MADHYA PRADESH STATE JUDICIAL ACADEMY
HIGH COURT OF M.P., JABALPUR

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Miscellaneous

1. POINT INVOLVED

Section 4 of Payment of Gratuity Act, and section 16 of the Hindu Marriage Act, 1955 – Payment of gratuity to the children born to the deceased from second wife.

Parties – ***Rameshwari Devi v. State Of Bihar***

Reported in – 2000 (3) M.P.H.T. 60 (SC)

Dispute between two wives of deceased employee regarding payment of family pension and death-cum-retirement gratuity. Deceased employee had married with second wife while the appellant/first wife was still alive. Children born to deceased employee from the wedlock of second wife. Question as to who is entitled to the family pension and death-cum-retirement gratuity on the death of employee arose. On this the Supreme Court held that children born to deceased employee from the wedlock of second wife are entitled to share in family pension and gratuity. But, second wife would not be entitled to anything. ***Badri Prasad v. Dy. Director of Consolidation, (1978) 3 SCC 527, State of Karnataka v. T. Venkataramanappa, (1996) 6 SCC 455*** and ***State of W.B. v. Prasenjit Dutta, (1994) 2 SCC 37*** referred to.

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2. POINT INVOLVED

Section 27 of the Hindu Marriage Act, 1955

Parties – ***Karan v. Smt. Mamtabai***

Reported in – 1999 (1) MPWN 216

Section 27 of H.M. Act provides sharing of only property which spouses received individually or collectively as presents which had come to be as a way of life in their joint use in their day-today living.

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3. POINT INVOLVED

Partition – Partition deed how to be considered

Parties – ***Gangaram v. Choudhary Jai Kumar***

Reported in – 2001 (1) MPWN NOTE 104

Document not signed by all members of family cannot be termed as partition deed.

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4. POINT INVOLVED

Section 44 of the Transfer of Property Act, 1881 – Claim of share from minor's property.

Parties – ***Prakash Chandra v. Nandkishore***

Reported in – 2000 (2) VIDHI BHASVAR 162

Ancestral property of joint Hindu Family sold for benefit of estate and legal necessity. None of the family members can claim his share. The provisions of Section 44 T.P. Act not applicable.

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5. POINT INVOLVED

Sections 13 and 23-A of the Hindu Marriage Act, 1955 and Order 8 Rule 6-A of the Civil Procedure Code, 1908 – Applicability of provisions of Order 8 Rule 6-A CPC with reference to section 23-A of Hindu Marriage Act.

Parties – ***Sameeran Roy v. Smt. Leena Roy***

Reported in – 2000 (4) M.P.H.T. 269

In view of the special provisions enshrined under Section 23-a of the Hindu Marriage Act, provisions of O. 8 R. 6-A of the Code of Civil Procedure shall not be applicable. Section 23-A of H.M. Act is a special Provision.

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6. POINT INVOLVED

Section 24 of the Hindu Marriage Act, 1955

Parties – ***Mamta Jaiswal (Smt.) v. Rajesh Jaiswal***

Reported in – 2000 (2) VIDHI BHASVAR 76

Party having capacity of earning choosing to remain idle, cannot be allowed to any alimony and expenses. Lady fighting matrimonial petition of divorce cannot be permitted to sit idle and put her burden on husband. The purpose of enacting section 24 of Hindu Marriage Act is for needy persons. Benefit cannot be asked by idle persons having capacity to earn. A well educated wife, in the present case M.Sc., M.C., M.Ed. cannot be supposed to need any other person for traveling with her. She does not require any expenses for such person's journey, to attain her proceedings in the Court. Please refer to ***Pawan Kumar Jain v. Smt. Sunita Jain 2000 (II) M.P.W.N. 178.***

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7. POINT INVOLVED

Sections 24 and 26 of the Hindu Marriage Act, 1955 and section 112 of the Evidence Act, 1872 – Entitlement of litigation expenses

Parties – ***Yashpal v. Anjana***

Reported in – 2001 (1) M.P.L.J. 43

Wife getting salary of about Rs. 4725/- per month. Application filed by the claiming litigation expenses in divorce proceedings. Trial court granted Rs. 2,500/- towards expenses of litigation. The order was set aside.

In the present application wife claimed grant of maintenance, to the Minor son. Husband disputed parentage of the child. No evidence had been adduced and the parties agreed for blood grouping the child but the same had not been done. Presumption under section 112 of the Evidence Act would arise in favour of the wife. Grant of maintenance allowance for the child at Rs. 600/- per month towards monthly maintenance allowance allowed from the date of order and not from the date of filing of the application. ***Devesh Pratap v. Sunita Singh, AIR 1999 MP 174,***

Shankar Lal v. Smt. Krishan Tiwari, 1995 Vol. I. D. & M.C. 492 relied on and ***Vinay Kumar v. Smt. Mithilesh Bai, 1995 Vol. II D & M.C. 133*** not applicable.

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8. POINT INVOLVED

Order 20 Rule 18 of the Civil Procedure Code, 1908 – Hindu Law Partition of joint family property- mere severance of Status of Joint family does not change character of Joint Family property.

Parties – ***M.L. Subbarya Setty (dead) By L.R's. Vs. M.L. Nagappa Setty (dead) Ry.L.R's & Ors.***

Reported in – (2002) 4 SCC 743

The date of valuation of the properties in a suit of partition has to be the date of the passing of the final decree and not the date of filing of the suit for partition. In a given case, however, there may be exception of this general rule. It is a matter of common knowledge that such suits for partition take considerable time for disposal. There is a big time-lag between the date of filing of the suit and date of the decision thereof. There is also considerable lapse of time between passing of preliminary decree and passing of final decree. Ordinarily, though it is the date of final decree but in reality the date of valuation which the Commissioner takes into view in the report, that is taken into consideration by the Court. But that would again depend on the facts of each case. in a given case, there may be a gap of years between the date of the report of the Commissioner and the date of the final partition. In the meanwhile, there may have been a sharp increase or decrease in the values of the property or properties. In such event, the Court may have to balance the equities and pass other directions in order to partition the properties between the parties as per their respective shares. The preliminary decree declares the shares of the parties and the properties which are joint and are required to be divided between the co-shares. (ii) The legal position is well settled that on mere severance of status of joint family, the character of any joint family property does not change with such severance. It retains the character of joint family property till partition. In ***Bhagwant P. Sulakhe***

V. Digambar Gopal Sulakhe, AIR 1986 SC 79 this Court held that the character of any joint family property does not change with the severance of status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-shares.

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9. POINT INVOLVED

Partition –There may be partial partition either in respect of property or in respect of persons.

Parties – ***Laxminaryan v. Smt. Prembai & Ors. Nagappa Setty (dead) Ry.L.R's & Ors.***

Reported in – 2002 (2) MPLJ 381 (H.C.)

Mulla in his *Principles of Hindu Law* vide section 328 admit a possibility of partial partition either in respect of property or in respect of persons making it. In ***Lilawati Vs. Paras Ram, AIR 1977 HP (1)*** Such possibility is accepted. Though of course in such cases normal presumption is that all the property was divided and the party alleging that some of the property in the exclusive possession of one of the brothers is joint and is liable to be partitioned has to prove his case. ***Tejraj and ors. v. Mohanlal and ors., AIR 1955 Rajasthan 157***.

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10. POINT INVOLVED

Section 151 of the Civil Procedure Code – Matrimonial Dispute: power of the courts to grant temporary injunction under section 151 C. P. C

Parties – ***Pratiksha v. Pravin Dinkar***

Reported in – 2002 (1) MPLJ 68

Paragraph 9 and 13 of the report are reproduced in toto section 151 of the code is not substantive provision conferring any right to get any relief of any kind. The object of the legislature in enacting the various provisions of laws of procedure is also to serve the ends of justice. This section provides recognition of an age old

well established principle that every court has inherent powers to act ex debito justitiae, to do that real and substantial justice for the administration of which alone it exists or to prevent abuse of the process of the court. It has been held by the Supreme Court in the case of ***measures JAIPUR mineral development syndicate, JAIPUR vs the Commissioner of L. T, New Delhi***, reported in ***A. I. R. 1977 SC 1348*** that "every court is constituted for the purposes of doing justice according to law and must be deemed to possess, as the necessary corollary; and as inherent in its very constitution, all such powers as may be necessary to do the right and two undo a wrong in the course of the administration of justice".

From the aforesaid discussion, it is clear that under inherent powers the court hearing petitions regarding conjugal rights and matrimonial obligations can issue injunctions and preventive orders, and in a case the element of property under dispute, the court can also exercise powers under order 39 rules one and two of the code to prevent misuse and waste of the property.

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11. POINT INVOLVED

Section 16 (3) of the Hindu Marriage Act, 1955 – Illegitimate children getting status of legitimacy under Section 16(3)-Entitled to claim inheritance in property of parents but not in ancestral coparcenary property.

Parties – ***Jinia Keotin and others v. Kumar Sitaram Manjhi and others***

Reported in – (2003) 1 SCC 730

The learned counsel for the appellants, while reiterating the stand taken before the courts below, vehemently contended that once the children born out of void and illegal marriage have been specifically safeguarded under Section 16, as amended by Central Act 68 of 1976, there is no justification to deny them equal treatment on a par with the children born of the wife in lawful wedlock by countenancing claims for inheritance even in the ancestral coparcenary property.

So far as Section 16 of the Act is concerned, though it was enacted to legitimise children, who would otherwise suffer by becoming illegitimate, at the same time it expressly provides in sub-section (3) by engrafting a provision with a non obstante clause stipulating specifically that 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". In the light of such an express mandate of the legislature itself, 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 to doing not only violence to the provision specifically engrafted in sub-section(3) of Section 16 of the Act but also would attempt to court relegislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself. Consequently, we are unable to countenance the submissions on behalf of the appellants.

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12. POINT INVOLVED

Sections 23 (2) and 24 of the Hindu Marriage Act, 1955 – Grant of relief under Section 24- It should precede efforts for reconciliation under Section 23 (2) of the Act.

Parties – ***Keshavrao v. Tihalibai***

Reported in – 2003 (1) MPHT 5 (NOC)

A perusal of the record including the copies of the order sheets reveals that the respondent/applicant never made appearance before the Court below which clearly indicates that the provisions of Section 23 (2) of the Hindu Marriage Act have not yet been complied with. These provisions are mandatory and unless the efforts for

reconciliation are made by the Court, no relief whatsoever could have been granted to the respondent/applicant.

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13. POINT INVOLVED

Section 25 of the Hindu Marriage Act, 1955 – Dismissal of divorce application-It cannot be regarded as decree for the purpose of making an order of permanent alimony u/s 25.

Parties – ***Prakash Chandra v. Rajkumari @ Jyoti***

Reported in – 2003 (2) MPLJ 324

It is true that under section 25 of the Act permanent alimony and maintenance can only be granted at the time of passing of any decree and this word "at the time of passing of any decree or at any time subsequent thereto" has been interpreted by the various High Courts that the expression "any decree" does not include an order of dismissal and it has been consistently held that the passing of an order of dismissal of a petition cannot be regarded as the passing of a decree within the meaning of this section.

The object of section 24 of the Act is to provide maintenance pendente lite to a party. Under section 24 of the Act the Court can grant maintenance and expenses of the proceedings to the wife or the husband during pendente lite of proceedings/petition, but section 25 of the Act makes provision for grant of permanent alimony and maintenance for future after decree. The word appearing in section 25 of the Act "at any time of passing any decree", have been interpreted by the various High Courts to the extent where decree, either for divorce or for restitution of conjugal rights or judicial separation if passed, then application for permanent alimony can be allowed and a decree for dismissal of the petition has not been regarded as passing of a decree within the meaning of this section. The expression "any decree" does not include an order of dismissal.

The Supreme Court in the case of ***Chand Dhawan vs. Jawaharlal Dhawan, 1994 MPLJ 1*** has held as under :-

> "Under the Hindu Marriage Act, 1955 the claim of a Hindu wife to permanent alimony or maintenance is based on the supposition that

either her marital status has been strained or affected by passing a decree for restitution of conjugal rights or judicial separation in favour or against her, or her marriage stands dissolved by a decree of nullity or divorce, with or without her consent. When her marital status is to be affected or disrupted, the Court does so by passing a decree for or against her. On or at the time of the happening of that event, the Court being seisin of the matter, invokes its ancillary or incidental power to grant permanent alimony. The Court also retains the jurisdiction as subsequent stages to fulfil this incidental or ancillary obligation when moved by an application on that behalf by a party entitled to relief. The Court further retains the power to change or alter the order in view of the changed circumstances. The whole exercise is within the ambit of a diseased or a broken marriage. In order to avoid conflict of perceptions the Legislature while codifying the Hindu Marriage Act preserved the right of permanent maintenance in favour of the husband or wife, as the case may be, dependent on the Court passing a decree of the kind as envisaged under sections 9 to 14 of the Act. Without the marital status being affected or disrupted by the matrimonial Court under the Hindu Marriage Act, the claim of permanent alimony was not to be valid as ancillary or incidental to such affectation or disruption. The wife's claim to maintenance necessarily has then to be agitated under the Hindu Adoptions and Maintenance Act, 1956 which is a legislative measure later in point of time than the Hindu Marriage Act, 1955, though part of the same socio-legal scheme revolutionizing the law applicable to Hindus".

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14. POINT INVOLVED

Section 27 of the Hindu Marriage Act, 1955 and section 151 & Order 7 Rule 7 of the Civil Procedure Code, 1908 – Relief, as per the provisions under Section 27 of the Act r/w/ Order 7 Rule 7 and Section 151 of the Code, when may be granted? – Held, Section 27 of the Act is applicable in respect of property received at or about time of marriage, which may belong jointly to both husband and wife – Decree/order in respect of such property may be granted by Court not only in a proceeding relating to matrimonial dispute but also in a subsequent proceeding initiated under Section

27 of the Act and Order 7 Rule 7 r/w/s 151 of the Code.

Parties – ***Manish Nema v. Sandhya Nema***

Reported in – 2009 (2) MPHT 267 (DB)

Section 27 of the Hindu Marriage Act of 1955 provides for that "In any proceeding under this Act, the Court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which, may belong jointly to both the husband and the wife."

Fair reading of the aforesaid provision reveals that it is applicable in respect of the property received at or about time of marriage, which may belong jointly to both husband and wife. It empowers the Court while deciding the matrimonial dispute to also pass decree in respect of property which may jointly belong to both husband and wife. It provides the civil remedy to an aggrieved wife or husband as the case may be.

The submissions put forth by learned Counsel for the appellant that such powers can be exercised by the Matrimonial Court in a matrimonial dispute and not in a proceeding subsequently initiated under Section 27 under Order 7 Rule 7 of the Code of Civil Procedure read with Section 151 of the CPC.

The submission of the learned Counsel for the appellant loses its hold in wake of judgments rendered by the Division Bench of this Court in ***Nirmala Gupta v. Ravendra Kumar, AIR 1996 MP 227*** wherein placing reliance of judgments rendered by the Supreme Court in ***Prathibha Rani v. Suraj Kumar, AIR 1985 SC 628*** and ***Manohar Lal Chopra v. Rai Bahadur Rao Raj Seth Hiralal, AIR 1962 SC 527*** and the judgment rendered by the High Court of Allahabad and Bombay in ***Kamta Prasad v. Smt. Om Wati, AIR 1972 All 153*** and ***Sangeeta Balkrishna Kadam v. Balkrishna Ramchandra Kadam, AIR 1994 Bombay 1***, it was observed that provision under Section 151 read with Order 7 Rule 7 of CPC permits a Court in passing a decree in favour of wife or husband as the case may be for return of the property, which may exclusively belong to either of them.

For the sake of completeness we note with profit paragraph 12 of the judgment referred in ***Nirmala Gupta*** (supra): –

> "It may be noted that the Act is a special enactment governing the matrimonial proceedings between the parties. Section 4 (1) of the Code of Civil Procedure reads as under: –
> '**4. Savings –** (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law not in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.' "

From this provision, it is clear that the procedure prescribed by the special law will not be limited by the Code of Civil Procedure. However, the Act itself adopts the CPC so far as it is applicable in the matrimonial proceedings under the Act and, therefore, all the provisions of the CPC will be applicable to the matrimonial proceedings under the Act. Section 151 read with Order VII Rule 7 of the Code of Civil Procedure will also be made applicable because there is no provision under the Act which bars the application of these provisions of the CPC. Order VII Rule 7 of the Code permits the Court to grant such relief not prayed for as would be just under the circumstances of the case."

Having thus considered we do not find any substance in the submission put forth on behalf of the appellant that Trial Court exceeded its jurisdiction inherent under Section 27 of the Act of 1955 or that it committed any error in allowing the application for return of ornament and furniture.

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15. POINT INVOLVED

Sections 5 and 7 of the Hindu Marriage Act, 1955 and Section 39 of the Insurance Act, 1938

- Evidence to establish marital status – Long co-habitation and acceptance of the society of a man and woman as husband and wife goes a long way in establishing a valid marriage.
- Effect of nomination of policy holder – Insurer gets a valid discharge of its liability under the policy on payment to nominee but such amount is subject to the law of succession applicable to the deceased.

Parties – *Challamma v. Tilaga and others*

Reported in – (2009) 9 SCC 299

The question as to whether a valid marriage had taken place between a man and woman is essentially a question of fact. In arriving at a finding of fact indisputably the learned trial judge was not only entitled to analyze the evidences brought on record by the parties hereto so as to come to a conclusion as to whether all the ingredients of a valid marriage as contained in Section 5 of the Hindu Marriage Act, 1955 stand established or not; a presumption of a valid marriage having regard to the fact that they had been residing together for a long time and has been accepted in the society as husband and wife, could also be drawn.

A long cohabitation and acceptance of the society of a man and woman as husband and wife goes a long way in establishing a valid marriage.

In ***Tulsa v. Durghatiya, (2008) 4 SCC 520***, this Court held:

> "11. At this juncture reference may be made to Section 114 of the Evidence Act, 1872 (in short "the Evidence Act"). The provision refers to common course of natural events, human conduct and private business. The court may presume the existence of any fact which it thinks likely to have occurred. Reading the provisions of Sections 50 and 114 of the Evidence Act together, it is clear that the act of marriage can be presumed from the common course of natural events and the conduct of parties as they are borne out by the facts of a particular case.
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> 12. A number of judicial pronouncements have been made on this aspect of the matter. The Privy Council, on two occasions, considered the scope of the presumption that could be drawn as to the relationship of marriage between two persons living together. In first of them i.e. ***Andrahennedige Dinohamy v. Wijetunge Liyanapatabendige Balahamy, AIR 1927 PC 185***, Their Lordships of the Privy Council laid down the general proposition that:
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> > "... where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage."
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> 13. In ***Mohabbat Ali Khan v. Mohd. Ibrahim Khan, AIR 1929 PC 135 = (1928-29) 56 IA 201***, Their Lordships of the Privy Council once again laid down that: (IA p. 207)
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> > "The law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years."
>
> 14. It was held that such a presumption could be drawn under Section 114 of the Evidence Act."

It is also well settled that a presumption of a valid marriage although is a rebuttable one, it is for the other party to establish the same. [See ***Ranganath Parmeshwar Panditrao Moli v. Eknath Gajanan Kulkarni (1996) 7 SCC 681*** and ***Sobha Hymavathi Devi v. Setti Gangadhara Swamy, (2005) 2 SCC 244***]. Such a presumption can be validly raised having regard to Section 50 of the Indian Evidence Act. [See ***Tulsa*** (supra)]. A heavy burden, thus, lies on the person who seeks to prove that no marriage has taken place.

Section 39 of the Insurance Act, 1938 enables the holder of a policy, while effecting the same, to nominate a person to whom the money secured by the policy shall be paid in the event of his death. The effect of such nomination was considered by this Court in ***Vishin N. Khanchandani v. Vidya Lachmandas Khanchandani, (2000) 6 SCC 724*** wherein the law has been laid down in the following terms:

> "10. ....The nomination only indicated the hand which was authorised to receive the amount on the payment of which the insurer got a valid discharge of its liability under the policy. The policy-holder continued to have an interest in the policy during his lifetime and the nominee acquired no sort of interest in the policy during the lifetime of the policy-holder. On the death of the policy-holder, the amount payable under the policy became part of his estate which was governed by the law of succession applicable to him. Such succession may be testamentary or intestate. Section 39 did not operate as a third kind of succession which could be styled as a statutory testament. A nominee could not be treated as being equivalent to an heir or legatee. The amount of interest under the policy could, therefore, be claimed by the heirs of the assured in accordance with the law of succession governing them."

In ***Sarbati Devi v. Smt. Usha Devi, (1984) 1 SCC 424***, this Court held:

> "4. At the outset it should be mentioned that except the decision of the Allahabad High Court in ***Kesari Devi v. Dharma Devi, AIR 1962 All 355*** on which reliance was placed by the High Court in dismissing the appeal before it and the two decisions of the Delhi High Court in ***S. Fauza Singh v. Kuldip Singh, AIR 1978 Del 276*** and ***Uma Sehgal v. Dwarka Dass Sehgal, AIR 1982 Del 36*** in all other decisions cited before us the view taken is that the nominee under Section 39 of the Act is nothing more than an agent to receive the money due under a life insurance policy in the circumstances similar to those in the present case and that the money remains the property of the assured during his lifetime and on his death forms part of his estate subject to the law of succession applicable to him."

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16. POINT INVOLVED

Section 26 of the Hindu Marriage Act, 1955 – Orders about custody of child and visitation rights are always considered interlocutory – They can be altered and modified as per the needs of the child.

Parties – ***Vikram Vir Vohra v. Shalini Bhalla***

Reported in – AIR 2010 SC 1675

In a matter relating to custody of a child, this Court must remember that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his or her life. That is why custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs of the child.

In ***Rosy Jacob v. Jacob A Chakramakkal, (1973) 1 SCC 840*** a three-Judge Bench of this Court held that all orders relating to custody of minors were considered to be temporary orders. The learned judges made it clear that with the passage of time, the Court is entitled to modify the order in the interest of the minor child. The Court went to the extent of saying that even if orders are based on consent, those orders can also be varied if the welfare of the child so demands.

The aforesaid principle has again been followed in ***Dhanwanti Joshi v. Madhav Unde, (1998) 1 SCC 112***.

Even though the aforesaid principles have been laid down in proceedings under the Guardians and Wards Act, 1890, these principles are equally applicable in dealing with the custody of a child under Section 26 of the Act since in both the situations two things are common; the first, being orders relating to custody of a growing child and secondly, the paramount consideration of the welfare of the child. Such considerations are never static nor can they be squeezed in a strait jacket. Therefore, each case has to be dealt with on the basis of its peculiar facts.

In this connection, the principles laid down by this Court in ***Gaurav Nagpal v. Sumedha Nagpal, AIR 2009 SC 557*** are very pertinent. Those principles in paragraphs 42 and 43 are set out below:

> "42. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said 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.
> 43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force".

That is why this Court has all along insisted on focussing the welfare of the child and accepted it to be the paramount consideration guiding the Court's discretion in custody order. (See ***Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, AIR 1982 SC 1276***).

In the factual and legal background considered above, the objections raised by the appellant do not hold much water.

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17. POINT INVOLVED

Section 16 of the Hindu Marriage Act, 1955 – Illegitimate children born out of live-in relationship are entitled to claim share only in self-acquired property of their parents – They cannot claim share in ancestral coparcenary property of their parents.

Parties – ***Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.***

Reported in – AIR 2010 SC 2685

It is evident that Section 16 of the Hindu Marriage Act intends to bring about social reforms, conferment of social status of legitimacy on a group of children, otherwise treated as illegitimate, as its prime object.

In ***S.P.S. Balasubramanyam v. Suruttayan @ Andali Padayachi & Ors., AIR 1992 SC 756***, this Court held that if man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under Section 114 of the Evidence Act that they live as husband and wife and the children born to them will not be illegitimate.

In ***S. Khushboo v. Kanniammal & Anr., 2010 AIR SCW 2770*** this Court, placing reliance upon its earlier decision in ***Lata Singh v. State of U.P. & Anr., AIR 2006 SC 2522***, held that live-in-relationship is permissible only in unmarried major persons of heterogeneous sex. In case, one of the said persons is married, man may be guilty of offence of adultery and it would amount to an offence under Section 497 IPC.

In ***Smt. P.E.K. Kalliani Amma & Ors. v. K. Devi & Ors., AIR 1996 SC 1963***, this Court held that Section 16 of the Act is not *ultra vires* of the Constitution of India. In view of the legal fiction contained in Section 16, the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents.

In ***Rameshwari Devi v. State of Bihar & Ors., AIR 2000 SC 735***, this Court dealt with a case wherein after the death of a Government employee, children born illegitimately by the woman, who had been living with the said employee, claimed the share in pension/gratuity and other death-cum-retiral benefits along with children born out of a legal wedlock. This Court held that under Section 16 of the Act, children of void marriage are legitimate. As the employee, a Hindu, died intestate, the children of the deceased employee born out of void marriage were entitled to share in the family pension, death-cum-retiral benefits and gratuity.

In ***Jinia Keotin & Ors. v. Kumar Sitaram Manjhi & Ors., (2003) 1 SCC 730***, this Court held that while engrafting a rule of fiction in Section 16 of the Act, the illegitimate children have become entitled to get share only in self-acquired properties of their parents. The Court held as under:-

> "4.....Under the ordinary law, a child for being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of contravention of the statutory prescriptions, any child born of such marriage would have the effect, per se, or on being so declared or annulled, as the case may be, of bastardising the children born of the parties to such marriage. Polygamy, which was permissible and widely prevalent among the Hindus in the past and considered to have evil effects on society, came to be put an end to by the mandate of the Parliament in enacting the Hindu Marriage Act, 1955. The legitimate status of the children which depended very much upon

> the marriage between their parents being valid or void, thus turned on the act of parents over which the innocent child had no hold or control. But for no fault of it, the innocent baby had to suffer a permanent set back in life and in the eyes of society by being treated as illegitimate. A laudable and noble act of the legislature indeed in enacting Section 16 to put an end to a great social evil. At the same time, Section 16 of the Act, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable chose also to confine its application, so far as succession or inheritance by such children are concerned to the properties of the parents only.
>
> 5. So far as Section 16 of the Act is concerned, though it was enacted to legitimise children, who would otherwise suffer by becoming illegitimate, at the same time it expressly provide in sub-section (3) by engrafting a provision with a non-obstante clause stipulating specifically that 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 this not being the legitimate child of his parents'. In the light of such an express mandate of the legislature itself 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 to doing not only violence to the provision specifically engrafted in sub-section (3) of Section 16 of the Act but also would attempt to court re-legislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself. Consequently, we are unable to countenance the submissions on behalf of the appellants...."

This view has been approved and followed by this Court in ***Neelamma and others v. Sarojamma and others,(2006) 9 SCC 612***.

Thus, it is evident that in such a fact-situation, a child born of void or voidable marriage is not entitled to claim inheritance in ancestral coparcenery property but is entitled only to claim share in self acquired properties, if any.

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18. POINT INVOLVED

Order 1 Rule 10 of the Civil Procedure Code, 1908 and section 13 (1) (i) of the Hindu Marriage Act, 1955 – Addition of parties – The question as to addition of parties is of judicial discretion and depends upon facts and circumstances of a particular case – If by adding a person as party, Court is in a better position to effectively and completely adjudicate the controversy involved in the suit, then person concerned should be impleaded as a party in the proceeding.

Necessary party and proper party, distinction between – A necessary party is one without whom no order can be made effectively – A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings.

Whether a person with whom adultery was committed by the respondent spouse is a proper party to the petition for dissolution of marriage on the ground of adultery? Held, Yes.

Parties – ***Jaideep Shah v. Rashmi Shah @ Miss Rashmi Vyas***

Reported in – 2011 (2) MPLJ 680

The question of addition of a party under Order 1, Rule 10 of the Code of Civil Procedure is generally of judicial discretion which has to be exercised in the facts and circumstances of a particular case. Where the Court is of the opinion that by adding a party it would be in a better position to effectively and completely adjudicate the controversy involved in the suit, in such a case the concerned person

should be impleaded as a party in the proceeding. [See : ***Razia Begum v. Sahebzadi Anwar Begum and others, AIR 1958 SC 886, Balraj Taneja and another v. Sunil Madan and another, AIR 1999 SC 3381*** and ***Ruma Chakraborty v. Sudha Rani Banerjee and another, AIR 2005 SC 3557***]. The distinction between necessary and proper party is also well settled in law. A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. [See : ***Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay and others, (1992) 2 SCC 524***].

In a petition under Section 13 (1) (i) of the Hindu Marriage Act, 1955, an allegation of voluntary sexual intercourse by the spouse with a third party is required to be adjudicated. The High Court in exercise of power under sections 14 and 21 of the Hindu Marriage Act 1955 has framed Rules. Under Rule 2(7) (e)(2) of the Rules, in a petition seeking dissolution of marriage on the ground of adultery, the date and place of the adultery and the name and address of the person with whom the adultery was committed by the respondent is required to be stated. Rule 5 enjoins a duty on the Court to issue notice to the respondent and co-respondent, if any. The aforesaid Rule is in consonance with the principles of natural justice as the finding recorded in the suit would adversely affect the reputation of the concerned person and, therefore, such a person should have an opportunity to defend his reputation before such a finding is recorded. My aforesaid conclusion finds support from a Division Bench decision of Karnataka High Court reported in ***Arun Kumar Agrawal v. Radha Arun and others, AIR 2003 Karnataka 508***. So far as the reliance placed by the learned counsel for the respondent No. 2 on the decision of this Court in ***Neelam Tiwari v. Sunil Tiwari, 2009 (3) MPLJ 45***, is concerned, in the said case, the adulterer was not impleaded as a party in the petition for divorce before the trial Court. In appeal, an objection was raised that since the adulterer was not impleaded as co-respondent, therefore, the petition filed under section 13 of the Hindu Marriage Act, 1955 was bad on account of non-joinder of necessary party. In the aforesaid context, the learned Single Judge of this Court held that Rules framed by this Court does not mandatorily require the impleadment of the adulterer. The ratio laid down in the aforesaid case is of no assistance to learned counsel for the respondent No. 2, in the facts and circumstances of the case.

For the aforementioned reasons, the order passed by the trial Court dated 07.12.2010 cannot be sustained in the eye of law.

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19. POINT INVOLVED

Sections 2 (c), 155 (2), 155 (4), 173 and 198 of the Criminal Procedure Code, 1973, Sections 417, 420, 494, 495 and 498-A of the Indian Penal Code, 1860 and Sections 5 (i) and 11 of the Hindu Marriage Act, 1955.

- Bigamy – Prosecution for – Scope, meaning and interpretation of expression "aggrieved person" under Section 198 CrPC – Held, a woman with whom a second marriage is solemnized by suppressing fact of former marriage is an aggrieved person and she is entitled to file a complaint under Sections 494 and 495 IPC as Section 495 is an extension of Section 494 IPC – Debarring second wife from filing complaint under Section 494 IPC would be height of perversity.
- Where the matter under investigation before the police on the basis of an FIR relates to cognizable as well as non cognizable offence, and after investigation if the police files a chargesheet, then the Court can take cognizance also of the non-cognizable offence with other cognizable offence by virtue of Section 155 (4) CrPC – Even in these circumstances, bar under Section 198 CrPC will not arise.

- Second wife is "wife" within the meaning of Section 498-A and is entitled to maintain a complaint under the said provision.

Parties – ***A. Subhash Babu v. State of Andhra Pradesh and another***

Reported in – (2011) 7 SCC 616

Section 494 introduces monogamy which is essentially voluntary union of life of one man with one woman to the exclusion of all others. It enacts that neither party must have a spouse living at the time of marriage. Polygamy was practiced in many sections of Hindu society in ancient times. It is not a matter of long past that in India, hypergamy brought forth wholesale polygamy and along with it misery, plight and ignominy to woman having no parallel in the world. In post vedic India a King could take and generally used to have more than one wife. Section 4, of Hindu Marriage Act nullifies and supersedes such practice all over India among the Hindus. Section 494 is intended to achieve laudable object of monogamy. This object can be achieved only by expanding the meaning of the phrase "aggrieved person".

For a variety of reasons the first wife may not choose to file complaint against her husband e.g. when she is assured of re-union by her husband, when husband assures to snap the tie of second marriage etc. Non-filing of the complaint under Section 494 IPC by first wife does not mean that the offence is wiped out and monogamy sought to be achieved by means of Section 494 IPC merely remains in statute book. Having regard to the scope, purpose, context and object of enacting Section 494 IPC and also the prevailing practices in the society sought to be curbed by Section 494 IPC, there is no manner of doubt that the complainant should be an aggrieved person. Section 198(1)(c) of the Criminal Procedure Code, amongst other things, provides that where the person aggrieved by an offence under Section 494 or Section 495 IPC is the wife, complaint on her behalf may also be filed by her father, mother, sister, son, daughter etc. or with the leave of the Court, by any other person related to her by blood, marriage or adoption.

In ***Gopal Lal Vs. State of Rajasthan, (1979) 2 SCC 170*** this Court has ruled that in order to attract the provisions of Section 494 IPC both the marriages of the accused must be valid in the sense that the necessary ceremonies required by the personal law governing the parties must have been duly performed.

Though Section 11 of the Hindu Marriage Act provides that any marriage solemnized, if it contravenes the conditions specified in Clause (i) of Section 5 of the said Act, shall be null and void, it also provides that such marriage may on a petition presented by either party thereto, be so declared. Though the law specifically does not cast obligation on either party to seek declaration of nullity of marriage and it may be open to the parties even without recourse to the Court to treat the marriage as a nullity, such a course is neither prudent nor intended and a declaration in terms of Section 11 of the Hindu Marriage Act will have to be asked for, for the purpose of precaution and/or record. Therefore, until the declaration contemplated by Section 11 of the Hindu Marriage Act is made by a competent Court, the woman with whom second marriage is solemnized continues to be the wife within the meaning of Section 494 IPC and would be entitled to maintain a complaint against her husband.

The expression “aggrieved person” denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of complainant's interest and the nature and the extent of the prejudice or injury suffered by the complainant. Section 494 does not restrict right of filing complaint to the first wife and there is no reason to read the said Section in a restricted manner as is suggested by the learned Counsel for the appellant. Section 494 does not say that the complaint for commission of offence under the said section can be filed only by wife living and not by the woman with whom subsequent marriage takes place during the life time of the wife living and which marriage is void by reason of its taking place during the life of such wife. The complaint can also be filed by the person with whom second marriage takes place which is void by reason of its taking place during the life of first wife.

To hold that a woman with whom second marriage is performed is not entitled to maintain a complaint under Section 494 IPC though she suffers legal injuries would be the height of perversity.

Section 495 IPC provides that if a person committing the offence defined in Section 494 IPC conceals from the person with whom the subsequent marriage is contracted, the fact of the former marriage, the said person is liable to be punished as provided therein.

The offence mentioned in Section 495 IPC is an aggravated form of bigamy provided in Section 494 IPC. The circumstance of aggravation is the concealment of the fact of the former marriage to the person with whom the second marriage is contracted. Since the offence under Section 495 IPC is in essence bigamy, it follows that all the elements necessary to constitute that offence must be present here also. A married man who by passing himself off as unmarried induces an innocent woman to become, as she thinks his wife, but in reality his mistress, commits one of the grossest forms of frauds known to law and therefore severe punishment is provided in Section 495 IPC.

Section 495 begins with the words “whoever commits the offence defined in the last preceding Section.....” The reference to Section 494 IPC in Section 495 IPC makes it clear that Section 495 IPC is extension of Section 494 IPC and part and parcel of it. The concealment spoken of in Section 495 IPC would be from the woman with whom the subsequent marriage is performed. Therefore, the wife with whom the subsequent marriage is contracted after concealment of former marriage, would also be entitled to lodge complaint for commission of offence punishable under Section 495 IPC. Where second wife alleges that the accused husband had married her according to Hindu rites despite the fact that he was already married to another lady and the factum of the first marriage was concealed from her, the second wife would be an aggrieved person within the meaning of Section 198 Cr. P.C.

If the woman with whom the second marriage is performed by concealment of the former marriage is entitled to file a complaint for commission of offence under Section 495 IPC, there is no reason why she would not be entitled to

file a complaint under Section 494 IPC more particularly when Section 495 IPC is an extension and part and parcel of Section 494 IPC.

For all these reasons, it is held that the woman with whom a second marriage is contracted by suppressing the fact of former marriage would be entitled to maintain a complaint against her husband under Sections 494 and 495 IPC.

Section 2(c) of the Code of Criminal Procedure, 1973 defines the phrase "Cognizable Offence" to mean an offence for which and "Cognizable Case" means a case in which, a Police Officer may, in accordance with the First Schedule or under any other law for the time being in force arrest without warrant. Part I of the First Schedule to the Code of Criminal Procedure, 1973 relating to offences under the Indian Penal Code inter alia mentions that Section 494 and 495 are non- cognizable.

Section 154 of the Criminal Procedure Code relates to information in cognizable cases and provides inter alia that every information relating to the commission of a cognizable offence, if given orally to an Officer in charge of a Police Station, shall be reduced to writing by him and be read over to the informant. Section 156 of the Code provides that any Officer in charge of a Police Station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over a local area within the limits of such station would have power to enquire into or try under provisions of Chapter XIII of Criminal Procedure Code. As Sections 494 and 495 are made non-cognizable, a Police Officer would not have power to investigate those cases without the order of a Magistrate, having a power to try such cases or commit such cases for trial as provided under Section 155(2) of the Code.

Further, as per Section 198 (1) (c), Court cannot take cognizance of an offence punishable under sections 494 and 495 IPC except upon a complaint made by some person aggrieved by the offence as enumerated therein. Even if it is assumed that in view of Section 198 (1) (c) of the CrPC the Magistrate is disentitled to take cognizance of the offence punishable under Sections 494 and 495 IPC if the matter under investigation before the police also relates to other cognizable offence and if the police files a charge-sheet, the court can take cognizance also of the offence under Section 494 along with other cognizable offences by virtue of Section 155 (4) of the Criminal Procedure Code.

Section 155(4) of the Code inter alia provides that:

> "Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable"

Here in this case in the charge sheet it is mentioned that the appellant has also committed offence punishable under Section 420 of the Indian Penal Code which is cognizable and therefore this is a case which relates to two or more offences of which at least one is cognizable and therefore the case must be deemed to be cognizable case notwithstanding that the other offences are non- cognizable. This is not a case in which the FIR is exclusively filed for commission of offences under Sections 494 and 495 IPC. The case of the respondent no. 2 is that the appellant has committed offences punishable under Sections 417, 420, 494, 495 and 498-A of the IPC.

A question may arise as to what should be the procedure to be followed by a complainant when a case involves not only non- cognizable offence but one or more cognizable offences as well. It is somewhat anomalous that the aggrieved person by the alleged commission of offences punishable under Sections 494 and 495 IPC should file complaint before a Court and that the same aggrieved person should approach the police officer for alleged commission of offences under Sections 417, 420 and 498A of the Indian Penal Code. Where the case involves one cognizable offence also alongwith non-cognizable offences it should not be treated as a non- cognizable case for the purpose of sub-section 2 of Section 155 and that is the intention of legislation which is manifested in Section 155(4) of the Code of Criminal Procedure.

So far Section 498-A IPC is concerned, this Court in ***Reema Aggarwal v. Anupam, (2004) 3 SCC 199*** after examining the scope of Section 498-A of the Penal Code and holding that a person who enters into marital arrangement cannot be allowed to take shelter behind the smokescreen of contention that since there was no valid marriage the question of dowry does not arise, held as under:

> The absence of a definition of "husband" to specifically include such persons who contract marriages ostensibly and cohabit with such woman, in the purported exercise of their role and status as "husband" is no ground to exclude them from the purview of

> Section 304B or 498A IPC, viewed in the context of the very object and aim of the legislations introducing those provisions."

In view of the firm and clear law laid down on the subject this Court is of the confirmed view that second wife is "wife" within the meaning of Section 498-A IPC and is entitled to maintain a complaint under the said provision.

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20. POINT INVOLVED

Section 7 of the Family Courts Act, 1984, Sections 7 and 9 (4) of the Hindu Adoption and Maintenance Act, 1956, Rule 2 (V) of the Juvenile Justice (Care & Protection of Children) Rules, 2003 (M.P.), Section 41 (6) (b) of the Juvenile Justice (Care & Protection of Children) Act, 2000 and Rule 33 (5) of the Juvenile Justice (Care & Protection of Children) Rules, 2007

Adoption under section 41 of the Juvenile Justice (Care and Protection of Children Act, 2000 – Family Court, jurisdiction of – Family Court has the same jurisdiction which is exercisable by the District Court or any subordinate Court – Further held, the Family Court can have jurisdiction to entertain the application under section 41 (6) of the Act of 2000.

Parties – *Tarun Kadam and another v. State of M.P. and another*

Reported in – 2014 (5) MPHT 310 (DB)

The dispute lies in a narrow compass. The learned Additional Principal Judge, Family Court Gwalior observing that "Court" in Rule 2 (V) of Madhya Pradesh Juvenile Justice (Care and Protection of Children) Rules, 2003 means Court of Principal Civil Court of the District, rejected the application stating that it has no jurisdiction to try the application.

The appellant - plaintiff moved an application under Section 7 read with Section 9 (4) of Hindu Adoption and Maintenance Act 1956 for adoption of the

subject a abandoned child who is in the custody of respondent No.2- Balkalyan Samiti. The same was decided by the impugned order. Therefore, in this appeal, without going into the merits of the case, we set to decide the question of jurisdiction only.

For the better understanding of the provision we extract Section 7 of the Family Courts Act, 1984.

> "7. *Jurisdiction* – (1) Subject to the other provisions of this Act, a Family Court shall –
>
> (a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and
>
> (b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a "district court" or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends".

For the better understanding of the matter in dispute, we also reproduce the provision of Sub Rule (5) of the Rule 33 of Juvenile Justice (Care and Protection of Children) Rules 2007 :-

> "(5) For the purpose of Section 41 of the Act, 'Court' implies a Civil Court, which has jurisdiction in matters of adoption and guardianship and may include the court of the District Judge, Family Court and City Civil Court".

The intend of the legislation clearly shows that the "Family Court" has the same jurisdiction which is exercisable by any District Court or any sub-ordinate Civil Courts.

In Madhya Pradesh, the Family Courts are established in different districts but jurisdiction has been restricted to the municipal areas of that place in which the courts have been established; whereas the District Courts have jurisdiction to try such cases arising out of the area other than the municipal area of that district in which the Family Court is established.

That being so, the dispute regarding the jurisdiction of Family Court is now very clear after the enactment of Juvenile Justice (Care and Protection of Children) Rule, 2007.

We descent the view expressed by the learned Single Bench of Kerala High Court in the case of ***Andreq Mendez & Others*** (supra).

We, therefore, find it absolutely safe to come to a definite conclusion that "Family Court" can have jurisdiction to entertain the application under Section 41 (6) of Juvenile Justice (Care & Protection of Children) Act, 2007.

Before parting with the case, we deem it necessary to circulate copy of order this to the District Courts and Family Courts so that for such petty matters the new born kids, abandoned, destitute or similarly situated child, who has a right to have a family, a name and a nationality, should not be allowed to remain in the Balkalyan Samiti for such a long time, whereas the prospective parents are eager to adopt them and to look after them.

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21. POINT INVOLVED

Section 16 of the Hindu Marriage Act, 1955 and Partition under Hindu Law – Availability of benefit of section 16 of Hindu Marriage Act – It comes into operation only in a case in which a marriage in fact proved to have taken place between the persons which may be null and void as per the provisions of the Act – If the factum of marriage is not proved, section 16 (1) is not attracted and the children born out of such relationship cannot get the benefit of section 16(1) of the Act – There must be a marriage, which would be hit by the provisions of this Act and would cover a relationship resulting from any other arrangement than any other marriage – Where there is no proof of solemnisation of marriage, the provisions of section 16 are not attracted. ***Reshamlal Baswan v. Balwant Singh Jwalasingh Punjabi, 1994 MPLJ 446***, relied on.

Parties – ***Babulal & anr. v. Natthibai & anr.***

Reported in – 2013 (III) DMC 776 (MP)

From a perusal of the plaint itself it is apparent that the respondents have not stated anything about a regular legitimate marriage between Damrulal and Natthibai. The plaint itself states that Natthibai was originally married to one Nand Kishore but she left him as they could not get along together after "Chhod Chhutti" and, thereafter, she came to Khurai to live with Damrulal. The trial Court, after analyzing the evidence of the witnesses on record, has recorded a finding in paragraph 13 of its judgment to the effect that the plaintiff has failed to establish and prove that Natthibai was married to Damrulal in accordance with the customs prevailing in the society or that any ceremony was conducted in that regard. The same finding has been recorded by the appellate Court in paragraph 22 of the impugned judgment. It is also undisputed that this concurrent finding has not been assailed by the respondents. It is, therefore, apparent that there is concurrent finding of fact to the effect that no marriage or ceremony whatsoever was ever held to solemnize the marriage between Damrulal and Natthibai either in accordance with law or in accordance with the custom prevailing in the society and in the absence of the fact of marriage the question or the issue of the marriage being void or voidable or being in contravention of provisions of Section 11 of the Act does not arise. As the factum of marriage itself has not been established, no right accrues to the respondent No.2 even if he is born from the physical relationship of Damrulal and Natthibai nor does he acquire any rights under Section 16 of the Act.

This Court in the case of ***Reshamlal Baswan v. Balwant Singh Jwala Singh Punjabi, 1994 MPLJ 446***, has answered a similar question involved therein in the following terms:

> "4. Marriage Laws Amendment Act, 1976 provided legitimacy to children of a marriage hit by Section 11 of Hindu Marriage Act. Section 11 provides a procedure for getting a marriage declared void if it contravenes one of the conditions of Section 5 of the said Act. The conditions under which a marriage is said to be void are those mentioned in Clauses (i), (iv) and (v) of Section 5 of the said Act. Marriage between parties having a spouse living at the time of marriage is hit by this provision. This provision has been interpreted to mean that there must be a marriage, which would be hit by the provisions of this Act and would not cover a relationship resulting from any other arrangement than the marriage. That is the reason why it has been held in ***M. Muthayya v. Kamu and ors., AIR 1981 NOC 172***

> ***(Mad)***, that in those cases where there is no proof of solemnisation of marriage, the provision in Section 16 is not attracted. The two Courts, in the instant case have found that there was no marriage of any type between respondent Jhunjhibai and the deceased Baswan and hence, it will have to be held that even if Baswan had died after 1976, the benefit of Section 16 of Hindu Marriage Act would not have been available to the appellant. That appears to be the reason why the learned Counsel for the appellant did not seriously press the question as framed by this Court."

Mayne's Hindu Law & Usage, 15th Edition, while discussing the provisions of Section 16 of the Act has stated as under:

> "Section 16 of the Act comes into operation only in a case in which a marriage is in fact proved to have taken place between the persons which may be null and void as per the provisions of the Act. Once the factum of marriage is not proved, Section 16(1) is not attracted and the children born out of such relationship get the benefit of Section 16(1) of the Act."

In view of the aforesaid provisions of law and the facts and circumstances of this case, even if it is held that respondent No.2 Bhagwan Singh was born out of the physical relationship between Damrulal and Natthibai, respondent No.1, he does not acquire any rights under Section 16 of the Act on account of the fact that there is no proof of marriage, customary or otherwise, between Damrulal and Natthibai. The substantial questions of law framed by this Court are accordingly answered in favour of the appellants/defendants.

As a consequence of the above, I am of the considered opinion that in view of the clear provisions of Section 16 of the Act and the law as laid down by this Court in the case of ***Reshamlal Baswan*** (supra), the first appellate Court has erred in law in decreeing the suit to the extent of the claim of respondent/plaintiff No.2, Bhagwan Singh and, therefore, the impugned judgment and decree dated 23.7.1997 passed by the lower appellate Court is accordingly set aside.

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22. POINT INVOLVED

Section 125 of the Criminal Procedure Code, 1973 and section 5 (1) (i) of the Hindu Marriage Act, 1955

- Solemnization of marriage by husband falsely representing himself single – Proceeding initiated by wife for maintenance under section 125 Cr.P.C. – Husband cannot be allowed to take advantage of his own wrong and turn around to say that wife petitioner is not his "legally wedded wife" – For the purpose of section 125 Cr.P.C. Such a lady would be treated as the wife of the petitioner – Claim of wife would be defeated only where a woman married a man with full knowledge of the first subsisting marriage.
- Approach of the Court in dealing with cases under section 125 Cr.P.C. – Provisions of maintenance fall in the category which aim at empowering the destitute and achieving social justice or equality and dignity of the individual – Drift in the approach from "Adversarial" litigation to "social context adjudication" is the need of the hour.
- Interpretation of statues – Court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to supress i.e. if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided.
- Legal maxim *"Construction ut res magis ualeat guam pereat"* meaning of

– 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.

Parties – ***Badshah v. Urmila Badshah Godse & anr.***

Reported in – 2013 (III) DMC 518 (SC)

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

The learned Counsel for the petitioner referred to the judgment of this Court in ***Yamunabai Anantrao Adhav v. Anantrao Shivram Adhay & anr., (1998) 1 SCC 530***. In that case, it was held that a Hindu lady who married after coming into force Hindu Marriage Act, with a person who had a living lawfully wedded wife cannot be treated to be "legally wedded wife" and consequently her claim for maintenance under Section 125, Cr.P.C. is not maintainable. He also referred to later judgments in the case of ***Savitaben Somabai Bhatiya v. State of Gujarat & ors., (2005) 3 SCC 636***, wherein the aforesaid judgment was followed. On the strength of these two judgments, the learned Counsel argued that the expression "wife" in Section 125 cannot be stretched beyond the legislative intent, which means only a legally wedded-wife. He argued that Section 5(1)(i) of the Hindu Marriage Act, 1955

clearly prohibits 2nd marriage during the subsistence of the 1st marriage, and so respondent No.1 cannot claim any equity; that the explanation Clause (b) to Section 125, Cr.P.C. mentions the term "divorce" as a category of claimant, thus showing that only a legally wedded-wife can claim maintenance. He, thus, submitted that since the petitioner had proved that he was already married to Shobha and the said marriage was subsisting on the date of marriage with respondent No.1, this marriage was void and respondent No.1 was not legally wedded wife and therefore had no right to move application under Section 125 of the Cr.P.C.

Before we deal with the aforesaid submission, we would like to refer two more judgments of this Court. First case is known as ***Dwarika Prasad Satpathy v. Bidyut Prava Dixit & anr., (1999) 7 SCC 675***. In this case it was held:

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

It is further held:

> It is to be remembered that the order passed in an application under Section 125, Cr.P.C. does not finally determine the rights and obligations of the parties and the said section is enacted with a view to provide summary remedy for providing maintenance to a wife, children and parents. For the purpose of getting his rights determined, the appellant has also filed Civil Suit which is spending before the Trial Court. In such a situation, this Court in ***S. Sethurathinam Pillai v. Barbara @ Dolly Sethurathinam, (1971) 3 SCC 923***, observed that maintenance under Section 488, Cr.P.C. 1898 (similar to Section 125, Cr.P.C.) cannot be denied where there was some evidence on which conclusion for grant of

> maintenance could be reached. It was held that order passed under Section 488 is a summary order which does not finally determine the rights and obligations of the parties; the decision of the criminal Court that there was a valid marriage between the parties will not operate as decisive in any civil proceeding between the parties."

No doubt, it is not a case of second marriage but deals with standard of proof under Section 125, Cr.P.C. by the application to prove her marriage with the respondent and was not a case of second marriage. However, at the same time, this reflects the approach which is to be adopted while considering the cases of maintenance under Section 125, Cr.P.C. which proceedings are in the nature of summary proceedings.

Second case which we would like to refer is ***Chanmuniya v. Virendra Kumar Singh Kushwaha & anr., (2011) 1 SCC 141***. The Court has held that the term "wife" occurring in Section 125, Cr.P.C. is to be given very wide interpretation. This is so stated in the following manner:

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

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

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

On this base, it was pleaded before us that this matter be also tagged along with the aforesaid case. However, in the facts of the present case, we do not deem it proper to do so as we find that the view taken by the Courts below is perfectly justified. We are dealing with a situation where the marriage between the parties has been proved. However, the petitioner was already married. But he duped the respondent by suppressing the factum of alleged first marriage. On these facts, in our opinion, he cannot be permitted to deny the benefit of maintenance to the respondent, taking advantage of his own wrong. Our reasons for this course of action are stated hereinafter.

Firstly, in ***Chanmuniya case***, (supra) the parties had been living together for a long time and on that basis question arose as to whether there would be a presumption of marriage between the two because of the said reason, thus, giving rise to claim of maintenance under Section 125, Cr.P.C. by interpreting the term "wife" widely. The Court has impressed that if man and woman have been living together for a long time even without a valid marriage, as in that case, term of valid marriage entitling such a woman to maintenance should be drawn and a woman in such a case should be entitled to maintain application under Section 125, Cr.P.C. On the other hand, in the present case, respondent No.1 has been able to prove, by cogent and strong evidence, that the petitioner and respondent No. 1 had been married each other.

Secondly, as already discussed above, when the marriage between respondent No.1 and petitioner was solemnized, the petitioner had kept the respondent No.1 in dark about her first marriage. A false representation was given to respondent No.1 that he was single and was competent to enter into marital tie with respondent No.1. In such circumstances, can the petitioner be allowed to take advantage of his own wrong and turn around to say that respondents are not entitled to maintenance by filing the petition under Section 125, Cr.P.C. as respondent No.1 is not "legally wedded wife" of the petitioner? Our answer is in the negative. We are of the view that at least for the purpose of Section 125, Cr.P.C., respondent No.1 would be treated as the wife of the petitioner, going by the spirit of the two judgments we have reproduced above For this reason, we are of the opinion that the judgments of this Court in ***Adhav*** (supra) and ***Savitaben*** (supra) cases would apply only in those circumstances where a woman married a man with full knowledge of

the first subsisting marriage. In such cases, she should know that second marriage with such a person is impermissible and there is an embargo under the Hindu Marriage Act and therefore she has to suffer the consequences thereof. The said judgment would not apply to those cases where a man marries second time by keeping that lady in dark about the first surviving marriage. That is the only way two sets of judgments can be reconciled and harmonized.

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

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

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

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

This approach is particularly needed while deciding the issues relating to gender justice. We already have examples of exemplary efforts in this regard. Journey from ***Mohd. Ahmed Khan vs. Shah Bano Begam and ors., AIR 1985 SC 945*** to ***Shabana Bano, v. Imran Khana AIR 2010 SC 305***, guaranteeing maintenance rights to Muslim women is a classical example.

In ***Rameshchandra Daga v. Rameshwari Daga, AIR 2005 SC 422***, the right of another woman in a similar situation was upheld. Here the Court had accepted that Hindu marriages have continued to be bigamous despite the enactment of the Hindu Marriage Act in 1955. The Court had commented that though such marriages are illegal as per the provisions of the Act, they are not 'immoral' and hence a financially dependent woman cannot be denied maintenance on this ground.

Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in *Heydon's, (1854) 3 Co. Rep. 7a, 7b,* which became the historical source of purposive interpretation. The court would also invoke the legal maxim construction *ut res magis valeat guam pereat,* in such cases i.e. where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife.

Therefore, at least for the purpose of claiming maintenance under Section 125, Cr.P.C., such a woman is to be treated as the legally wedded wife.

The principles of Hindu Personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against destitution. The manifest purpose is to achieve the social objectives for making bare minimum provision to sustain the members of relatively smaller social groups. Its foundation spring is humanistic. In its operation field 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.

In taking the aforesaid view, we are also encouraged by the following observations of this Court in Capt. ***Ramesh Chander Kaushal v. Veena Kaushal, (1978) 4 SCC 70***:

> "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."

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23. POINT INVOLVED

Section 26 and 13-B of the Hindu Marriage Act, 1955 – Application for custody of children – Whether maintainable even if order in this regard had already been passed by the Court at the time of passing of decree – Held, Yes – Further held, even after the decree, Court is empowered to make order in this regard and with regard to maintenance etc. and to revoke, suspend or vary any such order from time to time.

Parties – ***Rajendra Singh v. Garima***

Reported in – ILR (2014) MP 154 (DB)

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

In the circumstances, it is clear that even after the decree the court is empowered upon application to make the order in regard to the custody, maintenance and education and is empowered from time to time to revoke, suspend or vary any such orders.

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***24. POINT INVOLVED**

Sections 24 & 26 and 13-B of the Hindu Marriage Act, 1955 and section 11 of the Civil Procedure Code, 1908

- Subsequent application under section 24 r/w/s 26 of the Hindu Marriage Act – *Res judicata*, applicability of – Where earlier application is not decided finally on merits, principle of *res judicata* is not attracted to subsequent application.
- Application for amendment of quantum thereof, determination of – Such application must be decided within the prescribed limit of 60 days from the date of service of notice on the spouse taking into consideration the income of parties – Further held, Court exercises wider discretion in the matter but it

cannot be exercised in arbitrary and whimsical manner.

Parties – ***Sona v. Subhash***

Reported in – 2014 (2) MPLJ 466

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25. POINT INVOLVED

Section 24 of the Hindu Marriage Act, 1955 – Whether a woman marrying a man without the knowledge of subsistence of his first marriage is entitled to interim maintenance under section 24 of the Hindu Marriage Act, 1955? Held, Yes.

Facts of the case:

Petitioner husband filed petition against respondent wife whom he married by suppressing the fact of the subsistence of his first marriage – The Trial Court granted Rs. 3,000 per month as interim maintenance to respondent wife by allowing her application under section 24 of the Hindu Marriage Act – Meanwhile, petition originally filed by the husband was dismissed by the Trial Court and that order was affirmed by the High Court – Husband petitioner filed another petition before the High Court challenging the grant of interim maintenance by the Trial Court on the ground that his second marriage with respondent wife is void and no benefit can be claimed on the basis of the said illegal marriage – Dismissing the petition of the husband, the High Court relied on the judgment of the Supreme Court in ***Badshah v. Urmila Badshah Godse and***

another, (2014) 1 SCC 188 wherein it was held that the ratio arising out in the cases of ***Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav, (1988) 1 SCC 530*** and ***Savitaben Somabhai Bhatiya v. State of Gujarat and others, (2005) 3 SCC 636*** would apply only in those cases where the woman marries a man with full knowledge of subsistence of his first marriage. The order of the Trial Court granting interim maintenance to the wife, affirmed by the High Court.

Parties – ***Jagdish Singh Sankhwar v. Archana***

Reported in – 2014 (3) MPLJ 618

The singular ground of attack of Shri H.K.Shukla is based on ***Savitaben Somabhai Bhatiya v. State of Gujarat and others, (2005) 3 SCC 636. D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469*** and judgment of this Court in ***Tarachand Vishwakarma v. Smt. Pushpa Devi Vishwarkam, I.L.R. (2013) M.P. 956*** .On the basis of these judgments, it is urged that the petitioner has a living spouse. His earlier wife is already living and the marriage tie with her is still intact. Thus, alleged second marriage with present respondent is a void marriage and no benefit can be claimed on the basis of the said second marriage, which is not legal or lawful.

Per contra, Shri Vijay Sundaram, learned counsel for the respondent relied on ***Mohanlal Vs. Chief Executive Executive Officer, 2002 (1) MPWN 239*** This is relied upon to submit that the writ petition against the interim order becomes infructuous on decision of main case by the trial Court. The interim order stood merged in final order passed by the trial Court.

I have heard the learned counsel for the parties and perused the record.

The judgment of this Court in ***Tarachand*** (supra) is based on judgment of Supreme Court in ***D. Velusamy*** (supra). However,the Apex Court in a recent judgment reported in ***Badshah v. Urmila Badshah Godse and another, (2014)1 SCC 188*** reconsidered the issue regarding the claim of maintenance arising of out Section 24 of Hindu Marriage Act in favour of second wife. The Apex Court after

considering earlier judgments of Supreme Court including ***Savitaben*** (supra) distinguished those judgments and opined that the ratio arising out of ***Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav, (1988) 1 SCC 530*** and ***Saivtaben*** (supra) would apply only in those cases where a woman marries a man with full knowledge of subsistence of his first marriage.

In the written statement filed before the Court below (Annexure P-3), the respondent has specifically pleaded that the present petitioner has solemnized marriage with respondent by suppressing the fact that he had already solemnized marriage earlier. Thus, the present case is covered by the recent judgment of Supreme Court in the Case of ***Badshah*** (supra). The ratio of the judgments cited by Shri Shukla is considered by Supreme Court in recent judgment in ***Badshah*** (supra). Thus, the said judgments are distinguishable in the facts and circumstances of the present petition.

Apart from this, admittedly, the main case in which Annexure P-1 is passed is already dismissed. The said order is affirmed by the High Court. The interlocutory order Annexure P-1 stood merged in the final order passed by the Court below. The final order is upheld by this Court. For these cumulative reasons, I find no justification for interference.

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