Cri LJ 238

(42) I (2001) DMC 313 All

(43) I (2001) DMC 229 All

(44) I (2007) DMC 779 Del

(45) II (2007) DMC 820 Del

(46) II (2003) DMC 688 P&H

(47) II (2003) DMC 640 Gau

(48) I (2008) DMC 425 Jha

(49) AIR 1957 All 658

(50) AIR 1965 Ori 154

(51) II (2000) DMC 338 SC

(52) II (2003) DMC 344 Ker


(54) II (2008) DMC 19 Ker

(55) AIR 1987 SC 1049

(56) (2005) 4 SCC 449

(57) II (1999) DMC 693 AP
I (2001) DMC 763 SC

2004 MLR 609 Mad

II (2001) DMC 454 AP

I (2007) DMC 421 Ker

II (1999) DMC 693 AP

II (2008) DMC 462 Cal

AIR 1999 SC 3348: 2000 Cr.LJ 1 SC

I (2003) DMC 458

II (1993) DMC 162 SC: AIR 1993 SC 2295

II (2000) DMC 90 AP, 2004 MLR 231 MP

II (2002) DMC 530 Raj

II (2005) DMC 814 Del

I (2006) DMC 48 Cal

I (2006) DMC 83 AP

I (2006) DMC 793 Cal

I (2003) DMC 627 SC in this case it was held that directing the wife to undergo medical examination to disprove the allegations of mental disorder does not violate Article 21 of the Constitution (Right to Life which includes Right to Life with dignity) and also held that adverse inference can be drawn against her if the wife refuses to comply with the direction.

I (2006) DMC 19 All

I (2006) DMC 27 SC

II (2002) DMC 634 Pat

II (2008) DMC 341 Guj

I (2007) DMC 756 Mad

I (2007) DMC 246 AP

I (2008) DMC 249 HP
This issue has been discussed in detail in the previous chapter under ‘Rights of Married Minors to Maintenance’ in the section titled ‘Marriage of Minors’.

The Supreme Court ruling on conviction for bigamy which are referred here are the following: Bhaurao Shanker Lokhande v. State of Maharashtra, AIR 1965 SC 1564; Kanwal Ram v. The H.P. Administration, AIR 1966 SC 614; Priya Bala Ghosh v. Suresh Chandra Ghosh, AIR 1971 SC 1153; Lingari Obulamma v. L. Venkata Reddy, AIR 1979 SC 848. In these cases it was held that to prove the second marriage, it is essential to prove that saptapadi was performed.

An acceptable form of informal marriage. The term applies specially to the subsequent marriage of a divorcee woman. The marriage ceremony is informal and since the girl is not virgin, saptapadi is not performed during the marriage.
(101) I (2006) DMC 386 Bom

(102) Section 4: Overriding effect of the act – save as otherwise expressly provided in this Act, a) Any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this act shall cease to have effect with respect to any matter for which provision is made in this act.

(103) I (2009) DMC 164 SC

(104) Section 5(i) of the Hindu Marriage Act stipulates that neither party should have a spouse living at the time of the marriage. See section titled ‘Consequences of Monogamy’ in Chapter 1 Personal Laws and Women’s Rights of the first volume for a detailed discussion on this issue.

(105) AIR 1976 Bom 433

(106) (1991) 2 SCC 375

(107) I (2001) DMC 354 Mad

(108) I (2002) DMC 136 Bom


(110) AIR 2005 SC 1809: I (2005) DMC 503 SC

(111) I (2006) DMC 203 Bom

(112) I (2007) DMC 451 AP

(113) I (2001) DMC 204 All

(114) I (2008) DMC 719 Del

(115) I (2008) DMC 529 Del

(116) Section 29 (2) of Hindu Marriage Act, 1955.

(117) I (2001) DMC 110 MP

(118) This is a customary practice among certain communities. Gona or Gown is performed after the marriage, before the girl is sent off to her husband’s home for consummation of marriage or sexual cohabitation. The section titled ‘Marriage of Minors’ in the previous chapter has a reference to this custom.

(119) I (2005) DMC 1 SC

(120) II (2002) DMC 54 AP
(121) See section titled ‘Validity of Customary Laws’ of Chapter 1 Personal Laws and Women’s Rights of the first volume where this issue has been discussed in detail.

(122) AIR 1987 Bom 182

(123) (1989) 2 SCC 526

(124) II (2000) DMC 724 MP

(125) AIR 1982 Bom 231

(126) DMC I (2000) 579 Kar

(127) I (2003) DMC 430 Mad

(128) After the amendment in 2001, this remedy has been incorporated into the Divorce Act under Section 10A of the Act. So, a Christian couple can now avail of the remedy of divorce by mutual consent. See section titled ‘Christian Law of Marriage and Succession’ of Chapter 1 Personal Laws and Women’s Rights of the first volume where this issue is discussed in detail.

(129) AIR 1994 SC 133: I (1994) DMC 484 SC

(130) II (1998) DMC 503 Kar

(131) I (2000) DMC 164 SC

(132) II (2001) DMC (DB) 242 Kar

(133) AIR 2007 MP 242

(134) Natra is a form of customary remarriage of divorcees or widows which is less formal than the first marriage but carries with it contractual obligations as in a marriage. Customary divorces and natra marriages are accepted customary practices among many lower castes and tribes of North Indian states such as Rajasthan, Madhya Pradesh, Uttar Pradesh, etc.

(135) I (2002) DMC 90 Mad

(136) II (2000) DMC 278 Mad

(137) II (2005) DMC 567 Kar

(138) I (2003) DMC 1 SC

(139) II (2008) DMC 177 Bom

(140) AIR 1961 SC 1334
Section 18 (2)(e) of HAMA entitled a Hindu wife to live separately from her husband without forfeiting her claim to maintenance, if her husband keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere.

This case has been discussed under section titled ‘Legal Incidents of Marriage’ in Chapter 1 Marriage and its Dissolution.
discussed in detail.


(166) See section titled ‘Innovative Judicial Interpretation of the Muslim Women’s Act’ of Chapter 2 Constitutional Law and Citizenship Claims of the first volume where this issue is discussed in detail.

(167) 2000 Cri LJ 3560

(168) I (2007) DMC 820 Ker

(169) II (2007) DMC 215 Ker

(170) I (2000) DMC 229 Ker

(171) II (2008) DMC 575 Ker

(172) 2002 (7) SCC 518

(173) These cases have been discussed in detail under section titled ‘Islamic Law of Marriage and Succession’ in Chapter 1 Personal Laws and Women’s Rights of the first volume.

(174) II (2008) DMC 225 Pat

(175) II (2008) DMC 332 Bom

(176) II (2008) DMC 348 Ker

(177) I (2007) DMC 550 Kar

(178) 2002 Cr LJ. 2282 Cal

(179) II (1998) DMC 322 SC

(180) I (2007) DMC 226 Bom

(181) AIR 2007 SC 2215

(182) AIR 2010 SC 305

(183) 2010 (2) KLT 71

(184) II (2007) DMC 73 Del
(185) II (2007) DMC 677 Ker
(186) AIR 1980 Mad 82
(187) II (2002) DMC 646 AP
(188) I (2002) DMC 288 Ker
(189) II (2002) DMC 798
(190) AIR 2002 J&K 90
(191) I (2006) DMC 520 Del
(192) I (2006) DMC 55 Jha
(193) II (2000) DMC 283 MP
(194) II (2005) DMC 56 Ker; AIR 2005 Ker 91
(195) II (2008) DMC 111 P&H
(196) II (1999) DMC 127 Ori
(197) II (2008) DMC 113 Bom
(198) II (2007) DMC 550 Gau
(199) I (2006) DMC 444 Jha
(200) II (1998) DMC 322 SC
(201) II (2000) DMC 624 Kar
(202) I (2007) DMC 26 Del
(203) I (2007) DMC 22 All
(204) AIR 2000 SC 1398
(205) I (2004) DMC 632 Del
(206) 2005 MLR 311 AP
(207) 1993 Cri. LJ 238
(208) (1996)1 SCC 554
(209) I (2003) DMC 467 All
Section 2 (ii) of Dissolution of Muslim Marriages Act, 1939. See also Raj Mohammed v. Saeeda Amina Begam, AIR. 1976 Kar 201.

AIR 2002 Del 131

I (2001) DMC 469 Del

AIR 2000 Guj 277

I (2002) DMC 652 Del

I (2003) DMC 188 Kar

I (2008) DMC 827 Del

(1999) 6 SCC 326

II (2007) DMC 550 Gau

I (2008) DMC 22 SC

I (2002) DMC 20 MP

II (2006) DMC 35 All

I (2006) DMC 786 MP

II (2006) DMC 613 Ker

I (2008) DMC 481 Del
Section 127(3)(c) of Cr.PC stipulates that if a woman has obtained a divorce from her husband and has voluntarily surrendered her rights to maintenance after her divorce, the Magistrate may cancel the order of maintenance.
(258) II (2002) DMC 549 Cal: 2002 Cr.LJ 1751
(259) II (1997) DMC 164 SC: 1996 (4) SCC 479
(260) Through Marriage Law (Amendment) Act, 2003 (Act No.50 of 2003) which inserted Section 19(iii-a) in HMA and in Section 31(iii-a) in SMA w.e.f 23 December 2003.
(261) I (2006) DMC 32 AP
(262) See the rulings in Vinay Pandey v. Roshan Kumar, II (2000) DMC 571 SC; II (2000) DMC 511 SC.
(263) II (2001) DMC 171 SC
(264) II (2001) DMC (SC) 186
(265) II (2006) DMC 594 SC
(266) I (2008) DMC 354 SC
(267) II (2006) DMC 436 Bom
(268) I (2006) DMC 118 AP
(269) II (2006) DMC 589 MP
(270) I (2008) DMC 708 Ori
(271) I (2006) DMC 189 Ker
(272) (1992) 2 SCC 562
(274) (2004) 13 SCC 405
(275) (2005) 12 SCC 301
(276) II (2006) DMC 565 MP
(277) II (2001) DMC 593 MP
(278) II (2008) DMC 639 MP
(279) II (2002) DMC 24 MP
(280) II (2005) DMC 266 Ker
(281) AIR 1996 Bom 94
(282) AIR 1986 SC 984
(283) I (2002) DMC 749 AP
(284) AIR 1986 Guj 6
(285) AIR 1988 Raj 84
(286) AIR 1999 Bom 237
(287) AIR 1994 Del 234
(288) 2005 Cri.LR 572
(289) I (2007) DMC 514 Ker
(290) I (2006) DMC 465 Cal
(291) II (2008) DMC 830 SC
(292) I (2007) DMC 398 Cal
(293) II (2008) DMC 352 MP
(294) II (2007) DMC 731 Bom
(295) II (2006) DMC 453 Del
(296) I (2004) DMC 581 Mad
(297) II (2002) DMC 557 Guj
(298) AIR 1989 Del 10

(299) The removal of ceiling of Rs 500 for maintenance under Section 125 of Cr.PC has contributed a great deal in achieving this objective.

(300) In actual fact, the sums awarded are much lower, though in recent times one can discern an upward trend in the amounts awarded as maintenance. This is linked to the upward surge in salaries drawn by the middle and upper middle classes in the corporate world (AIR 1979 Bom.173).

(301) II (2005) DMC 417 Guj

(302) See ‘Husband’s Obligation to Maintain the Wife’ discussed earlier.

(303) 1998 Cri.LJ 2762

(304) II (2007) DMC 215 Ker
The order was passed in the days where mobile phones were considered as a status symbol.

Vinod Dulerai Mehta v. Kanak Vinod Mehta. AIR 1990 Bom 120. See also Mukesh Mittal v. Seema Mittal where husband’s income-tax returns were not produced and adverse inference was drawn.

The Times of India, Bombay, 20 February 2009, P. 11.
(328) II (2001) DMC 507 Pat

(329) I II (2003) DMC 142 Cal

(330) II (1999) DMC 536 Raj

(331) I (1998) DMC 699 Mad

(332) II (2001) DMC 381 Bom

(333) I (2004) DMC 445 Raj

(334) I (2007) DMC 751 Ori

(335) II (2008) DMC 363 SC

(336) I (2008) DMC 371 Del

(337) II (2005) DMC 345 Raj

(338) I (2006) DMC 709 Raj

(339) II (2008) DMC 276 Raj

(340) AIR 1994 Ori 15

(341) AIR 1996 P&H

(342) DMC I (2000) 524 Del

(343) II (2006) DMC 179 Del

(344) I (2007) DMC 590 Kar

(345) I (2003) DMC 580 Bom


(347) AIR 1964 Bom 83

(348) AIR 1991 Bom 440

(349) II (1993) DMC 110 SC

(350) II (2000) DMC 727 Bom

(351) II (2007) DMC 677 Ker

(352) II (2002) DMC 712 Bom
(353) II (2006) DMC 637 Gau
(354) I (2004) DMC 344 Jha
(355) I (2006) DMC 181 Cal
(356) II (1998) DMC 533 Mad
(357) AIR 1983 SC 916
(358) II (1999) DMC 681 Kar
(359) II (2001) DMC 260 MP
(360) II (2007) DMC 119 Bom
(361) I (2000) DMC 313 SC
(362) I (2000) DMC 156 P&H
(363) I (2004) DMC 693 AP
(364) I (2006) DMC 106 Mad
(365) I (2007) DMC 136 Ker
(366) II (2005) DMC 1 SC
(367) I (2006) DMC 461 All
(368) II (2007) DMC 779 P&H
(369) I (2003) DMC 483 HP
(370) II (2005) DMC 315 Guj
(371) II (2008) DMC 575 Ker
(372) II (2005) DMC 1 SC
(373) I (2006) DMC 461 All
(375) II (2006) DMC 270 Pat
(376) AIR 1993 All 133
(377) AIR 1993 All 133
(378) AIR 1965 Ori 154

(379) II (2008) DMC 19 Ker

(380) See the discussion on post divorce adultery in section titled ‘Matrimonial Misconduct and Right of Maintenance’ earlier.

(381) AIR 2005 Bom 352

(382) II (2006) DMC 120 Jha

(383) II (2006) DMC 629 Cal

(384) II (2006) DMC 310 Del

(385) II (2006) DMC 642 All

(386) II (2006) DMC 823 Del

(387) I (2007) DMC 82 AP

(388) I (2007) DMC 791 Pat

(389) II (2007) DMC 541 Cal

(390) II (2007) DMC 399 All

(391) See section titled ‘Material Basis for the Notion of Sacramental Indissolubility’ of Chapter 1 Marriage and Its Dissolution.

(392) See section titled ‘The Journey from Sacrament to Compract’ of Chapter 1 Marriage and Its Dissolution.

(393) Law Reform ( Married Women and Tortfeasors) Act, 1935 (c. 30).

(394) (1947) 63 TLR 645 (as cited in Heward 2003: 49)

(395) (1962) 3 All ER 345

(396) (1969) 2 All ER 385: (1970) AC 777

(397) (1971) AC 886: (1970) 2 All ER 780

(398) (1965) 2 All ER 472 HL

(399) The position was further altered through the enactment of the Family Law Act of 1996, which lay emphasis on conciliation and mediation rather than contested litigation.

(400) Rather surprisingly, the Hindu law did take into account an anti-women premise,
which was getting introduced in some Western countries, of equality and gender neutrality within matrimonial statutes, and awarded equal rights of maintenance to both the spouses, though the actual ground level reality of husbands and wives varied drastically in the Indian context.

(401) ‘The Act did not even provide for claiming the Hindu woman’s customary right of stridhan at the time of divorce. The concept of a woman’s claim to stridhan was evolved in contemporary times through a Supreme Court ruling under the criminal law, under Section 406 of IPC, Criminal Breach of Trust in Pratibha Rani v. Suraj Kumar AIR 1985 SC 658.

(402) (1962) LXV BLR 750
(403) (1977) Mh.LJ 66
(404) AIR 1982 Bom 341
(405) AIR 1985 AP 207
(406) I (2003) DMC 602 Bom
(407) II (2003) DMC 809 Cal
(408) I (2006) DMC 386 Bom

(410) Section 27—Disposal of Property: In any proceedings under this Act, the Court may make such provisions in the decree as it deems just and proper with respect to any property presented at or about the time of marriage, which may belong jointly to both the husband and the wife.

(411) Section 26 of the Act.

(412) This issue is discussed at length in sub-section, ‘Rights of Women in Informal Relationships’, in Section A earlier.

(413) (2007) 6 MLJ 205 Mad
(416) I (2008) DMC 507 Del
(417) 152 (2008) DLT 691
(418) 2008 (3) ALD 486
(419) 157 (2009) DLT 472


(421) CRA No.501/07 and 595/07 (decided on on 25 March 2008) MP.

(422) 2008 (5) Bom.CR149: (2008) 110 Bom LR 1797

(423) (1973) 1 All ER 829

(424) (1982) 1 All ER 41

(425) (1987) 1 FLR 7

(426) (1985) 1 All ER 328

(427) (1990) 1 FLR 140

(428) (2001) 1 AC 596


(430) The factors are set out in Section 75(2), FLA

(431) This section is based on the information gathered from the following website: How to: *The division of property when a marriage, civil union or de facto relationship ends* http://www.howtolaw.co.nz/html/ml013.asp (New Zealand)

(432) 1989 SLR 342

(433) (2003) 3 MLJ 273

(434) (1997) 1 MLJ 125

(435) (2004) 4 MLJ 395

(436) This section is based on information provided in *Know Your Rights* by Women Living Under Muslim Laws (2003: 316–19) and a recent news report regarding the situation in Tanzania.

(437) Dar-es-Salaam Daily News, 1 August 2009

(438) Ibid

(439) I am relying upon an incisive essay by Martha Fineman (1991a 265–77). While the essay is dated, the arguments are still relevant for our understanding of these concepts.
(440) (1984) 3 SCC 698
(441) AIR 1992 Pat 76
(442) Preamble of the Act
(443) AIR 1955 Nag 193
(444) Section 4 (1) of the Act
(445) (1917) ILR 40 Mad 672
(446) AIR 1914 PC 41
(447) AIR 1924 All 622
(448) AIR 1940 All 329
(449) AIR 1961 P&H 51
(450) AIR 1971 Mys 211; AIR 1971 MP 235
(451) (1984) 3 SCC 698
(452) AIR 1987 SC 3
(453) AIR 1993 Bom 232
(454) AIR 1993 Gau 38
(455) (1997) 10 SCC 342
(456) (1804) KB 5 East 221
(457) (1897) 1 Ch 786
(458) (1926) All ER 111
(459) (1948) 2 All ER 413
(460) Proviso to Section 6 (a) of HGMA
(461) The Punjab Chief Court was set up under the Punjab Chief Courts Act of 1866 and was converted into the Lahore High Court later in 1919.
(462) (1917) 40 IC 107
(463) AIR 1926 Lah 117
(464) AIR 1955 Mad 451
This issue is discussed in section titled ‘Marriages with Expatriate Indians’ of Chapter 1 Marriage and its Dissolution.

‘Unnatural offence’ is a term which is used in Section 377 of IPC to describe acts of a sexual nature which are outside of the scope of peno-vaginal intercourse. This section was in the news in the context of same sex relationships when the Delhi High Court read down the section to exclude consentual same sex relationships in Naz Foundation v. Government of NCT, 2010 Cri.LJ 94 Del.
(487) I (2004) DMC 414 Bom

(488) City sees rise in cases of parents kidnapping kids, Bombay: The Times of India, 27 April 2009.

(489) II (2008) DMC 774 SC

(490) AIR 1981 SC 1829

(491) AIR 2004 Bom 478

(492) I (2005) DMC 345 SC: (2005) 3 SCC 313

(493) AIR 2005 SC 3557

(494) (1991) 2 SCC 375

(495) I (2007) DMC 396 Bom

(496) AIR 1976 Bom 433

(497) AIR 2005 SC 1809: I (2005) DMC 503 SC

(498) The magistrate’s courts are the lowest in the rung of judicial hierarchies. Between this court and the Supreme Court are two other rungs—the sessions court and the high court.