

ANSWERS

Answer of Question 1. Speedy disposal of matrimonial and other cases can be done by avoiding court proceedings in the very first place. Instead, the parties must be encouraged for mediation and/or counselling. These processes involve ending a state of conflict between the parties by helping them talk about their issues and trying to resolve them such that both of them end up agreeing on a solution, be it continuing marriage or dissolving it. It has been made mandatory that court proceedings should be started only after mediation fails. This will help them avoid the court proceedings which are generally very time consuming.

However, if the parties are absolutely bent on proceeding further to the court, some other measures can be taken to ensure speedy trials. Firstly, there should be a specified time frame for the wrapping up of cases. It is in this particular time frame that all the proceedings of the court must take place. During this while, mediation also continues in the background. Secondly, there should be minimal or no adjournment of these proceedings once they've begun. The cases must be addressed on a daily basis. This will help avoid a lot of delay which is important in order to save both the parties from prolonged physical and emotional harassment.

There are a few impediments in the speedy disposal of these cases. Firstly, lawyers play a major role in persuading the parties for proceeding with litigation. Secondly, parties often show a stubborn attitude and refuse to settle without court proceedings. Thirdly, greed for alimony might also be responsible for the failure of mediation proceedings.

The biggest remedy for this problem can be to have several rounds of mediation between the parties to help them reach a consensus on whether to continue the marriage further or dissolve it.

Answer of Question 2. Section 9 of the Family Courts Act states that it is the duty of the court to endeavour for a possible reconciliation between the parties and an effort towards the same should be made at the earliest possible opportunity and in the first instance. As mentioned in the previous answer, the best way to tackle a family court case can be by avoiding court proceedings and resorting to mediation or counselling instead. As these processes are not very time taking, the disposal of a case will be earlier. The court must try to conciliate the case as far as possible. This is supposed to help the parties decide if they wish to continue their marriage or dissolve it, without having to get into court proceedings.

Apart from that, courts can be evolved to minimise adjournment periods in order to facilitate the speedy disposal of cases. A time frame can also be specified for the wrapping up of cases.

Answer of Question 3. This case talks of a husband who has filed a divorce suit accusing his wife of cruelty and desertion. The wife has admitted to desertion but not cruelty and has even made counter allegations of cruelty. This problem can be addressed part by part. Firstly, it is important to state that if either the husband or wife desert their partners for a period of two years or more without any valid reason, they can be compelled by the law to live together without any provision of divorce. Also, cruelty can be of different types; emotional, physical and economical.

Here, it has been stated that the husband has filed a divorce suit on the basis of cruelty and desertion by his wife. If the husband is able to prove that it was indeed his wife who was the one inflicting cruelty, his divorce suit will be granted decree. However, the given case has another twist in that the wife has also accused her husband of cruelty. Hence, if it is proven that the wife was subjected to cruelty and that is the reason behind deserting him, the husband's law suit will not be granted decree.

If the husband had not alleged his wife of cruelty, he would not be granted decree of divorce. That would be a case of the wife deserting her husband because of the cruelty done towards her. So, he would not get divorce.

Yes, the limitation of cooling off period would be applicable to the case where both the partners have accused each other of cruelty but not in the case where only desertion has been alleged by either of them.

Answer of Question 4. There are certain considerations which need to be kept in mind while awarding custody of a child whose parents have a strained relationship. The court shall consider the situation of both the father and the mother individually and assess which one of them is in a better situation to bring up the child. To raise a child, the parent must be able to meet the needs of education, clothing, proper nourishment while giving him/her their care and affection as well. Education of the child is considered paramount in these cases as it is their education that will help the child build a brighter and secure future for themselves. Whichever parent is found capable of providing the child with all the above stated things shall be granted custody. The doors of the court shall also remain open for the parents to settle their disputes whenever they want to so that the child doesn't remain deprived of the love of either parent.

Shared parenting may also be considered by the court if both the parents are found capable of providing the child with proper education, nourishment and a cordial atmosphere. This would also require both the parties to agree to parent the child together and not let their tensed relationship come in between this proposition. This would be beneficial for the child as they would receive the love of both their parents.

Answer of Question 5: If a man fails to provide his wife with the maintenance amount that he is supposed to (to provide her and their children with basic necessities), the wife can approach the court and can file an application under Section 125 of Cr-PC asking her husband to pay the maintenance amount. The court can ask the husband to pay the maintenance amount in two different forms:

Final payment: The amount that is paid after the court case ends and the decision has been made regarding the maintenance amount to be paid to the wife every month.

Ad interim payment: Sometimes, the wife might be in an economic distress and might need the maintenance amount to be paid even while she is pursuing the court case. In these cases, the court will ask the husband to start paying the maintenance amount right away. This provision is made under Section 24 of the Hindu Marriage Act

The difficulty that arises in these cases is majorly the husband refusing to pay the maintenance amount. In these cases, the court can take the following steps:

If the husband is a government servant, the court can send a notice to the department that he is employed in and can ask the department to deduct the given maintenance amount from his salary per month.

If the husband is a retired government employee, the court can issue the notice to the authorities concerned with rewarding him with pension and the deductions can be made from his pension and transferred to the bank account of the wife.

If the husband is not a government employee, a distress warrant can be issued against him asking him to appear before the court where he can again be asked to make at least part payment of the

pending amount. In these cases, it is also investigated if the husband has some property in his possession and if it is possible to attach his property in order to pay off the maintenance amount. If he still refuses, he can be sent to jail but not for a period of more than one month.

Answer of Question 8. Adoption of kids in India can be made through two different procedures. These include the Juvenile Justice Act (Section 56-58) and Hindu Adoption and Maintenance Act(HAMA,1956:Section 7). An abandoned child is first brought to Special Adoption Agencies (SAA).These SAAs look for the child's parents' whereabouts for 48 hours and if these are not successful in finding them, this responsibility is handed over to the Child Welfare Committee(CWC).If the CWC also fails to find the child's parents, he/she is declared free for adoption.

For Indian prospective adoptive parents(PAPs): Indian parents seeking to adopt will have to first register with the Central Adoption Resource Authority(CARA).The CARA will show the parents photographs of various children out of which the parents can chose one for adoption. The CARA will communicate this with the SAA which will file an application in the court. During this while, pre adoption foster care can also be assigned to the parents. In this while, the prospective adoptive parents are allowed to familiarise with the child. After the court passes an order, the custody of the child is awarded to them.

For intercountry adoption: Inter country adoption requires a No Objection Certificate from the Embassy of the prospective adoptive parents' country in India. Those parents will also need to seek permission from their governments and the permission letter needs to be shown to the Embassy.

Eligibility criteria for adoption:

- 1.Must be physically fit, financially sound, mentally alert and sound person and highly motivated to adopt a child for providing a good upbringing to him.
- 2.In case of couples, the consent of both the spouses shall be required for adoption.
- 3.A single male is not eligible to adopt a girl child. A single or divorced person can also adopt, subject to the fulfilment of adoption criteria framed by the authority. In case of non-resident Indians who wish to adopt a child, the authorised foreign adoption agency or central authority or a concerned government authority shall prepare a home study report of such PAPs and upon finding them eligible, will sponsor their application to CARA for adoption of the child from India.

Abhay Kumar Sinha

Principal District Judge, Khunti

Q.1

Family Courts are to facilitate satisfactory resolution of disputes concerning the family through a forum expected to work expeditiously in a just manner and with an approach ensuring maximum welfare of society and dignity of women. The main purpose behind setting up these Courts was to take the cases dealing with family matters away from the intimidating atmosphere of regular courts and ensure that a congenial environment is set up to deal with matters such as marriage, divorce, alimony, child custody etc. The setting up of these family courts was a dynamic step so far as reducing the backlog and disposing off cases while ensuring that there is an effective delivery of justice goes. However, there are still matters of concern which plague these courts.

The Family Courts are free to evolve their own rules of procedure. Special emphasis is put on settling the disputes by mediation and conciliation, the proceedings before the Family Court are first referred to conciliation and only when the conciliation proceedings fail to resolve the issue successfully, the matter taken up for trial by the Court. The aim is to give priority to mutual agreement over the usual process of adjudication. The cases are kept away from the trappings of a formal legal system. The Act stipulates that a party is not entitled to be represented by a lawyer without the express permission of the Court.

There are various impediments also to the speedy disposal of cases, such as defendants avoiding to receive summons, delay in producing witnesses and adducing evidence, filing of miscellaneous petitions, etc. One of the ways in which the faster procedure of disposal of the courts can be done is modernizing the court. The courts should be fully digitized and technical experts should be brought in to streamline the whole process right from when a person files a case, to updating it, to the final verdict. Use of technology can help facilitate the judiciary in bringing greater access transparency, and ultimately help in reducing backlog and delays in the court. Proper training to judges and staffs would enable them to work in efficient manner. No long adjournment should be given. Trial can be organized through video

conferencing. Service of summons, procuring copies of documents connecting parties in far flung areas for quick resolution of issues will all become far more efficient and cost efficient once electronic connectivity is established and style of judicial functioning is changed.

Q. 2

Family Courts are to facilitate expeditious resolution of disputes concerning the family. The main purpose behind setting up these Courts was to take the cases dealing with family matters away from the intimidating atmosphere of regular courts and ensure that a congenial environment is set up to deal with matters such as marriage, divorce, alimony, child custody etc. For this purpose certain powers have been conferred upon the family court under the Family Courts Act. Under Family Courts Act special emphasis is put on settling the disputes by mediation and conciliation, and For this purpose Family Courts are free to evolve their own rules of procedure, and once a Family Court does so, the rules so framed over ride the rules of procedure contemplated under the Code of Civil Procedure. The provisions of Evidence Act are also not strictly applicable in family court matters. **S.9 (1)** of this Act says that in every suit or proceeding endeavor shall be made by the Family Court in the first instance to assist and persuade the parties in arriving at a settlement, it further says that for this purpose a Family Court may follow such procedure as it may deem fit. **S.9 (2)** says that at any stage of suit or proceeding, if it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement. **S.10** says that despite application of the provisions of C.P.C and Cr.P.C the Family Court can evolve its own procedure. **S.13** says that a party is not entitled to be represented by a lawyer without the express permission of the Court. **S.14** says that Family Court may receive as evidence any

report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act. **S.15** says that in suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but only a memorandum of the substance of what the witness deposes can be recorded. **S.16** says if evidence of any person is of a formal character, it may be given by affidavit. The Rules regarding the speedy disposal of cases in Family Courts are contained in **Rules 20 to 23 and rule 36** of The Family Courts (Jharkhand High Court) Rules , 2004.

Q. 3

According to clause (ib) of S.13(1) of the Hindu Marriage Act a husband or wife can bring suit for divorce on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

However, according to the explanation given in S.13(1) of the Hindu Marriage Act, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage. Thus, to constitute desertion, it must be by the other party without reasonable cause.

In the instance case where the husband has filed the suit for divorce on the ground of cruelty and desertion, though the wife has admitted desertion but she also makes counter allegation of cruelty against her husband, and therefore, it cannot be said that desertion by the wife is without any reasonable cause. Under such circumstances desertion by the wife, even if admitted, does not constitute the ground for divorce as contemplated in clause (ib) of S.13(1) of the Hindu Marriage Act. And

therefore, the divorce suit cannot be decreed.

In the instant case, if there is no allegation of cruelty by the husband, then the only allegation that remains is that of desertion. And therefore, the same provisions of desertion, as stated above, would apply and the situation will remain the same.

Limitation of cooling off period applies only in the cases of divorce by mutual consent u/s 13-B of the Hindu Marriage Act. In the instant case, since the divorce suit has not been filed by mutual consent u/s 13-B of the Hindu Marriage Act, limitation of cooling off period does not apply in this case.

Q. 4

The separation of parents of a child brings upon the issue of custody of their child. When a couple goes on the warpath that leads to separation or divorce, it is the children who pay the heaviest price as they are shattered when the court tells them to go with the parent whom he or she deems best. The Indian Law, while keeping in mind the parents' right to the custody of a child, holds the welfare of the child as the most important factor of consideration when deciding upon who gets the custody of a minor child. Welfare of the child, broadly, includes Safe-keeping of the child, Ethical upbringing of the child, Good education to be imparted, Economic well-being of the guardian. The mother and father both have an equal right to the custody of a child. Who gets the custody of the child, however is a question which the court decides upon. While the statutes are conflicting when it comes to personal laws as opposed to secular enactment in the form of The Guardian and Wards Act, 1890, the court of competent jurisdiction strives to strike a balance between the two, all the while holding the welfare of the child as the paramount importance. If custody of a minor has been awarded to one parent, the other parent gets visitation rights. But, that is not sufficient in all cases.

The trauma of parents separating sometimes destroys not only the child's

present but also his future as his overall mental development and health gets affected. A child is entitled to love and affection of both the father and the mother and he/she should have access to both of them. Here comes the role of shared parenting system. In this system a child is looked after by both the parents after divorce or separation instead of giving custody to one of them. Shared Parenting can be defined as a Court Ordered “Plan” which allocates all parental rights and responsibilities involving a minor child in case of separation of parents. Shared Parental rights and responsibilities means that most or all aspects of a child's welfare remain the joint responsibility and right of both parents, so that both parents retain equal parental rights and responsibilities, and both parents make joint decisions regarding the child's welfare. In determining whether shared parenting is in the best interest of your child, the court shall consider all relevant factors, including the “best interests” tests factors, as well as the ability of the parents to cooperate and make decisions jointly with respect to the children, the ability of each parent to encourage the sharing of love, affection and contact between the child and the other parent, any history of, or potential for, child abuse, spousal abuse, other domestic violence, or parental kidnapping by either parent, the geographic proximity of the parents to each other, as the proximity relates to the practical considerations of shared parenting. *Yashita Sahu v State of Rajasthan (AIR 2020 SC 577)*, *Dr. V. Ravi Chandran vs Union of India & ors (2010(1)SCC 174(SC))* are the judgments of the Hon'ble courts on this point.

Q. 5

Sub-section (3) of S.125 Cr.P.C deals with execution of maintenance orders passed u/s 125 Cr.P.C. According to S.125(3), if any person so ordered fails without sufficient cause to comply with the order, the court may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines and may sentence such person for the whole or any part of each month's

allowance for

-6-

the maintenance or the interim maintenance and expenses of proceedings, as the case may be, remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one month or until payment is made. However, a number of practical difficulties are faced in execution of an order for grant of maintenance u/s 125 Cr.P.C. The person against whom such an order is passed mostly evades the execution of the order. Only in few cases execution reports are submitted by the executing agency. Sometimes the person against whom order has been passed is not found on the address given in the petition, sometimes he does not have any movable property of his own to be attached. If he is not a salaried person, it is very difficult to get the order executed against him. However, in case of non-payment of arrears of interim maintenance both under Domestic Violence and u/s 125 Cr.P.C the court has power to strike off the defence for meeting the ends of justice. (Bani vs Prakash Singh, Anita vs Prakash Sancheti).

Q.6

S. 125 Cr.P.C gives effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves. Section 125 Cr.P.C empowers the court to order for maintenance in such cases. Its provisions apply and are enforceable whatever may be the personal law by which the persons concerned are governed. At the time of ordering maintenance the court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and for those he is obliged under the law. It must not be inadequate or insufficient and at the same time not excessive or unreasonable. In the case of Dr.Kulbushan Kumar vs Raj

Kumari and Anr (1970) SCC 129 it was held that 25% of the husband's net salary would be just and proper to be awarded as maintenance to the wife.

-7-

Though there is no any express provision u/s 125 Cr.P.C for granting adjustment or deducting the amount of maintenance granted under Domestic Violence Act or u/s 24 of the Hindu Marriage Act, but in view of the judgments passed by the Hon'ble Courts, the amount of maintenance granted under these Acts may be adjusted towards the amount of maintenance finally awarded u/s 125 Cr.P.C so long the such aggrieved person is receiving such amount.

Q. 7

Under the Hindu Minority and Guardianship Act the court has jurisdiction to appoint or declare guardian of a minor Hindu with respect to the person of the minor or of his property or of both his person and property. However, in light of S.12 of this Act the court cannot appoint Guardian for minor's undivided interest in joint family property. According to S.13 of this Act, in the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration and no person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

Under the Courts of Wards Act when any land holder is minor, the courts of wards may make order assuming the superintendence of his property or both his person and property. The court is not authorized to appoint or declare guardian of the property of a minor whose property is under the superintendence of a court of wards

Q. 8

S.58 of the Juvenile Justice (Care and Protection of Children) Act, 2015 lays down procedure for adoption by Indian prospective adoptive parents living in India whereas S.59 of this Act lays down procedure for inter-country adoption of an orphan or abandoned or surrendered child. S.59 says that If an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parent despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, only then such child shall be free for inter-country adoption, also children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.

According to S.58, in case of adoption by Indian prospective adoptive parents living in India, the prospective adoptive parents may apply for the same to a Specialised Adoption Agency. The Specialised Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child. On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order. On the receipt of a certified copy of the court order, the Specialised Adoption Agency shall send immediately the same to the prospective adoptive parents. The progress and wellbeing of the child in the adoptive family shall be followed up and ascertained.

On the other hand, according to S.59, in case of inter-country adoption the prospective adoptive parents may apply to an authorised foreign adoption agency, or

Central Authority or a concerned Government department in their country of habitual residence, as the case may be. The authorised foreign adoption agency, or Central

-9-

Authority, or a concerned Government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India. On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialised Adoption Agencies, where children legally free for adoption are available. The Specialised Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency. On receipt of the acceptance of the child from the prospective adoptive parents, the Specialised Adoption Agency shall file an application in the court for obtaining the adoption order. On the receipt of a certified copy of the court order, the specialised adoption agency shall send immediately the same to Authority, State Agency and to the prospective adoptive parents, and obtain a passport for the child. The Authority shall intimate about the adoption to the immigration authorities of India and the receiving country of the child. The prospective adoptive parents shall receive the child in person from the specialised adoption agency as soon as the passport and visa are issued to the child. The authorised foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption, in consultation with Authority and concerned Indian diplomatic mission. A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions.

Eligibility criterion of prospective adoptive parents :

According to S.57 of the Juvenile Justice (Care and Protection of Children) Act, 2015 following are the eligibility criteria of prospective adoptive parents :

-10-

1. The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.
2. In case of a couple, the consent of both the spouses for the adoption shall be required.
3. A single or divorced person can also adopt, subject to fulfillment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.
4. A single male is not eligible to adopt a girl child.
5. Any other criteria that may be specified in the adoption regulations framed by the Authority.

(Lakshmi Kant Pandey vs Union of India (1984 SCR (2) 795, Stephanie Joan Becker vs State and ors, Union of India & anr etc vs Ankur Gupta & ors).

Q.1- Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the Family Court. Discuss the impediments and possible remedies.

Ans- “The greatest drawback of the administration of justice in India today is delay... I am not aware of any country in the world where litigation goes on for as long a period as India [...]” Nani Palkhiwala in “Delays in Administration of Justice”

The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.

The main object of the Family Courts Act 1984 was to provide the opportunity of conciliation to the litigants and to pave way for speedy disposal.

The Courts are provided with Special Powers under section 10 of the Act, wherein the Judge can formulate his own ways and means within the scope of Law, to help the litigants to arrive at a settlement.

Thus it becomes the duty of the Judge of the Family Court as well as the Lawyers to ensure that there is no miscarriage of justice on account of delayed adjudication and by virtue of mechanical and unnecessary adjournments.

Impediments-

Major reasons cited for judicial delays are:

- a) Paucity of judges and court staff
- b) Inefficiency of the case management system
- c) Apathy towards use of technology in justice deliverance
- d) Absence of work culture
- e) Predominance of Adjournment culture“ in litigation
- f) Poor judges to population ratio (1 judge in every million)
- g) Inadequate infrastructure and ill-trained court staff.

The lack of uniformity regarding the rules laid down by different states also leads to confusion in its application. Merely passing a central legislation is not in itself a complete step; for implementation in its spirit, it is to be ensured that some level of uniformity is maintained, at least in the initial stages of its coming into effect. Further, the need to amend certain laws is also to be examined and implemented effectively in order to ensure that these courts do not face any hindrance in their working. These small steps, if examined and implemented within time, will go a long way to ensure that the Family Courts are successful, to a greater degree, to fulfil the noble purpose for which they were created.

The plight of the litigants should be very carefully handled by the lawyers. If not inevitably there might be miscarriage of Justice. The intention of a litigant might be to protract the proceedings. For such reasons, though required or not, he/she may come forward with a petition for any interim relief. The request should be genuine.

The scope of interim maintenance is wrongly construed. The Hindu Marriage Act 1955 envisages either of the spouse to claim interim maintenance from the other. The condition precedent is that the party claiming such maintenance has no independent income which is sufficient for him/her to maintain. Whereas The Special Marriage Act 1954, and the Divorce Act 1869 entitles the wife alone to claim interim maintenance.

Though it may be a genuine need of the wife, the Lawyer has to carefully analyze the circumstance before filing such interim petition such that the main objective of the litigant is not defeated. A slow pedaling and assessing the mindset of the other party has to be done by the lawyer. Thereafter such petitions could be brought in without emphasizing much allegations. Invariably we could see interim petitions filed with lots of allegations which are no way relevant to satisfy the requirements mandated under the provisions for interim relief.

It is also invariably seen that the filing of petitions for interim relief contain lengthy pleadings and include every averment of the original petition which is totally unwarranted. The crux of the petition alone could be explained in the affidavit. Thus the Lawyer has to be very much sensitized so that he realizes his social responsibility than that of the legal obligation.

The concern and anguish that was expressed by this Court in **Bhuvan Mohan Singh v. Meena and Ors., 2015 (6) Supreme Court Cases 353**, is to the following effect:-

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

"The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith."

The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being alive to the objects and reasons of the Act and the spirit of the provisions Under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied.

The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should

show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation.

A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc."

When the aforesaid anguish was expressed, the predicament was not expected to be removed with any kind of magic. However, the fact remains, these litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. It occurs either due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the Courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the Court. As regards the second facet, it is the duty of the Court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands "still" on some unknown bank of the river. It cannot allow it to sing the song of the brook. "Men may come and men may go, but I go on forever." This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a proactive approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. For the present, we say no more."

Possible Remedies-

- Increasing the number of judges.
- Improving work efficiency .
- Specified time frames.
- Improving technologies in lower courts.

The Evidence Act has no role to play in Family Court matters. In case of expert opinion like DNA test, the invoking of the provisions under section 45 of the Evidence Act is unwarranted. Section 12 of The Act, deals in respect of approaching an expert to assist the Court.

Hence the Courts as well as the Lawyers should be sensitized very much. The issues should be attempted to be settled at the budding stage by adopting subtle methods else, the small wear and tear would lead to the eruption of volcano.

The pre-litigation counseling could be one of the best solution which the Lawyers could adopt and advice their clients. The role of lawyers in assisting the Courts in referring the matters to mediation centers or to the counseling sessions assume much significance. Where a litigant is not able to understand the importance of settlement through counseling, mediation or conciliation it becomes incumbent on an advocate to explain to his/her client, the importance of such processes which would help the litigants to avoid the unpleasant adversarial procedure by which the second round of litigation by way of appeal could be avoided.

Last but not the least, the Lawyers are the guiding lights to the litigants who struggle in dark in search of justice. It is also to be remembered that the best Judgments come from the bench where there is Good Bar. The litigants should be enlightened in respect of their rights, if not the Law would not come to their rescue. It would be worth quoting the legal maxim "**Ignorantia facti excusat, Ignorantia Juris non excusat**" which means that the Law excuses the ignorance of facts and not the ignorance of Law. Thus the role of a Lawyer becomes laudable when the righteous approach is made towards Justice by balancing the Equity coupled with Humanity.

Q.2.- In what manner and to what extent the procedure in family courts can be evolved for speedy disposal of cases? Explain with reference to the relevant provisions of the Family Courts Act and Rules.

Ans-Conventional adversary legal systems have been deplored as unsuited for matrimonial disputes primarily due to time consuming procedural intricacies, structural animosity and lack of privileged treatments to women and children involved in the altercations. In the matrimonial cases, an alternative legal system that is capable of addressing these issues was demanded by the activists as well as the policy formulators. There was a great demand for a judicial system in the familial domain that would pursue conciliatory practices and disposes the disputes expeditiously. Such a distinctive and innovative judicial system was also presumed to be proactive in delivering gender justice effectively.

Since the early days of independence there was thinking in favour of a judicial system, which deals exclusively with family squabbles and correspondingly there was a great compulsion on the policy makers to set up Family Courts similar to those in other countries. The social and political pressure to modify the ongoing

judicial practices in the personal law sector has compelled the legislature to design an alternative dispute resolution system with conciliatory procedures and time bound disposal of family disputes.

The right to speedy trial has been held to be a part of right to life or personal liberty by the Supreme Court of India. Despite the constitutional mandate for speedy trial, inordinate delay in disposing the cases has become the rule of Indian legal system . Considering the level of damage the judicial delay can cause to the society, the Law Commissions of India in their reports have made focused suggestions and recommendations for the elimination of the delay factor. It goes without saying that speedy disposal of cases is the desirable goal and undue delay will surely defeat the ends of justice . Notwithstanding the repeated instructions by the Law Commission and the apex court, the courts have not succeeded in achieving the object of speedy trial. The adverse effect of delayed disposal was felt more in the field of matrimonial cases for they were dealing with most crucial issues affecting the lives of the victims and those associated with them. It was due to this reason, the Family Courts Act has made speedy disposal as mandatory by inserting the words 'secure speedy settlement' in the Preamble. In common parlance, the word 'secure' means 'to obtain or achieve' something. Since the Family Courts are dealing with critical issues like maintenance, marriage expense, divorce, custody of children, restitution of conjugal rights etc, it is all the more important to have time bound orders and immediate execution. Delay in awarding these remedies is unaffordable and will defeat the purpose of the cases.

Generally when a case is filed before a Family court it will be taken into file and will be posted after two three months for return of notice. In case of appearance of opposite parties after serving notice, the parties will be referred for counseling. On getting the report of the counselor, the court will direct the opposite party to file his/her objections if any and then the trial will start. In the meantime there may be attempts for conciliation such as adalat and mediation. If it is not settled the evidence will be recorded and orders will be passed. On getting the copy the decree holder can file execution petition if any and proceed with it as per Order 21 CPC or Section 128 Cr. P C.

Despite the clear legislative will of speedy disposal of matrimonial cases as depicted in the Preamble of the Family Courts Act, the courts have not fully succeeded in deciding the cases expeditiously. This aspect has been elucidated in various studies and reports. It was opined that it would, however, be very useful if the Family Courts were to bear in mind the need for utmost expediency while dealing with this branch of litigation.

The Family Courts could not achieve the desired goals mainly due to the absence of specific provisions in the Statute for speedy disposal of cases and absence of direction for time bound disposal of cases in the substantive laws that are being administered by them.

Merits and Constraints-

The above discussion evinces that notwithstanding specific statutory provisions, prior to the enactment of the Family Courts Act for alternative dispute resolution, the judiciary in general has not made use of the provisions effectively. The feeble victims of family altercations and injustices did suffer the misdemeanours of adversary legal system and found themselves with no way out. The Family Courts Act was enacted for establishing a network of courts exclusively dealing with family disputes. It was also intended to eliminate specific issues of conventional legal system from the realm of familial cases. A careful analysis of the provisions of the Family Courts Act and the modalities of its operations will show that despite unique positive aspects, the law and the practice do suffer from some serious deficiencies. The Family Courts Act demands fundamental modifications for becoming progressive welfare legislation. Setting up of Family Courts was undoubtedly a meaningful attempt to put in place an alternate dispute resolution system in one of the very sensitive areas of social life to bring justice within the easy reach of people.

Reference to Family Courts Act-

The Family Court was established to resolve family disputes, primarily between spouses and the structure established was without frills and excessive legalese. The most unique aspect regarding the proceedings before the Family Court is that they are first referred to conciliation and only when the conciliation proceedings could not resolve the issues, the matter is taken up for trial by the Court. Special emphasis is put on settling the disputes by mediation and conciliation to ensure that the dispute is resolved by an agreement between the parties and the chances of any further conflict or further litigation by way of appeal or revision are reduced.

The Family Courts Act also brought large part of civil and criminal jurisdiction relating to family under one roof. The maintenance cases under the provisions of section 125 Cr.PC, 1973 which had been tried by the Magistrate Court along with other criminal cases also have been shifted to the Family Courts which are having a congenial atmosphere in which family disputes are resolved amicably. The cases are rescued from the intricacies of a formal legal system and its far reaching social consequences. However, there are chances for some related cases being tried in other courts simultaneously.

Although the apparent goal of the Family Courts Act is a remarkable shift from the conservative legal system with potentials to advance gender justice irrespective of caste, creed and community, in practice the Family Courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. It is reported in the family courts are just and extension of the normal sessions courts, where no trial are ever held in camera.

Since the Family Courts Act is only a procedural law it does not in any way alter the substantive law relating to marriage, property rights, inheritance and the legal status of women. It is a known fact that in the personal laws of all the communities gender injustice is inbuilt. Women do undergo many difficulties and experience severe trauma in matters concerning their marriage, divorce and inheritance. Polygamy, desertion, triple divorces are some of the methods of cruelty to the women. The personal laws perpetuate such atrocities. Although the Indian women have been

formally granted equal political rights through the Indian Constitution, they are subject to inequality, deprivation and violence under different personal laws. The Family Courts are established mainly to administer these personal laws which are conspicuous for their anti-women postures.

Another limitation is about the multiple legal actions in different Courts that involve several judges and lawyers. It causes serious delays in the final determination of the issues. Sometimes, a woman in distress has to approach different courts for reliefs like maintenance, divorce, residence right and protection from harassments. A major drawback of the Family Courts Act is that it doesn't explicitly empower the Courts to grant injunctions to prevent domestic violence. A woman victim has to approach so many judicial and quasi judicial forums for ensuring protection for a violence free life. Due to the problems of jurisdiction as per the substantive law, parties have to approach different courts at a time. Multiple actions and multiple judges can produce inconsistent decisions which will have severe impacts not only on the parties of the case but also on their children. Inconsistent determinations also result when different judges hearing similar cases review the applicable law but arrive at contradictory interpretations.

Apart from prescribing the qualification of the Judges of Family Courts, the Central Government has no role to play in the administration of this Act. Different High Courts have laid down different rules of procedure.

However, this lack of uniformity could also be one of the reasons behind the fact that some areas of family laws are still being heard by civil courts.

Lastly, many studies reported the difficulty of implementing Court sentences because of the lack of well-trained and competent law enforcement agencies.

The people, who are parties before the Family Courts, are almost all the unfortunate lot in the society who are on the brink of the collapse of their marital lives. Unless, the stake holders in this system show more concern, going by the huge pendency of the cases in the Family Courts, it is sure that speedy settlement of family disputes, as aimed at by the Act, will only be a mirage. It is high time for the Government to establish more Family Courts in the metro cities and other places as early as possible so as to instill a ray of hope in the minds of the litigant public that speedy settlement of Family disputes by the Family Courts is a reality.

Conclusion-

The Courts as well as the Lawyers should be sensitized very much. The issues should be attempted to be settled at the budding stage by adopting subtle methods else, the small wear and tear would lead to the eruption of volcano.

Work efficiency should be improved by using technologies and computers in lower courts.

The pre-litigation counseling could be one of the best solution which the Lawyers could adopt and advice their clients. The role of lawyers in assisting the Courts in referring the matters to mediation centers or to the counseling sessions assume much significance. Where a litigant is not able to understand the importance of settlement through counseling, mediation or conciliation it becomes incumbent on an advocate to explain to his/her client, the importance of such processes which would help the litigants to avoid the unpleasant adversarial procedure by which the second round of litigation by way of appeal could be avoided.

Last but not the least, the Lawyers are the guiding lights to the litigants who struggle in dark in search of justice. It is also to be remembered that the best Judgments come from the bench where there is Good Bar. The litigants should be enlightened in respect of their rights, if not the Law would not come to their rescue. It would be worth quoting the legal maxim “Ignorantia facti excusat, Ignorantia Juris non excusat” which means that the Law excuses the ignorance of facts and not the ignorance of Law. Thus the role of a Lawyer becomes laudable when the righteous approach is made towards Justice by balancing the Equity coupled with Humanity.

To end I would like to quote-

“The greatest drawback of the administration of justice in India today is delay... I am not aware of any country in the world where litigation goes on for as long a period as India [...]” Nani Palkhiwala in “Delays in Administration of Justice”

Q.3. In a matrimonial suit for divorce filed by the husband on the ground of cruelty and desertion the wife appears and admits desertion but makes counter allegation of cruelty. Can the divorce suit be decreed on the ground of desertion on admission? Will the situation be different if there is no allegation of cruelty by the husband? Whether the limitation of cooling off period apply in such cases

Ans- It is very clear that desertion can be a ground for divorce and a petition for divorce can be filed making desertion a ground. It is also clear that the onus to prove the act of desertion lies on the petitioner. But, divorce will not be granted if the petitioner is found to be guilty or if the conduct of the respondent having deserted the petitioner is well justified. The plain and simple rule of “who is guilty” would be taken.

Often it happens that cruelty becomes the very reason or ground for desertion and vice versa also. Thus, where a spouse is being treated with cruelty and being tortured whether physically, mentally or psychologically, it would be an extremely

normal phenomenon if that spouse leaves away the matrimonial household where he or she is subjected to cruelty. It is very obvious and a very basic nature of human beings that none of us want to be controlled by anyone and none of us can tolerate harsh, rigid and more specifically cruel kind of behavior towards us. Hence, it is always better to end or leave such relations which do not give us the space even to breathe.

Desertion is a very different ground as compared to other ground of divorce like cruelty and adultery. To me it seems like a softer ground which indirectly gives parties time to reconcile as, it is actionable only after a petition is filed with that regard. Desertion will not arise a cause of action until and unless a petition is filed in that respect. Unlike cruelty and adultery, where the cause of action arises the moment they occur, the cause of action will arise only when a party files a petition in this regard. Thus, till the time no such petition is filed, parties are at full freedom to terminate the desertion at any time and resume their cohabitation together.

In the given scenario the plain and simple rule of who is guilty would be taken into consideration. Yes, In the given question the divorce suit can be decreed on the ground of desertion on admission in favour of the husband if the wife has withdrawn from the society of the husband and could not prove the counter allegation of cruelty.

In **Sheetal Raju v. Raju Malhotra**, the wife had withdrawn from the society of the husband and gave the reason as cruelty for her such act which however could not be established. Now in this case, the refusal of the wife to come back was construed as cruelty upon the husband by the wife. In such cases, the feeble and gutless wives are instead charge with cruelty for being unable to prove the cruelty inflicted by the husband.

However, the situation will be different if there is no allegation of cruelty by the husband based using the same “who is guilty” principle. If in the question there is no allegation of cruelty by the husband and the wife is able to establish the allegation of cruelty against the husband divorce will not be granted since the petitioner is guilty for the conduct of the respondent having deserted the petitioner is well justified.

The relief of divorce had been sought for in this case on the grounds of desertion and cruelty and before proceeding further, it would be appropriate to refer to the relevant provision under which, divorce can be sought for viz;

Section 13(1) (i-a) and (i-b) of the Hindu Marriage Act, 1955 Divorce Any marriage solemnized, whether before or after the commencement of this Act, may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

[(i).....

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petitioner; or]

The Honourable Apex Court and High Courts in plethora of Judgments has held that for establishing the claim of desertion , so far as the deserting spouse is concerned, two essential conditions must be there viz., (i) the factum of separation; and (ii) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly, two elements are essential so far as the deserted spouse is concerned: (i) the absence of consent; and (ii) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. Thus, under Section 13(1)(i-b) of the Hindu Marriage Act, the petitioner who seeks for divorce has to prove (i) that there was desertion for a continuous period of two years immediately preceding the presentation of the petition; (ii) the desertion was without reasonable cause and without the consent or against the wish of the petitioner. Further, heavy burden is cast upon the petitioner who seeks relief of divorce on the ground of desertion to prove four essential conditions viz., (i) factum of separation; (ii) animus deserendi; (iii) absence of any or her consent; and (iv) absence of his or her conduct giving reasonable cause to desert the spouse to leave the matrimonial home. It is necessary for the petitioner to establish that during all the period that there has been a desertion, petitioner must affirm that he/she was ready and willing to resume the married life. Offence of desertion must be proved beyond any reasonable doubt and as a rule of prudence evidence of the petitioner is to be corroborated. In the light of the above well settled principles, it is to be seen whether respondent / husband has discharged his burden of proof establishing that appellant / wife had no reasonable cause to leave the matrimonial home.

Further, to prove the ground of cruelty, firstly it has been shown that the acts, words and emotions on events alleged to amount the cruelty alldged against the petitioner must be proved beyond the reasonable doubt and it must be in accordance with law of evidence; secondly, it must be established that there is an apprehension that it would be harmful or injurious for the petitioner to live with the other party and, thirdly, the requirement of law is that the Court must be satisfied that the apprehension is reasonable.

No decree of divorce could be granted on the ground of desertion in the absence of pleading and proof.

To prove desertion in matrimonial matter it is not always necessary that one of the spouse should have left the company of the other as desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case.

The Honourable Supreme Court in **Savitri Pandey vs. Prem Chandra Pandey**, reported in (2002) 2 SCC 73, has held as follows:

Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(ia) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other.

In the decision reported as **(2010) 4 SCC 476 Ravi Kumar vs Julmidevi** the Supreme Court has observed as under:-

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

In **(1997) 11 SCC 701 Balwinder Kaur Versus Hardeep Singh** the Apex Court has held that a petition for divorce is not like any other commercial suit. A divorce not only affects the parties, their children, if any, and their families but the society also feels its reverberations. Stress should always be on preserving the institution of marriage. That is the requirement of law. Hence, we find that the Family Court has erroneously granted divorce on the grounds of desertion and cruelty without proper appreciation of facts and evidence on record and thereby, the findings of the Family Court are liable to be set aside.

The divorce on the ground of cruelty does not require separation between spouses for more than 2 years. However, two years separation would be valid only if desertion was the only ground for divorce. In case the divorce on the ground of cruelty is prayed for, only one year period since the date of marriage would make the petition for divorce competent.

Cruelty and Desertion-

The divorce on the ground of cruelty does not require separation between spouses for more than 2 years. However, two years separation would be valid only if

desertion was the only ground for divorce. In case the divorce on the ground of cruelty is prayed for, only one year period since the date of marriage would make the petition for divorce competent.

Cooling period Waiver-

In **Amardeep Singh vs. Harveen Kaur (12.09.2017 - SC): MANU/SC/1134/2017**, it was held by the Hon'ble Apex Court that-

If the Court dealing with a matter is satisfied that a case is made out to waive the statutory period Under Section 13B (2), it can do so after considering the following:

The statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year Under Section 13B(1) of separation of parties is already over before the first motion itself;

All efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 Code of Civil Procedure/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

The parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

The waiting period will only prolong their agony.

The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be at the discretion of the concerned Court. The Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice.

Conclusion-

A question that arises here is that when does desertion amount to cruelty? On one hand the we are struck with a question that if at all the concept of desertion also concedes with cruelty then why to have desertion as a separate ground and why should it not be included in the very ambit of cruelty. However, this question was answered after reading instances wherein desertion as a ground for divorce actually stood successfully independent of cruelty and without cruelty as a ground for divorce being seen in a case. Thus to conclude desertion no doubt in few cases ends up being a kind of cruelty being inflicted on the other spouse, but in maximum cases it has proved to be of much importance for allowing the incompatible marital couples to undergo divorce on the very ground of desertion.

Q.4.- Due to strained relations between the parents, a child who ideally needs the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective considerations to be kept in mind in awarding "shared parenting" orders. Discuss in the light of latest case laws on the point.

Ans- The law governing custody of children is closely linked with that of guardianship. Guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor, while custody is a narrower concept relating to the upbringing and day-to-day care and control of the minor. The term "custody" is not defined in any Indian family law, whether secular or religious.

The face of child custody arrangements is changing. A number of countries across the globe have adopted a preference for shared parenting systems over sole custody as a post-divorce arrangement with respect to children. In the West, this trend has arisen largely in response to changing familial roles (male care takers taking on more child rearing responsibilities) as well psychological studies revealing that the involvement of both parents in child rearing is preferable to sole custody arrangements. Studies indicate that children generally fare better when parents share custody, and some jurisdictions in some countries have a legally prescribed presumption of joint custody.

Joint custody of a child does not mean that the parents will both live together because of the child even though that what Indian courts believe is best for the welfare of a minor. It simply means that both the parents will take turns keeping the child in their custody. The rotation of a child between the parents' custody may vary from certain days or a week or even to a month. This not only benefits the child as the affection of both the parents is not lost and the parents also get to be a part of their child's life in those young years.

Joint legal custody means that both parents have the legal authority to make major decisions for the child. These include decisions regarding education, religion, and health care. In other words, it is possible for co-parents to share legal custody but not share physical custody.

Objective Considerations-

The court shall have regard to the following objective considerations ,namely: —

- a. whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child;

- b. whether each of the parents is willing and able to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
- c. whether the parents are able to jointly design and implement a day-to-day care plan that fosters stability;
- d. the maturity, lifestyle and background (including culture and traditions) of the child and parents, and any other characteristics that the court thinks are relevant;
- e. the extent to which each parent has fulfilled, or failed to fulfil, his responsibilities as a parent;
- f. the extent to which the parents are able or unable to find a reasonable way of working together;
- g. the extent to which the higher income parent is willing to support in creating similar standards of living in each parental home;
- h. the child's existing relationship with each parent, siblings, and other persons who may significantly affect the child's welfare;
- i. the needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
- j. any family violence involving the child or a member of the child's family;
- k. whether the child is capable of forming an intelligent preference; and
- l. any other fact or circumstance that the court thinks is relevant.

The court shall direct the parents to conduct an annual review of the welfare of the child and the income of each parent, and to file the same before the court. Parents should have to submit a "Parenting Plan" which provides the personal profile, educational qualification, residence, and income of both parties. Parents should open a joint bank account that can only be used for the child's expenses.

In **KM Vinaya v. B Srinivas**, a two- judge bench of Karnataka High Court ruled that both parents are entitled to get custody "for the sustainable growth of the minor child." Joint custody was effected in the following manner:

The minor child was directed to be with the father from 1 January to 30 June and with the mother from 1 July to 31 December of every year.

The parents were directed to share equally the education and other expenditures of the child. Each parent was given visitation rights on Saturdays and Sundays when the child was living with the other parent. The child was to be allowed to use telephone or video conferencing with each parent while living with the other.

Considerations governing grant of Custody(Case Laws)

The welfare of the child shall include various factors like ethical upbringing, economic well being of the guardian, child's ordinary comfort, contentment, health,

education, etc., **Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42.**

The crucial factors which have to be kept in mind by the courts for gauging the welfare of the children and equally for the parents can be, inter alia, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual, **Lahari Sakhamuri v. Sobhan Kodali, (2019) 7 SCC 311.**

Issues common to all child custody disputes are: (a) continuity and quality of attachments, (b) preference, (c) parental alienation, (d) special needs of children, (e) education, (f) gender issues, (g) sibling relationships, (h) parents' physical and mental health, (i) parents' work schedules, (j) parents' finances, (k) styles of parenting and discipline, (l) conflict resolution, (n) social support systems, (o) cultural and ethnic issues, (p) ethics and values and religion. Though the prevailing legal test is that of the 'best interests of the child', the Courts have also postulated the "least detrimental alternative" as an alternative judicial presumption, **J. Selvan v. N. Punidha, 2007 SCC OnLine Mad 636.**

Supreme Court has time and again expressed deep concern in such cases. Divorce and custody battles can become a quagmire and it is heart-wrenching to see that the innocent child is the ultimate sufferer who gets caught up in the legal and psychological battle between the parents. The eventful agreement about custody may often be a reflection of the parents' interests, rather than the child's. The issue in a child custody dispute is what will become of the child, but ordinarily, the child is not a true participant in the process. While the best-interests principle requires that the primary focus be on the interests of the child, the child ordinarily does not define those interests himself nor does he have representation in the ordinary sense. The child's psychological balance is deeply affected through the marital disruption and adjustment for changes is affected by the way parents continue positive relationships with their children. To focus on the child rights in case of parental conflict is a proactive step towards looking into this special situation demanding a specific articulation of child rights, **Lahari Sakhamuri v. Sobhan Kodali, (2019) 7 SCC 311.**

Q.5.-What are the practical difficulties in execution of an order for grant of maintenance under s 125 Cr.P.C? Discuss the available

options in law before a family judge for the realisation of maintenance amount awarded under s 125 Cr.P.C. with special reference to the case laws.

Ans- Non-Disclosure of Income-

It is common knowledge that in maintenance cases parties rarely disclose their actual income. It is application for interim maintenance admitted that she had some nominal income from some deposits though she did therefore, left to the court to make an assessment by taking various factors in to the consideration, one of the most significant factors is the lifestyle and status of the parties.

A problem arising under Section 25(1) of the Hindu Marriage Act, 1955, is of ascertaining the income and property of the parties for fixing the quantum of alimony and maintenance. In practice the difficulty comes in ascertaining the income and property of the respondent. The applicant is not generally aware of or is not in possession of documents from which the income of respondent can be ascertained. Such documents are accessible to the respondent only. It is, therefore, suggested that matrimonial statutes themselves should contain specific provisions which would make it obligatory on the parties of maintenance proceeding to produce documents particularly 'Income tax Return'. In an instant judgment Allahabad High Court observed that without recording any finding regarding income of the husband for payment of maintenance is not proper.

Another problem is as to enforcement of maintenance laws. The code of Cr.P.C permits the defaulter under the award to raise such pleas during enforcement proceedings where he tries to justify his non-compliance with the terms of the award. Defaulters are often bent upon to harass and torture their dependants from whom they expect no returns, in order to defeat or delay the payment of maintenance. In number of cases it is seen that husband offer to maintain his wife on the condition of her living with him. Court orders investigation of the matter in such cases which in turn delays the execution of maintenance orders invariably.

Visualising the hurdle in implementation of maintenance orders passed by the Court and in order to avoid such delay the Court has pronounced a very remarkable judgment striking out the importance of implementation of such orders without any delay in order to achieve the object of the statutory provision.

The Hon'ble Apex Court in **Miss Shilpa Bansilal Shah vs Bansilal K. Shah on 8/9/1992(1993) 1 GLR 223** while allowing a contempt petition for non payment of maintenance amount by the respondent in defiance of the Court's order held that whether a Court granting an ad interim or final award of maintenance to the discarded, disabled dependents, should rest itself, contended, thus far only and not further, merely stopping at the passing -of the said award, and thereafter necessarily wait for sometime to help them out to realize the amount so awarded till only, if, as and when they so approach it once again, following the second bout of the legal duel by way of execution of the impugned award either by taking-up further proceedings by way of execution and/or the Contempt proceedings or whether

alternatively, following the call of humanistic approach and the speedy justice as promised under Article 21 of the Constitution of India, the concerned Court should immediately volunteer and take upon itself the sacred duty to render easy and expeditious substantial justice by seeing that the amount awarded is immediately made available to the claimants in a manner which may not only ultimately save them from further undue harassment of roaming about from pillar to the post, but before they ultimately getting exhausted and exasperated, start thinking and cursing that the remedy sought for was worst than their ailments and: start entertaining second thought of ever approaching the Court in future for begging the Justice. The Court held that not to comply with the maintenance orders passed by Court is indeed something extremely serious and one of the most vexed social problem which plagues most of the maintenance claimants. The Court appreciating the human tragedy involved and heart-burns for such ill-fated claimants and also taking the responsibility of reflecting the overall social conscience and the concern of which the Court claims to be the beholder endeavoured to find out, discuss and direct certain ways and means which may ultimately provide immediate helping hand of the Court extended to such claimants before their faith in the "law" and "the administration of justice" is put to test if not lost.

Available options and guidelines-

Under the circumstances above, true to the spirit of Article 21 of the Constitution of India to deliver speedy justice, in order to see that the claimants of maintenance under various statutes are not made to suffer any further more, unnecessarily, the Court advised that the Courts entertaining such application should as a duty follow certain guidelines which are enumerated as under:

(i) To first of all find out as to whether the opponent from whom the maintenance is claimed is serving, that is to say, whether he is an employee either of the State or the Central Government or Public/Private Corporation, or any private Institution or of any individual, as the case may be, by collecting the relevant material in the said regard from the petitioner. On getting the same, it should thereafter make the Head of the said Department a necessary-party to the proceedings by issuing a notice in the said regard.

(ii) Thereafter, to call upon the opponent to produce on record the latest salary and allowance certificate, date of his retirement, etc.

(iii) To further call upon the opponent to file an affidavit stating therein what are his other moveable and/or immoveable properties in his name and possession along with the latest savings bank account passbook, shares, securities and other relevant documents pertaining to any investment anywhere.

(iv) At the end of the ad interim or final proceeding, after determining the maintenance amount, the Court shall further direct the said head-of-the-department first to deduct the said amount from the salary of opponent and give the same to the petitioner and only thereafter to release the pay-packet to the respondent.

(v) That while doing above, the Court shall also expressly impress upon the department concern that in the event of non-compliance with the direction of the Court, he shall be liable for the Contempt of Court.

(vi) That further, in case the opponent does not fall in any of the categories streamlined above, than in that case, it will equally be - duty of the Court to see that the maintenance proceedings before it are given top most priority to decide and dispose of the same as expeditiously as possible, avoiding unjust and indiscreet adjournments even by awarding ad interim relief, cost or exemplary cost, as the facts and circumstances of the given case warrants, taking special care that harassment and agonize of the claimants are as far as possible minimised, if cannot be totally eliminated.

The aforesaid guidelines are required to be given, bearing in mind the pathetic plight of the discarded, disabled dependents who without the activism and assistance of the Court are not able to self-help and carry the struggle for existence. This, much needed dynamism and judicial activism is the only way to ensure speedy justice as warranted under Article 21 of the Constitution of India which is the guiding spirit and source of inspiration to any Court. The net result of this would be that not only the needy weaker sections of the society will get their survival dose of maintenance immediately and on every month in time but it may as well save the colossal wastage of precious public time because of the multiplicity of the proceedings and save weaker sections from roaming about from pillar to the post with begging bowl in then-hands, begging for the maintenance.

Q.6.- What are the principles for computation of maintenance in a case under section 125 Cr.P.C.? How will the quantum of maintenance vary in case the competent court has awarded maintenance under Domestic Violence Act and/ or under section 24 of the Hindu Marriage Act.

Ans- Before we proceed to consider this question, it would be appropriate if we examine the relevant provisions of law. Sub-sections (1) and (2) of Section 125 of the Code, read thus:

125.Order for maintenance of wives, children and parents.-

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

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) 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 his wife or such child, 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:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct: Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation.- For the purposes of this Chapter, –

(a) “minor” means a person who, under the provisions of the Indian Majority Act, 1875(9 of 1875) is deemed not to have attained his majority; (b) “wife” includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

It is apparent that the ceiling which was fixed under the original enactment of 1973 of Rs.500/- p.m. has been removed and now it is open to a Court under the amended law to fix such amount as it `thinks fit`.

Again, there is no substantial change so far as the date of payment is concerned. Under sub-section (2) as originally enacted, it was provided that such maintenance

could be made payable from the date of the order or if so ordered, from the date of application. Even after the amendment of 2001, an order for payment of maintenance can be made by a Court either from the date of the order or where an express order is made to pay maintenance from the date of application, then the amount of maintenance can be paid from that date, i.e. from the date of application.

So far as `interim' maintenance is concerned, it is true that Section 125 of the Code as it originally enacted did not expressly empower the Magistrate to make such order and direct payment of interim maintenance. But the Code equally did not prohibit the Magistrate from making such order. Now, having regard to the nature of proceedings, the primary object to secure relief to deserted and destitute wives, discarded and neglected children and disabled and helpless parents and to ensure that no wife, child or parent is left beggared and destitute on the scrap-heap of society so as to be tempted to commit crime or to tempt others to commit crime in regard to them, it was held that the Magistrate had `implied power' to make such order. The jurisdiction of the Magistrate under Chapter IX (Order for Maintenance of Wives, Children and Parents) is not strictly criminal in nature. Moreover, the remedy provided by Section 125 of the Code is a summary remedy for securing reasonable sum by way of maintenance subject to a decree passed by a competent civil Court. Hence, in absence of any express bar or prohibition, Section 125 could be interpreted as conferring power by necessary implication to make interim order of maintenance subject to final outcome in the application.

A direct question came up for consideration before the Hon'ble Supreme Court in **Savitri v. Govind Singh Rawat, (1985) 4 SCC 337 : 1986 CriLJ 41**. The Court considered that though there was no specific provision for grant of interim maintenance, considering the object underlying the provision and social purpose behind the legislation, such a power must be conceded to the Court.

In **Jasbir Kaur Sehgal v. District Judge, Dehradun and Others - 1997 (7) SCC 7** , It is held that wife's right to maintenance includes maintenance to the child as well.

In case of **Rachna Oswald Malhotra -v- Oswald, 2014 Mh L J 711**, the Division Bench of Hon'ble High Court observed that in assessing financial liability one must have regard not only to disclose sources of income but to the true state of affairs as revealed by cross examination.

In case of **U. Sree -v- U. Srinivas, AIR 2013 SC 415**, it is held that while granting permanent alimony no arithmetical formula can be adopted as there cannot be mathematical exactitude. It shall depend upon status of the parties, their respective social needs, the financial capacity of the husband and other obligations.

In case of **Vinny Parmar-v- Paramveer Parmar, AIR 2011 SC 2748**, the Apex Court held that while granting permanent alimony the Court is required to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband. At the same time, the amount so fixed cannot be excessive of affect the living condition of the other party.

Maintenance from which date:

The proviso empowered the Magistrate for granting interim maintenance and expenses of proceeding during its pendency. The allowances either can be granted from the date of application or from the date of order. The Division Bench of Hon'ble Apex Court observed in Jaimini Ben Hirenbai Vyas and another .vs. Hirenbai Rameshchandra Vyas and another, 2015 All MR. (Cri) 376, Supreme Court, that the Court should record reasons while granting maintenance either from date of order or from date of application.

The scope of Sec. 125, Cr.P.C. as well as Sec. 24 of the Hindu Marriage Act stand on different footing.

The maintenance awarded under Section 24 of the Hindu Marriage Act is a maintenance pendente lite and after the conclusion of the matrimonial case, the same will have no effect, however, the maintenance granted under Section 125 Cr.P.C will continue till the same is altered on the changed circumstances as has been mentioned under section 127 of the Cr.P.C.

Section 24 of the Hindu Marriage Act, 1955 has been introduced with a laudable object of ensuring maintenance to a party to the proceeding so as to enable him/her to maintain during the pendency of such proceedings.

Section 125 of the Cr.P.C has also been introduced to ensure maintenance to women, children as also old and infirm poor parents who are unable to maintain themselves. Thus, the object of both the sections are to provide maintenance. If the interim alimony under Section 24 of the Hindu Marriage Act, 1955 is allowed to be paid to the claimant by the other party over and above the amount being paid under Section 125 Cr.P.C, the purpose of granting maintenance would itself frustrate overburdening the person against whom the said order has been passed.

The wife and children can claim maintenance under Section 125 of the Code of Criminal Procedure, under Section 18 and 20 of the Hindu Adoption and Maintenance Act, 1956 and also under Section 20 read with 23 of the D.V. Act.

The wife additionally can claim interim alimony under Section 24 of the Hindu Marriage Act. Even if all these remedies are simultaneously pursued by the wife and some or the other order is passed in each of the said proceedings, it would not be permissible for the wife to claim the amount of maintenance awarded in each of the said proceedings independently.

Firstly, the propriety demands that if any similar relief is granted in the earlier proceedings, the person in whose favour such relief is granted has to disclose the said fact in the subsequent proceedings. For a moment even if it is presumed that no such disclosure was made or in a hypothetical situation, all the proceedings are simultaneously decided, the husband will definitely have a right to claim adjustment of the amount awarded in the said proceeding and can not be subjected to independently pay the amount of maintenance awarded under each of the said proceedings.

Conclusion-

To conclude, What I intend to emphasize is the fact that the adjustment is permissible and the adjustment can be allowed of the lower amount against the higher amount. Though the wife can simultaneously claim maintenance under the different enactments, it does not in any way mean that the husband can be made liable to pay the maintenance awarded in each of the said proceedings. I am supported by a decision in the case of **Sudeep Chaudhary V/s. Radha Chaudhary, reported in AIR 1999 SC 536**, wherein it has been held that when the wife is granted interim alimony both under Sec. 24 of the Hindu Marriage Act and under Sec. 125, Cr.P.C., in that event, the maintenance amount granted under Sec. 125, Cr.P.C. is to be adjusted against the amount awarded in matrimonial proceeding. Although the provision for granting maintenance under Section 125 Cr.P.C and Section 24 of the Hindu Marriage Act are different, the husband is not obliged to pay maintenance twice rather he is only required to pay higher amount amongst the two.

Q.7.- What is the difference in jurisdiction of the courts under the Courts and Wards Act and Minority and Guardianship Acts in appointments of Guardians of a minor?

Ans- The courts are empowered to appoint guardians under the Guardians and Wards Act, 1890. The High Courts also have inherent jurisdiction to appoint guardians but this power is exercised sparingly.

The Hindu Minority and Guardianship Act is supplementary to and not in derogation to Guardians and Wards Act.

Hindu Minority and Guardianship Act, 1956 does not codify the entire law of guardianship applicable to Hindus but amends and codifies only certain parts of law relating to minority and guardianship among Hindus. The provisions are to be read supplemental to the Guardians and Wards Act. The Act does not apply to minors with court guardians. Provisions of the Act are supplementary to that of Guardianship and Wards Act.- **AIR 1981 Cal 206 (Satyendra Nath Maitra and Anr. V. Balaram Chakraborty)**

Under the Guardians and Wards Act, 1890, the jurisdiction is conferred on the District Court: The District Court may appoint or declare any person as the guardian whenever it considers it necessary in the welfare of the child.' In appointing „a guardian, the court takes into consideration various factors, including the age, sex, wishes of the parents and the personal law of the child. **The welfare of the children is of paramount consideration.**

The District Court has the power to appoint or declare a guardian in respect of the person as well as separate property of the minor. The chartered High Courts have inherent jurisdiction to appoint guardians of the- person as well as the property of minor children. This power extends to the undivided interest of a coparcener.

The guardian appointed by the court is known as certificated guardian.

The Supreme Court in **Ruchi Majoo v Sanjeev Majoo** had the occasion to deal with the provisions of the Guardian and Wards Act, 1890 regarding jurisdiction in appointment of guardians of a minor. While examining the judicial pronouncements on the subject Hon'ble Justice T.S. Thakur has held as under;

Section 9 of the Guardian and Wards Act, 1890 makes a specific provision as regards the jurisdiction of the Court to entertain a claim for grant of custody of a minor. While sub- Section (1) of Section 9 identifies the court competent to pass an order for the custody of the persons of the minor, sub-sections (2) & (3) thereof deal with courts that can be approached for guardianship of the property owned by the minor. Section 9 alone is, therefore, relevant for our purpose. It says

S 9 . Court having jurisdiction to entertain application.- (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

If the application is with respect of the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in the place where he has property.

If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly on conveniently by any other District Court having jurisdiction.

In the case of Divya J. Nair v. S.K. Sreekanth,2018 SCC OnLine Ker 3375, dated 12-09-2018 it has been held that Court, where minor ordinarily resides, has jurisdiction under Section 9(1) of Guardians and Wards Act, 1890.

Q.8.- What are the major differences in procedure for adoption by Indian prospective adoptive parents living in India and inter country adoption? What are the eligibility criterion for prospective adoptive

parents? Discuss with relevant provisions of law and latest case laws.

Ans- Juvenile Justice (Care and Protection of Children) Act, 2015

58. Procedure for adoption by Indian prospective adoptive parents living in India.

1. Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a Specialised Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.

2. The Specialised Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority.

3. On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

4. On the receipt of a certified copy of the court order, the Specialised Adoption Agency shall send immediately the same to the prospective adoptive parents.

5. The progress and wellbeing of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the Authority.

59. Procedure for inter-country adoption of an orphan or abandoned or surrendered child.

1. If an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parent despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption:

Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.

2. An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children.

3. A non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.
4. The authorised foreign adoption agency, or Central Authority, or a concerned Government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority.
5. On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialised Adoption Agencies, where children legally free for adoption are available.
6. The Specialised Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency.
7. On receipt of the acceptance of the child from the prospective adoptive parents, the Specialised Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.
8. On the receipt of a certified copy of the court order, the specialised adoption agency shall send immediately the same to Authority, State Agency and to the prospective adoptive parents, and obtain a passport for the child.
9. The Authority shall intimate about the adoption to the immigration authorities of India and the receiving country of the child.
10. The prospective adoptive parents shall receive the child in person from the specialised adoption agency as soon as the passport and visa are issued to the child.
11. The authorised foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption, in consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority.
12. A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to

Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority.

Eligibility criterion for prospective adoptive parents-

Section 57 of the Juvenile Justice (Care and Protection of Children) Act, 2015 reads as follows:-

"Eligibility of Prospective adoptive parents:-

- (1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.
- (2) In case of a couple, the consent of both the spouses for the adoption shall be required.
- (3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.
- (4) A single male is not eligible to adopt a girl child.
- (5) Any other criteria that may be specified in the adoption regulations framed by the Authority."

Section 68 empowers the Central Adoption Resource Agency to frame regulations on adoption and related matters from time to time as may be necessary.

Thus, as laid down in the above provisions, there are a few major differences between inter-country and intra-country adoption process:

1. The international adoption is preferred only after the national adoption process has failed.
2. The international adoption involves the joint efforts of a foreign authorised adoption agency and the diplomatic mission in India
3. Moreover, the international adoption needs an immigration clearance and no objection from their State so that the child has a secure life in his country of adoption.

Various Case Laws-

The question regarding the validity of inter-country adoption was first debated in the well-known case of **In Re Rasiklal Chhaganlal Mehta**, whereby the Court held that inter-country adoptions under Sec 9(4) of the Hindu Adoptions and Maintenance

Act, 1956 should be legally valid under the laws of both the countries. The adoptive parents must fulfill the requirement of law of adoptions in their country and must have the requisite permission to adopt from the appropriate authority thereby ensuring that the child would not suffer in immigration and obtaining nationality in the adoptive parents' country.

The Supreme Court of India in a public interest litigation petition, **Laxmi Kant Pandey v. Union of India**, had framed the guidelines governing inter-country adoptions for the benefit of the Government of India. A regulatory body, i.e., Central Adoption Resource Agency (for short 'CARA') was recommended and accordingly set up by the Government of India in the year 1989.

Since then, the agency has been playing a pivotal role, laying down norms both substantive and procedural, in the matter of inter as well as in country adoptions. The said norms have received statutory recognition on being notified by the Central Govt. under Rule 33 (2) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and are today in force throughout the country, having also been adopted and notified by several states under the Rules framed by the states in exercise of the Rule making power under Section 68 of the JJ Act, 2000.

In the case of **Mr. Craig Allen Coates v. Statethrough Indian Council for Child Welfare and Welfare Home for Children**, the Court held that where the adoptive parents fail to establish clearly the motive for adopting a child from another country, then the adoption process would be barred and be declared as mala fide and that CARA should ensure more stricter guidelines in this regard.

One of the most significant issues in inter-country adoptions is finding prospective adoptive parents, preferably of Indian origin. The Supreme Court of India, in the **Karnataka State Council for Child Welfare v. Society of Sisters of Charity St Gerosa Convent**, had held that the rationale behind finding Indian parents or parents of Indian origin is to ensure the well-being of the children and that they grow up in Indian surroundings so that they can retain their culture and heritage. The best interest of the children is the main and prime consideration.

Bombay High Court in a recent judgment, **Varsha Sanjay Shinde & Anr. v. Society of Friends of the Sassoon Hospital and others**, held that once a child is approved by an Overseas couple after the due procedure is followed, the same child cannot be shown to other Indian parents and that such Indian Parents then cannot claim any right or priority to get the child merely because they are Indian Parents and preference should be given to them over Overseas Indians and Foreign Couples. Although the main issues was decided the Court kept the petition pending in order to see the compliance of directions given by the Court for giving the child to the Overseas Indian Couple and to ensure that the Indian Parents (Petitioners) also get a child expeditiously.

Court further laid down following guidelines for in-country and inter-country adoptions to be read and applied in consonance with Guidelines of 2011:

(i) All the concerned Agencies viz RIPA, Specialized Adoption Agencies, SARA, ARC, AFAA to scrupulously follow the Guidelines which have been laid down in 2011

(ii) Though there is no specific number mentioned in the Guidelines as to the number of Indian parents to whom the child should be shown, within a period of 3/4 weeks, the child should be shown to as many Indian parents as possible and, secondly, at a time, the child should be shown only to one parent and not multiple number of parents as has been done in the present case.

(iii) Only if the child is not accepted by Indian parents and the Adoption Agencies on account of their experience come to conclusion that the child is not likely to be taken in adoption by Indian parents then, in that case, it should be shown to foreign parents.

(iv) When the child is shown to the foreign parents, it should be shown in the list of priorities which are mentioned in the said Guidelines.

(vi) ARC and SARA should work not in conflict but in coordination with CARA, it being the Centralized Nodal Agency.

And as Gabriel Mistral once quoted,
MY NAME IS 'TODAY' "We are guilty of many errors and many faults, But our worst
crime is abandoning the children;
Neglecting the fountain of life.
Many things we need can wait, But the child cannot.
Right now is the time;
His bones are being formed, His blood is being made, His senses are being
developed.
To him, we cannot answer, "Tomorrow", His name is "Today".

Hence, any legislation or decision centred around children must be sensitive to the varying needs and aspirations of the child, it is only this way that we can secure our future. Provisions like Hague Convention on Inter country adoption are just the right way forward in this arena.

Question 1. Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the family court. Discuss the impediments and possible remedies?

Answer: An endeavour should be made to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs such as matrimonial disputes between the couple or/and between wife and her in-laws.

It said India being a vast country has a high number of matrimonial disputes due to differences in temperament, lifestyle, opinions and thoughts, among others, and a majority of such couples was approaching courts to get redressal. "The court must exercise its inherent power under section 482 CrPc to put an end to the matrimonial litigations at the earliest so that the parties can live peacefully," it said while quashing the FIR.

A few alternatives to legal remedies could be:-

- 1) **Mediation is a form of Alternative Dispute Resolution (ADR)** which aims to assist two or more disputants in reaching an agreement. The content of that agreement is determined by the parties themselves rather than accepting something imposed by a third party. Mediators are those impartial professionals who use appropriate techniques and skills to open or improve dialogue between disputants, aiming to help the parties reach an agreement on the disputed matter.

- 2) **Marriage Counselling** is also an excellent way to figure out what to do. The marriage counsellor will ask questions that help one think more clearly about what is going on and what he/she wants. The marriage counsellor will help the parties to communicate better with each other and provides innovative ways to resolve conflicts. Divorce is a potential minefield regarding the impact it can have on the parties, their children and their extended families. Counseling should be one method to overcome the problem of matrimonial

dispute Family courts have a very crucial role to play in reducing the load of disputes on an overburdened judicial system, providing relief to litigants, who are forced to suffer prolonged delays in getting justice.

It said the constitutional mandate is for speedy disposal of matrimonial disputes and to grant quick justice to litigants, but the courts here are already "overburdened due to pendency of large number of cases" because of which it becomes difficult for speedy disposal of such issues.

As the matrimonial disputes are mainly between the husband and the wife and personal matters are involved in such disputes, so, it requires conciliatory procedure to bring a settlement between them. Nowadays, mediation has played a very important role in settling the disputes, especially, matrimonial disputes and has yielded good results," Justice P S Teji said.

Courts in India are now normally taking the view that as the study showed that after counselling, couples became more confident and had a greater sense of responsibility. Divorce counselling is often a useful means of ending the marriage peacefully, and is usually encourage when one of the parties, typically the non-initiator of the divorce, requests marriage counselling. In divorce counselling, the initiator is provided with a safe setting to tell the other spouse why her decision is irrevocable. And the spouse gets a safe place to tell the initiator his feelings about the divorce and the relationship. An experienced counsellor can help to keep the discussion off guilt and blaming and help the couple conclude that the marriage, however disappointing, is over.

(2) **Premarital counselling**, a specialized type of therapy usually provided by marriage and family therapists, is believed to offer benefit to all couples who are considering a long-term commitment such as marriage. Typically, the goal of premarital counselling is to identify and address any potential areas of conflict in a relationship early on, before those issues become serious concerns, and teach partners effective strategies for discussing and

resolving a conflict¹.

¹ <https://blog.ipleaders.in>

QUESTION 2. In what manner and to what extent the procedure in family court can be evolved for speedy disposal of cases? Explain with reference to the relevant provision of the Family Court Act and Rules.

ANSWER. Hon'ble Justice Vimala said: "Apart from provisions of the Family Courts Act, under Article 21 of the Constitution of India, no person can be deprived of life or liberty, except in accordance with the procedure established by law and if the procedure is to be fair and reasonable, the Family Court should ensure speedy disposal.

Section 7 (1) of the Act confers on family courts the jurisdiction and powers exercisable by district and subordinate civil courts in respect of civil suits and proceedings enumerated in the explanatory clause. All matrimonial disputes enumerated in the explanation and dispute relating to maintenance under Section 125, Cr. P.C is to be adjudicated in a particular district. This Act is aimed at providing speedy and effective settlement of all types of matrimonial disputes under one roof, to all sections of people irrespective of caste, creed and religion.¹

The preamble of the Family Court Act of 1984 itself indicates the obligation on the Family Court to make every endeavour to assist the parties in arriving at a speedy settlement of disputes relating to marriage and family affairs. Section 9 of the Act envisages the method adopted for settlement of disputes. Section 9 of this Act states that a duty is cast on the family court to make endeavour to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceedings. If the family court feels that there is a reasonable possibility of a settlement between the parties, the proceedings have to be adjourned for a reasonable period to enable the parties to effect such Settlement.²

As per section 10(3), The family court can also lay down its own procedure to facilitate proper and speedy settlement of disputes. Thus the following types of procedure are made applicable to the family courts for the settlement of disputes. Civil Procedure Code, Cr P.C and Procedural rules framed by the High Court, central government and respective state governments. Therefore the family courts are expected to adhere to simple

¹ Section 3(2), The Family Court Act, 1984

² The Family Court Act, Section 9 (2).

and practicable procedure either in combination of or any of the procedures laid down in the Act.

We can also say that the working procedures of the family courts are such that rules of evidence need not be followed rigidly. It means that the documents submitted as part of a dispute need not be prepared in the framework or format, provided in the other Acts. To achieve the objectives of the enactment, the family court need not stick to the rigid rules of proof through documentary evidence, examination of witness, admissibility, relevancy of evidence, etc. and can lay down its own simple procedure through administrative orders.³

³ K. Pandu Ranga Rao, Commentary on Family Courts Act, 1984

QUESTION 3. In a matrimonial suit for divorce filed by the husband on the ground of cruelty and desertion the wife appears and admits desertion but makes counter allegation of cruelty. Can the divorce suit be decreed on the ground of desertion on admission? Will the situation be different if there is no allegation of cruelty by husband? Whether the limitation of cooling off period apply in such case.

ANSWER: In the case of Karishma Qureshi vs Faisal Qureshi¹ the Hon'ble Court the same question arises before the court that for consideration is: whether on the basis of the admission made by the respondent, the petitioner is entitled to a decree of divorce. The Hon'ble court held that where admissions of fact have been made, decree on admission can be passed as per the principles of Order 12 rule 6 of code of civil procedure 1908. But in the current situation The present case being a matrimonial proceedings, what was only admitted was that the respondent was willing to give a divorce to the petitioner under the personal law and not the grounds on which the divorce was sought by the petitioner. Therefore, the admission made by the respondent cannot be said to be an admission as contemplated under Order 12 Rule 6 of the CPC. Decree on admission is not a matter of right, but rather a discretion of the Court, which discretion must be exercised in accordance with known judicial canon. The observation of court was “it may be noted that the proceedings are matrimonial proceedings, wherein the petitioner has sought divorce on the grounds of cruelty and desertion. The said petition is contested by the respondent by filing his written statement.

According to the respondent, he is ready and willing to give divorce to the petitioner, as per the customs prevailing in their community. The said acceptance of the respondent of divorce cannot be said to be an admission under Order 12 Rule 6. The grounds on which divorce is sought by the petitioner i.e. cruelty and desertion are not accepted by the respondent and are in fact contested by him.”²

¹ AIR 2015 BOM 46

² Para 12 AIR 2015 BOM 46, Karishma Qureshi vs Faisal Qureshi

In the case of Amardeep Singh vs Harveen Kaur³ the Hon'ble supreme court observed that: The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.

The Hon'ble court further held that provision of Section 13 (B) of the Hindu Marriage, Act, 1955 laying down cooling off period of six months is a mandatory requirement or it is open to the Family Court to waive the same having regard to the interest of justice in an individual case. In the nutshell we can conclude that **“the statutory period of six months can waived by the supreme court under Article 142 of the Constitution and the marriage can dissolved”**

³(2016) 13 SCC 383

QUESTION 4. Due to strained relations between the parents ,a child who ideally need the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective consideration to kept in mind in awarding “shared Parenting” orders. Discuss in the light of latest cases on law point.

ANSWER: If a marriage breaks down and ends up in a separation of couple, the person who suffer the most is the child or children born out of the marriage.

Shared custody is a specific type of joint custody that allows the child to have frequent and continuing contact with both parents. (In some areas, it may be called “joint physical custody.” Shared custody generally means that each parent has physical custody of the children 50 percent of the time, such that the child’s time and interaction is equally divided between the parents. The child has a legal home in both parents’ homes. Depending on your state, the term “visitation” may not be used in this custody arrangement.

This custody arrangement may provide equal rights to make important decisions for the children’s well-being — like education, healthcare, extracurricular activities, and religious affiliation. However, many times these decisions fall to one parent or the other. If the parents have agreed to share the decision making, they usually try to do so together and cooperate as a unit. Because shared custody arrangements have a greater focus on the amount of time the children spend with each parent, shared custody may be more appropriate in certain cases where one parent might shoulder more responsibility

In the case of DSG Vs. AKG¹ Delhi High Court-A Bench of Justice Jyoti Singh and Justice G.S. Sistani, dismissed an appeal filed against the order of the family court whereby it directed that interim custody of the 11 years old girl remained with the respondent-father for four days and with the appellant-mother for three days in a week. The appellant appearing in person sought modification of the order on the ground that the respondent

¹ 2019 SCC OnLine Del 7767

was a sexually abusive father and she sought to produce a video recording to that effect. Per contra, the respondent appearing in person with Yidhishter Sharma and Nishant Sharma, Advocates denied the allegations and instead stated that the appellant was suffering from mental illness.

The High Court endorsed the view of the family court that both the parties had equal rights over the child. It was noted that the video recording did not prima facie support the allegations made by the appellant. It was also noted that the child was counselled by three independent counsellors and the reports stated that the child was happy and wished to live with her father. It was observed, **“The Apex Court, as well as this court, has repeatedly held that where the parties are not able to resolve their differences and stay together, then shared parenting is the best formula to bring up a child.”** Everything considered, the Court was of the opinion that there was no occasion to interfere with the impugned order of custodial arrangement.

The consideration of paramount importance in a proceeding for the custody of a minor is the welfare of the child. No legal right, preferential right or any other right holds more importance than the well-being of the child. Any court of law grants custody to that party who can assure the court that the welfare of the child best lies with them.

QUESTION 5. What are the practical difficulties in execution of an order for grant of maintenance under section 125 Cr. P.C? Discuss the available options in law before a family judge for realisation of maintenance amount awarded under section 125 Cr. P.C with special reference to the case laws.

ANSWER: In the case of Shamima Farooqui vs Shahid Khan¹ the Hon'ble Supreme Court Held that: It needs no special emphasis to state that when an application for grant of maintenance is filed by the wife the delay in disposal of the application, to Say the least, is an unacceptable situation. It is, in fact, a distressing phenomenon. An application for grant of maintenance has to be disposed of at the earliest. The family courts, which have been established to deal with the matrimonial disputes, which include application under Section 125 Cr PC, have become absolutely apathetic to the same². Fundamental principle behind Section 125 Cr PC is for amelioration of the financial state of affairs as well as mental agony and anguish that woman suffers when she is compelled to leave her Matrimonial home. It occurs either due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the Courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the Court. As regards the second facet, it is the duty of the Court to have the complete control over the proceeding and not permit the list to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands "still" on some unknown bank of the river. It cannot allow it to sing the song of the brook. "Men may come and men may go, but I go on for ever". This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a pro-active approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the

H

i

g
h

(2015) 5 SCC 705

²
C

Para 12 Shamima Farooqui vs Shahid Khan

ò

Para 13 Shamima Farooqui vs Shahid Khan

u

r

t

s

Question 6. What are the Principles for computation of maintenance in the case under section 125 Cr. P.C.? How will the quantum of maintenance vary in the case the competent court has awarded maintenance under Domestic Violence Act and or under section 24 of Hindu Marriage Act.

Answer: Section 125 Cr Pc. – A husband is supposed to maintain his un-earning spouse out of the income which he earns. No law provides that a husband has to maintain a wife, living separately from him, irrespective of the fact whether he earns or not. Court cannot tell the husband that he should beg, borrow or steal but give maintenance to the wife, more so when the husband and wife are almost equally qualified and almost equally capable of earning and both of them claimed to be gainfully employed before marriage.

Chander Prakash Bodhraj v. Shila Rani Chander Prakash AIR 1968 Delhi wherein it has been opined thus:- “An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodies person to show to the Court cogent grounds for holding that he is unable to reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him.”

While determining the quantum of maintenance, this Court in Jasbir Kaur Sehgal v. District Judge Dehradun & Ors. (1997) 7 SCC 7 has held as follows:-

“The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate.”

Coming to the second part of the question **Sudeep Chaudhary Vs Radha Chaudhary** decided on 31.01.1997, AIR 1999 SC 536, 1999 CLL.'. 466, JT 1998 (9) SC 473. It was held by Hon'ble Apex Court that the jurisdiction for granting maintenance under Section 125 of the Code of Criminal Procedure and Domestic Violence Act is parallel jurisdiction and if maintenance has been granted under Section 125 of the Code of Criminal Procedure after taking into account the entire material placed before the Court and recording evidence, it is not necessary that another Magistrate under Domestic violence Act should again adjudicate the issue of maintenance.

The law does not warrant that two parallel courts should adjudicate same issue separately. If adjudication has already been done by a Court of Magistrate under Section 125 of the Code of Criminal Procedure, re-adjudication of the issue of maintenance cannot be done by a Court of Magistrate under Domestic violence Act.

Quantum of Maintenance:

The following are the documents relevant for the Court to decide application for maintenance:

- (a) Income Tax returns
- (b) Form 16 and Form 12BA
- (c) Appointment letter
- (d) Cost to company certificate
- (e) Salary certificate
- (f) Bank statement of all the bank accounts
- (g) Credit/debit card statements
- (h) Title deeds in respect of immovable property
- (i) Registration certificate of vehicle

QUESTION 7. What is the difference in jurisdiction of the courts under the Courts and Wards Acts and Minority & Guardianship Acts in appointment of Guardians of a Minor?

ANSWER : Supreme Court in Ruchi Majoo vs. Sanjeev Majoo¹ had the occasion to deal with the provisions of the Guardian and Wards Act, 1890 regarding jurisdiction and recognition.

Section 9 of the Guardian and Wards Act, 1890 makes a specific provision as regards the jurisdiction of the Court to entertain a claim for grant of custody of a minor. While sub- Section (1) of Section 9 identifies the court competent to pass an order for the custody of the persons of the minor, sub-sections (2) & (3) thereof deal with courts that can be approached for guardianship of the property owned by the minor.

So basically for the purpose of jurisdiction of the court section 9(1) is relevant if the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having Jurisdiction in the place where the minor ordinarily resides." It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the 'ordinary residence' of the minor. The expression used is "Where the minor ordinarily resides". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy.

In Mrs. Annie Besant vs. Narayaniah² the infants had been residing in the district of Chingleput in the Madras Presidency. They were given in custody of Mrs. Annie Besant for the purpose of education and were getting their education in England at the University of Oxford. A case was, however, filed in the district Court of Chingleput for the custody where according to the plaintiff the minors had permanently resided. Repeating the plea that the Chingleput Court was competent to entertain the application their Lordships of the Privy Council observed: "The district court in which the suit was instituted had no jurisdiction over the infants

¹ (2011)6 SCC 479

² AIR 1914 PC 41

except such jurisdiction as was conferred by the Guardians and Wards Act 1890. By the ninth Section of that Act the jurisdiction of the court is confined to infants ordinarily residing in the district³.

Whereas if we talk about The Hindu Minorities and Guardianship Act, 1956 it is only focus on the Hindu or we can further say that it is a not a secular legislation. On the part of jurisdiction section 8(6) of this act define the court and also discuss the jurisdiction, In this section, “Court” means the city civil court or a district court or a court empowered under section 4A of the Guardians and Wards Act, 1890 (8 of 1890), within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

³ <http://www.legalblog.in/2011/05/jurisdiction-of-courts-under-guardians.html>

Question 8. What are the major differences in the procedure for the adoption by the Indian prospective adoptive parents living in India and inter country adoption? What are the eligibility for prospective adoptive parents? Discuss with relevant provisions of law and latest case laws.

Answer: In the case of Union of India and Ankur Gupta¹ the Hon'ble Supreme Court discuss the procedure of **Indian Prospective Adoptive Parents Living in India and Inter Country Adoption** the difference between these two are discussed below-:

The section 58 of the Juvenile Justice Act deals with procedure for adoption by Indian prospective adoptive parents living in India.

(1) Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a Specialised Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.

(2) The Specialised Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority.

(3) On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(4) On the receipt of a certified copy of the court order, the Specialised Adoption Agency shall send immediately the same to the prospective adoptive parents.

¹ 2019 SCC ONLINE SC 262

(5) The progress and well-being of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the Authority.

The section 59 of the Juvenile Justice Act which provides for procedure for inter- country adoption of an orphan or abandoned or surrendered child, which is as follows:-

(1) If an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parent despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption:

Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.

(2) An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children.

(3) A non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

(4) The authorised foreign adoption agency, or Central Authority, or a concerned Government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority.

(5) On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialised Adoption Agencies, where children legally free for adoption are available.

(6) The Specialised Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency.

(7) On receipt of the acceptance of the child from the prospective adoptive parents, the Specialised Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(8) On the receipt of a certified copy of the court order, the specialised adoption agency shall send immediately the same to Authority, State Agency and to the prospective adoptive parents, and obtain a passport for the child.

(9) The Authority shall intimate about the adoption to the immigration authorities of India and the receiving country of the child.

(10) The prospective adoptive parents shall receive the child in person from the specialised adoption agency as soon as the passport and visa are issued to the child.

(11) The authorised foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption, in consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority.

(12) A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority

Coming to the last part of the question in the case of Indian Council Social Welfare Vs State of Madhya Pradesh² Hon'ble Supreme court held that it is necessary to note that before Guardianship certificate is issued by the family court or district court concerned , a letter of relinquishment, VCA clearance, no objection certificate from the CARA and other relevant documents such as the home study of the proposed guardians , no- objection certificate from the agency which has scrutinised the application of the proposed foreign guardians, as also approval from the scrutinising agency in India who scrutinises these application are required. Thereafter the court decides whether the guardianship should be granted or not. In case there is any objection in respect of any proposed guardianship application, the same can be and are usually raised by the appropriate authority before the family court/ District Court Concerned.

Devendra Kumar Pathak
Dumka

² (1999) 6 SCC 365

FAMILY LAW

Kumar Kamal

*Principal District & Sessions Judge, Simdega
Jharkhand.*

Question No. 1. Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the Family Court. Discuss the impediments and possible remedies.

Answer:

The Law Commission in its 59th report (1974) recommended for setting-up of special courts related to family matter where rules of procedure would be simpler emphasized that such courts may adopt and approach radical steps distinguished from the existing civil courts and that such courts should make reasonable efforts for settlement before commencement of the trial. Hence, we have the current mandatory provision related to settlement wherein the Family Court is duty bound to make efforts for settlement as mentioned in Sec 9 of the Family Courts Act, 1984.

In 1975, the 'Committee on the Status of Women' recommended that all matters concerning the 'family' be dealt with separately. Hence, in 1984 the current Act was enacted and the rules therein were framed by the respective States.

Hence for speedy disposal of the matrimonial disputes and other family matters, the separate family courts were formed which have dealt matters related to marriage, adoption and other similar matters.

The Supreme Court has observed in case of – ***Santhini vs Vijaya Venketesh , TRANSFER PETITION (CIVIL) NO.1278 OF 2016*** – “*The object of stating this is that the legislative intent, the schematic purpose and the role attributed to the Family Court have to be perceived with a sense of sanctity. The Family Court Judge should neither be a slave to the concept of speedy settlement nor should he be a serf to the proclivity of hurried disposal abandoning the inherent purity of justice dispensation system. The balanced perception is the warrant and that is how the scheme of the 1984 Act has to be understood and appreciated.*”

In the above referred judgment, the Supreme Court has also laid down and, it is quoted *ad verbatim*: “the Family Court has been given ample power to modulate its procedure. The Evidence Act is not strictly applicable. Affidavits of formal witnesses are acceptable. It will be permissible for the other party to cross-examine the deponent. We are absolutely conscious that the enactment gives emphasis on speedy settlement. As has been held in *Bhuwan Mohan Singh*, the concept of speedy settlement does not allow room for lingering the proceedings. A genuine endeavour has to be made by the Family Court Judge, but in the name of efforts to bring in a settlement or to arrive at a solution of the *lis*, the Family Court should not be chained by the tentacles by either parties. Perhaps, one of the parties may be interested in procrastinating the litigation. Therefore, we are disposed to think that once a settlement fails and if both the parties give consent that a witness can be examined in video conferencing, that can be allowed. That apart, when they give consent that it is necessary in a specific factual matrix having regard to the convenience of the parties, the Family Court may allow the prayer for videoconferencing. That much of discretion, we are inclined to think can be conferred on the Family Court. Such a limited discretion will not run counter to the legislative intention that permeates the 1984 Act. However, we would like to add a safeguard. A joint application should be filed before the Family Court Judge, who shall take a decision.”

The Family Courts Act 1984 envisages an active role for the Family Court to foster settlements. Under the provisions of Section 11, the Family Court has to endeavour to "assist and persuade" parties to arrive at a settlement. Section 9 clearly recognises a discretion in the Family Court to determine how to structure the process. It does so by adopting the words "where it is possible to do so consistent with the nature and circumstances of the case". Moreover, the High Courts can frame rules under Section 9(1) and the Family Court may, subject to those rules, "follow such procedure as it deems fit". In the process of settlement, Section 10(3) enables the Family Court to lay down its own procedure. The Family Court is entitled to take the benefit of counsellors, medical experts and persons professionally engaged in promoting the welfare of the family.

Question No. 2. In what manner and to what extent the procedure in family courts can be evolved for speedy disposal of cases? Explain with reference to the relevant provisions of The Family Courts Act and Rules.

Answer:

The Family Courts are established under **the Family Courts Act, 1984**, (hereinafter referred to as the Act) for the speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.

Such speedy disposal can be achieved by settlement, appointment of Counsellor, restrictive applicability of Evidence Act, 1872. Each of these is being dealt in detail as under:

As per Section 9 of the Act, the family Court is obligated under the Act to make efforts for settlement at the first instance, wherever it is possible to do so, consistent with the nature and circumstance of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding. As the settlement brings finality to the litigation and peace to the family, Section 10 of the Act provides for adoption of procedures generally and thus the provision of the Code of Civil Procedure, 1908. Hence, settlement of disputes in the matrimonial and other matters pending in the Family Court can be done through like Alternate Dispute Resolution (ADR) methods, i.e., Conciliation, Mediation, Lok Adalat, etc.

Rule 18 of the **Family Courts (Jharkhand High Court) Rules, 2004**, (hereinafter referred to as the Rules) deals with the Role of Counsellor appointed under Section 6 of the Act, in which one role is that the Counsellor entrusted with any petition on appearance of the parties before her/him shall assist and advise the parties regarding the settlement of the subject matter of dispute and shall endeavour to help the parties in arriving at conciliation. Rule 20 and 21 deals with the further procedure related to Efforts for arriving at settlement and the procedure when the parties arrive at settlement.

Section 5 of the Family Courts Act provides for Association of Social Welfare Agencies, the State Government may, in consultation with the High Court, provide. by rules, for the association, in such manner and for such purposes and subject to such conditions as may be

specified in the rules. The Family Courts (Jharkhand High Court) Rules, 2004 has several provisions which deals with welfare agencies such as Rule 2 (f) and Rule 20.

Sec. 14 and 15 of the Act deals with applicability of Evidence Act, 1872 and record of oral evidence under the Act respectively. So far as recording of evidence is concerned, it shall not be necessary to record the evidence of witnesses, verbatim, and it is enough if the substance of the evidence is recorded.

Question No. 3. In a matrimonial suit for divorce filed by the husband on the ground of cruelty and desertion the wife appears and admits desertion but makes counter allegation of cruelty. Can the divorce suit be decreed on the ground of desertion on admission? Will the situation be different if there is no allegation of cruelty by the husband? Whether the limitation of cooling off period apply in such cases.

Answer:

The grant of divorce in cases of desertion by wife is totally subjective and the Court has to decide the same on the basis of facts and circumstance of each case. There cannot be fixed conditions for determining the same, though the same has to be within the yardsticks laid down by several judgments of the Supreme Court and respective High Courts.

Yes, the divorce can be granted on the grounds of desertion but the same has to pass the test as laid down by the Act and precedents, few such precedents are discussed below:

The term "Desertion" was added by the Marriage Laws (Amendment) Act, 1976, providing Desertion as a ground for divorce. It contains two expressions:-

(i) Desertion

(ii) Continuous period of not less than two years.

Desertion- This expression is defined under *Explanation*: - "In this sub-section, the expression, "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expression shall be construed accordingly."

In case of ***Pulford vs. Pulford (1923) P 18.***; Sir Henry Duke has observed that- “Desertion is not the withdrawal from a place, but from a state of things. The husband may live in a place and make it impossible for his wife to live there, though it is she and not he that actually withdraws; and that state of things may be desertion of the wife. The law does not deal with mere matter of place. What it seeks to enforce is the recognition and discharge of the common obligation of the married state.”

So, keeping in view the law, it looks to two things.

(i) Whether there is desertion

(ii) Whether desertion is justified or not.

The Supreme Court has observed in case of- ***Bipin Chandra Shah v. Prabhavati, AIR 1957 SC 176*** - that for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly, two elements are essential so far as the deserted spouse is concerned; (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. Desertion is a matter of inference to be drawn from the facts and circumstances of each case.

Yes, the situation may be different if there is no allegation of cruelty by the husband, the onus of proving such desertion lies on the person who asserts it. However, the Court may not necessarily consider the imposition of cooling off period in such cases of desertion as the separation already exist which might have turned the matrimonial relationship beyond repair and limitation of cooling off period may not serve the purpose.

It might be a case wherein cruelty has ignited and caused desertion. When the co habitation becomes unbearable, harsh, over bearing, abusive or violent beyond tolerance, then desertion is the natural outcome as breathing in suffocation becomes too difficult. The same has been explained in several cases, we would deal with few as under:

Dharam Pal v. Pushpa Devi, AIR 2006 P&H 59- The Court ruled that- Petition by husband for divorce on the ground of cruelty and desertion, it is a case where wife had been living separately for the last 20 years without explaining justifiability and furthermore, the wife made baseless complaints against the husband to the higher authorities which amounted

to cruelty. Grant of divorce was proper. The Court did not reason on the cooling off period in the case and the desertion is of almost 20 years.

Manju Kumari Singh v. Avinash Kumar Singh AIR 2009 Jhar 35- The allegation of cruelty and desertion has not been conclusively and satisfactorily proved by the husband. Therefore, the judgment and decree passed by the court below cannot be sustained in law. However, as the couple has been living separately since more than a decade and there is no chance of its being retrieved, the continuance of such marriage would itself amount to cruelty. Accordingly, it is held that the marriage of the appellant and the respondent husband shall stand dissolved subject to the payment of rupees two lakhs by husband by way of permanent alimony to the appellant.

Question No. 4. Due to strained relations between the parents, a child who ideally needs the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective considerations to be kept in mind in awarding "Shared Parenting" orders. Discuss in the light of latest case laws on the point.

Answer:

Observations of Supreme Court on "**Shared Parenting**" as per laid down in the judgment of ***Yashita Sahu v. State of Rajasthan 2020 SCC OnLine SC 50*** are that welfare of the child is of paramount importance accompanied with the visitation rights and the contact rights of both the parents as per the circumstances.

- It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. However, while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.
- Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does

not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

- **Various Considerations:**

- If the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only.
 - In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the visitation rights must be given over long weekends, breaks, and holidays.
 - In cases where the parents are in two different continents effort should be made to give maximum visitation rights to the parent who is denied custody.
- ‘Contact rights’ are also important for development of the child specially in cases where both parents live in different states or countries. The concept of contact rights in the modern age would be contact by telephone, e-mail or in fact, we feel the best system of contact, if available between the parties should be video calling. With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible. Unless there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 5-10 minutes everyday

Question No. 5. What are the practical difficulties in execution of an order for grant of maintenance under section 125 Cr.P.C.? Discuss the available options in law before a family judge for the realisation of the maintenance amount under section 125 Cr.P.C with special reference to case laws.

Answer:

- The scheme of the provisions embodied in Chapter IX of the Code comprising Sections 125 to 128 which constitutes a complete code in itself requires to be comprehended. It deals with three questions viz.: (1) adjudication as regards the liability to pay monthly allowance to the neglected wife and child etc., (2) the execution of the order on recovery of monthly allowance, and (3) the mode of execution of an order for monthly allowance.

FEW PRACTICAL DIFFICULTIES IN EXECUTION OF MAINTENANCE ORDER U/S 125 CrPC

- The order for monthly allowance can be discharged only upon the monthly allowance being recovered. The liability cannot be taken to have been discharged by sending the person liable to pay the monthly allowance, to jail. At the cost of repetition it may be stated that it is only a mode or method of recovery and not a substitute for recovery. No other view is possible. However, Sometimes Husband prefers to go to jail and not to pay the maintenance amount.

Available options in law before a family judge for the realisation of the maintenance amount under section 125 Cr.P.C

- Sub-section (3) to Section 125 deals with the problem arising in the context of a person against whom order for maintenance allowance has been made failing without sufficient cause to comply with the order. It states that :"*If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to*

imprisonment for a term which may extend to one month or until payment if sooner made:”

- If the order has not been complied by a person without sufficient cause and if the court finds that there is failure of the compliance of the order without sufficient cause , the court will issue a distress warrant for levying the amount due for every breach of the order in the manner provided for levying fines section 421 Cr.P.C.
- After execution of distress warrant, if the court finds that any amount has remained unpaid he may sentence such person for the whole or part of each months allowance remaining unpaid to imprisonment for a term which may extend to one month or until payment whichever is earlier.
- One of the modes for enforcing the order of maintenance allowance with a view to effect recovery thereof is to impose a sentence of jail on the person liable to pay the monthly allowances. (See. ***Kuldip Kaur v. Surinder Singh, (1989) 1 SCC 405***)

Question No. 6 . What are the principles for computation of maintenance in a case under section 125 Cr.P.C.? How will the quantum of maintenance vary in case the competent court has awarded maintenance under Domestic Violence Act and/or under section 24 of the Hindu Marriage Act.

Answer:

Principles for computation of maintenance

The Hon'ble Supreme Court in the case of ***Reema Salkan v. Sumer Singh Salkan, (2019) 12 SCC 303 at para 16*** have summarised the principles for computation of maintenance u/s 125 of the CrPC as under following heads:

- living standard of the husband ;
- his family ;
- his conduct of prolonging litigation;
- his income;
- inflation rate and high cost of living.

IMPACT ON MAINTENANCE ORDER UNDER SECTION 125 CrPC :

a) DOMESTIC VIOLENCE ACT

- In the case of ***Shome Nikhil Danani v. Tanya Banon Danani*** **Petition(s) for Special Leave to Appeal (Crl.) No(s).6005/2019** Order Dated : 22-07-2019, The Division Bench of the Supreme Court held that "***mere passing of an order under Section 125 of the Code of Criminal Procedure 1973 did not preclude the respondent from seeking appropriate reliefs under the Protection of Women from Domestic Violence Act 2005.***"
- The scope of Section 20 of the DV Act is much wider than that of Section 125 Cr.P.C.. While Section 125 Cr.P.C. talks only of maintenance, Section 20 DV Act stipulates payment of monetary relief to meet the expenses incurred and losses suffered as a result of the domestic violence including but not limited to loss of earning, medical expenses, loss caused due to destruction, damage or removal of any property from the control of aggrieved person. Further, Section 20(1)(d) of the DV Act clearly provides that "In proceedings under the DV Act, the magistrate may direct the Respondent to pay the maintenance to the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 Cr.P.C. or any other law for the time being in force. ***Nutan Gautam v. Prakash Gautam, (2019) 4 SCC 734***

b) 24 of the Hindu Marriage Act

- In the case of ***Sanjay Kumar Sinha v. Asha Kumari (2018) 5 SCC 333***, The Hon'ble Supreme Court has held that "***consequent upon passing of the maintenance order under Section 24 of the Hindu Marriage Act by the Family Court, the order passed under Section 125 CrPC stands superseded and no longer holds the field.***"

Question No. 7. What is the difference in jurisdiction of the courts under the Guardians and Wards Acts and Minority & Guardianship Acts in appointment of Guardians of a minor?

Answer:

THE GUARDIANS AND WARDS ACT, 1890

The Guardians and Wards Act, 1890, shall apply to and in respect of an application for obtaining the permission of the court under sub-section (2) of Section 8 of Hindu Minority and Guardianship Act, 1956 in all respects as if it were an application for obtaining the permission of the court under section 29 of The Guardians and Wards Act, and in particular-

- (a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof;
- (b) the court shall observe the procedure and have the powers specified in sub-sections (2),(3) and (4) of section 31 of that Act; and
- (c) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

Section 9 of this Act contemplates about the Courts having jurisdiction to entertain the application. It contemplates that with respect to the guardianship of the minor, the application has to be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to the District Court having jurisdiction in the place where he has the property.

In case of *V. Ravi Chandran (Dr) vs. Union of India and Ors, (2010) 1 SCC 174*; it was held by Supreme Court that in a cases where a child was removed from one country to another in contravention of the Court orders of that country, the course to be followed by the Courts of recipient country in that there should be a direction to the disputing parents to

present their respective claims relating to the custody of the child where the Courts of competent jurisdiction in that country which had already passed a consent order.

HINDU MINORITY AND GUARDIANSHIP ACT, 1956:

Hindu Minority and Guardianship Act, 1956 does not codify the entire law of guardianship applicable to Hindus but amends and codifies only certain parts of law relating to minority and guardianship among Hindus. The provisions are to be read supplemental to the Guardians and Wards Act. The Act does not apply to minors with court guardians. Provisions of the Act are supplementary to that of Guardianship and Wards Act. The welfare of the child shall be of paramount consideration.

The Hindu Minority and Guardianship Act, 1956 is an Act to amend and codify the law relating to minority and guardianship among Hindus. The objects and reasons for this enactment read: "This is another instalment of the Hindu Code and deals with the law relating to the minority and guardianship. Under the Indian Majority Act, 1875, a person attains majority on his completing the age of 18 years but before the completion of that age he has a guardian appointed by the court, he attains majority on completing the age of 21 years. That Act applies to all persons including Hindus but an exception is made with respect to the capacity of any persons to act in the matter of marriage, dower, divorce, and adoption .

Sec. 8 statutorily recognises some of the powers which used to be enjoyed by the natural guardian under the old Hindu law and imposes two important restrictions on him in dealing with the property of the minor. The first restriction is that the guardian can in no case bind the minor by a personal covenant. The second restriction is that he shall not mortgage or create a charge or transfer by sale, gift, exchange or otherwise or even lease out the property for a term exceeding five years or for a term extending more than a year beyond the date on which the minor will attain majority, without the previous permission of the court. These restrictions on the natural guardian in relation to the property of the minor apply only to the separate or absolute property of the minor. Though the expression used is "minor estate" it cannot include the minor's undivided share in the joint family property as under s.6 there cannot be a natural guardian in respect of such property which

is specifically excluded.- *Miriyalu v. Bodireddi Subbayamma 1966 (1) An WR 368, Sri Narayan Bal v. Sri Sridhar Sutar 1996 (1) HLR 174 (SC).*

Under s.12 in regard to the undivided interest of the minor in joint family property no guardian can be appointed. Courts have consistently held that under the Guardians and Wards Act, no legal guardian can be appointed for the undivided interest of the minor in joint family property governed by the Mitakshara law unless the minor is the sole surviving coparcener or unless all the coparceners are minors. Under the old Hindu Law, the manager or the karta of the family of the minor can alienate the minor's undivided interest in the joint family property without the permission of the court, where the alienation is for legal necessity or for the benefit of the minor and this right is left untouched by this Act.- *Krishnakant, In re AIR 1961 Guj 68.*

Question No. 8. What are the major differences in procedure for adoption by Indian prospective adoptive parents living in India and inter country adoption? What are the eligibility criterion for prospective adoptive parents? Discuss with relevant provisions of law and latest case laws.

Answer:

Adoption usually range from the humanitarian motive of caring and bringing up a neglected or destitute child, to a natural desire for a kid as an object of affection, a caretaker in old age, and an heir after death.

But since adoption comes under the ambit of personal laws, there has not been a scope in the Indian scenario to incorporate a uniform law among the different communities which consist of this melting pot. Hence, this law is governed by various personal laws of different religions.

Indian citizens who are Hindus, Jains, Sikhs, or Buddhists are allowed to formally adopt a child under the Hindu Adoption and Maintenance Act of 1956 that was enacted in India as a part of the Hindu Code Bills. Adoption is not permitted in the personal laws of Muslims, Christians,

Parsis and Jews in India. Hence, they usually opt for guardianship of a child through the Guardians and Wards Act, 1890.

Section 11(vi) of the Hindu Adoption and Maintenance Act lays down, "The child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or, in the case of an abandoned child or child whose parentage is not known, from the place of family where it has been brought up to the family for its adoption"

Legal Procedure for domestic adoption in India:

(1) The specialised adoption agency shall file the adoption petition in the court, having jurisdiction over the place where the specialised adoption agency is located, within seven days from the date of acceptance by prospective adoptive parents for obtaining the necessary adoption orders under the Act.

(2) In case the child is from a children's home which is located in another district, the specialised adoption agency shall file the adoption petition in the concerned court of that district.

(3) The adoption petition shall contain all requisite documents as per Schedule- 8.

(4) The court will hold the adoption proceeding in-camera and dispose of the case within a period of two months from the date of filing of the adoption petition by the specialised adoption agency.

(5) The specialised adoption agency shall obtain a certified copy of the adoption order from the court and will forward it to the prospective adoptive parents within ten days and it shall also post a copy of such order in the Child Adoption Resource Information and Guidance System and make necessary entries in Child Adoption Resource Information and Guidance System.

(6) Registration of an adoption deed shall not be necessary.

(7) The specialised adoption agency shall obtain the birth certificate of the child from the birth certificate issuing authority within ten days from the date of issuance of adoption order, with the name of adoptive parents, as parents, and date of birth as recorded in the adoption order.

Inter- Country Adoption:

Inter-country adoption is the process by which one:

1. Adopts a child from a country other than your own through permanent legal means; and
2. Bring that child to your country of residence to live with you permanently.

Inter-country adoption is similar to domestic adoption. Both consist of the legal transfer of parental rights and responsibilities from a child's birth parent(s) or other guardian to a new parent or parents.

Lakshmi Kant Pandey's case (*Lakshmi Kant Pandey v. Union of India, 1984 AIR 469*) is the most important judgement in the area of inter-country adoption. In 1982, a petition was filed under Article 32 of the Constitution by advocate Lakshmi Kant Pandey in which by an order dated 6.2.1984 the Supreme Court laid down detailed principles and norms to be followed for the adoption of children by the people overseas. Many examples and references were cited while 'discussing the issue, including the statutory provisions and the international standards. While discussing the issue the court said: "When the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might arise on account of cultural, racial or linguistic differences in case of adoption of the child by foreign parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socio-economic conditions prevailing in the country, it might have to lead the life of a destitute, half-clad, half-hungry and suffering from malnutrition and illness."

Central Adoption Resource Authority (CARA), Ministry of Women and Child Development, Government of India has also published that since the Supreme Court of India has laid down that every application from a foreigner/NRI/PIO (as applicable) desiring to adopt a child must be sponsored by a social or child welfare agency recognized or licensed by the Government or a Department of the Foreign Govt. to sponsor such cases in the country in which the

foreigner is resident, the foreign agency should also be an agency 'authorized' by CARA, Ministry of Social Justice & Empowerment, Govt. of India. No application by a foreigner/NRI/PIO for taking a child in adoption should be entertained directly by any social or child welfare agency in India.

Eligibility criterion for prospective adoptive parents:

- (a)** The prospective adoptive parents should be physically, mentally and emotionally stable; financially capable; motivated to adopt a child; and should not have any life threatening medical condition;
- (b)** any prospective adoptive parent, irrespective of his marital status and whether or not he has his own biological son or daughter, can adopt a child;
- (c)** single female is eligible to adopt a child of any gender;
- (d)** single male person shall not be eligible to adopt a girl child;
- (e)** in case of a couple, the consent of both spouses shall be required;
- (f)** no child shall be given in adoption to a couple unless they have at least two years of stable marital relationship;
- (g)** the age of prospective adoptive parents as on the date of registration shall be counted for deciding the eligibility and the eligibility of prospective adoptive parents to apply for children of different age groups;
- (h)** the minimum age difference between the child and either of the prospective adoptive parents should not be less than twenty five years;
- (i)** the age for eligibility will be as on the date of registration of the prospective adoptive parents;
- (j)** couples with more than four children shall not be considered for adoption;

In pursuance of the powers conferred by sub-section (3) of section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) and in supersession of the Guidelines Governing the Adoption of Children, 2011, except as respects things done or omitted to be done before such supersession, the Central Government hereby notifies the following Guidelines issued by the Central Adoption Resource Authority to provide for the regulation of adoption of orphan, abandoned or surrendered children.

Submitted By

Lalit Prakash Chaubey
Principal Judge (Family Court)
Pakur.

Answer to question No. 1

The disputes before the family court mostly involve sentimental and emotional matter of dispute between the parties and, therefore, directly entering into the trial of the dispute mostly offends the parties giving a sense of guilt in their mind. It is, therefore, does not give good result of speedy disposal once the dispute is directly taken up for trial like any other dispute. In my view, the family dispute has to be kept on different footing by the court and instead of directly taking up the trial of the dispute, it is better that such dispute should be mandatorily referred to the mediation centre providing opportunity to the parties to have a chance of discussion and also the court should directly involve for ensuring that the parties are taken to the table for the discussion and shorting out the dispute by some possible suggestion suggested by themselves. It is my experience that this mechanism is more appropriate than any other.

Answer to question No. 2

Needless to say, that a family court is a tribunal by its constitution under the relevant Act. It implies that family court is not bound by strict provisions of C.P.C. and Evidence Act. But, however the principles of the procedure and Evidence Act is so far as it is practicable, is applicable. This simply authorises to Family Court to deviate from the strict principles of recording and appreciation of evidence and following the provisions for holding the trial of the case. It is, therefore, desirable that in good case where the parties are adopting procrastinating attitude, they can be dealt with in the suitable way to curtail the tendency by avoiding the established norms and principles which are adopted in the normal course. This is how the Family court can somehow can make a speedy disposal of a case.

Answer to question No. 3

Desertion is a specific ground to seeking divorce by either of the couple who has been deserted by other for a period of two years preceeding form the date of petition filed for seeking divorce. But however, if the couple deserting is in position to forward lawful excuse for such desertion, then the desertion is cannot be the ground for seeking divorce. In the instant case wife who is the defendant has admitted the desertion, but makes a courter clam that the husband is committing cruelty against her. If the allegation of cruelty is proved by the wife of the period of desertion in question, this proved cruelty would be a lawful excuse for the wife giving complete disentitlement to the husband for seeking divorce. But however, if no cruelty is alleged and proved by the wife nor any other lawful excuse is forwarded, the husband would be entitled for seeking divorce. However, the question of cooling off period does not apply to such a ground of divorce, except in cases of divorce by mutual consent.

Answer to question No. 4

It is trite to say that in case of court deciding the custody of child, the paramount consideration is to see the welfare of the child, from both angles i.e. physical and mental. There is hardly any difference for the court to make any difference while considering the custody either exclusive or share parenting. But, however in the matrimonial dispute it has been observed that both the parent have same love and affection for the child and, therefore, the question has been mooted in the legal field about “shared parenting” and this concept has been involved for preserving the emotional aspect of both the parent as well as the child who is the biggest casualty in their dispute for no fault of his own. It is therefore, that when the court is considering for the shared parenting, the most important question coming forward for answering is the paramount consideration of welfare of the child and then the rights of equality of both the parents for dealing with the child in question.

Answer to question No. 5

My experience as a Judge of a Family Court goes to demonstrate that the order of maintenance passed U/s 125 of the Cr.P.C. is kept at relegated level and treated differently by police. That apart, the family court no power of its own to realise the amount except by realising the same as an arrear of land revenue which again falls within the jurisdiction of revenue authority. Much of the time of the court is an exhausted in making the correspondence with less result.

Answer to question No. 6

While computing the maintenance U/s 125 of the Cr.P.C., the court must take into consideration whether the party against whom the maintenance is ordered is guilty of misconduct of matrimonial life and the wife claiming the maintenance is not guilty of any misconduct of such matrimonial life? And also while doing so, the court will take into consideration the income of the husband and the income (if any) of the wife and also the status of the parties and also the dependency of others on their shoulder. The provisions for granting maintenance to wife even including interim maintenance, are well founded in several in statutory provisions. But, how where the larger amount of maintenance granted in any provision would only be the entitlement and the maintenance ordered, if any, of lesser amount would merge into the larger amount. It is so because the maintenance order in different provision, if given, separately, it will become a great hardship against the husband and it would be a kind of windfall to the wife.

Answer to question No. 7

The jurisdiction of courts and wards Act is basically secular in scope and applies to all those who are not Hindu. Whereas the Hindu Minority and Guardianship Act is religion based and it applies to only Hindus. The courts and wards Act does not speak about types of guardianship, whereas the Hindu Minority and Guardianship Act postulates to types of guardian i.e. Natural Guardian and Guardian appointed by courts. The Hindu Minority and Guardianship Act defines the nature and types of guardians, their powers and duty. The Court and Wards Act provides the provision of tutors whereas Hindu Minority and Guardianship Act do not so.

Answer to question No. 8

The provisions of Indian prospective parents living in India is regulated by the either Hindu Adoption and Maintenance Act (HAMA) or by Juvenile Justice (Care and Protection of Children) Act. The provision relating to inter country adoption is regulated by the guidelines as laid down in CARA which provides such provisions for adoption of inter country adoption. The eligibility criteria for a prospective adoptive parent of a foreign country is well laid down in CARA guidelines and such adoptive parents must be a sponsored by a child welfare agency or a social agency recognized by that country to whom such parents belong.

Submission of questionnaire

Question No. 1. Sir, the first question is elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the Family Court. In this regard, I have to say the followings tools and techniques for speedy disposal of matrimonial and other matter pending in the Family Court;

(1) Use of A.D.R Mechanism: Sec. 9 of the Family Court Act provide a mandatory duty of the Family Courts to take efforts for settlement by rendering assistance and persuading the parties for arriving at a settlement, in respect of subject matter of the suit. The A.D.R Mechanism should be used at first instance of the hearing. However, if it appears to the court in any suit or proceeding at any stage that there is a reasonably possibility of settlement between the parties, the court may adjourned the proceeding for such period as yet think fit for make attempt of settlement.

Order XXXIIA Rule-3 of the C.P.C also cast duty on the court to make every efforts for settlement in family matters.

(2) Use of Conciliation Proceeding: This proceeding may help the speedy disposal of Family matters as a role of counsellor in the family Court is basically to find out what is the area of incompatibility between the spouses, where the parties are under the influence of anybody.

The Counsellor can also assist the child in custody matters if he/she is such age to accept the reality of incompatibility between the parents and at mark child

understand that the child is of both parents and the child a right to get the love and affection of both the parents and also has a duty to love and respect both the parents.

(3) Court Management : There should be case plan for each and every case to dispose off within the time frame. At the beginning of each quarter, the court should draw a plan for disposal of old cases and cases chronologically. The court should adopt such means as may live minimize the duration of disposal of cases. The cause list of the court should not be over burdened in order to avoid harassment to the litigants coming from different places.

(4) Assistance of Medical and Welfare Experts: Sec. 12 of the Family Court Act provides that in every suit, it shall be open to a Family court to secure the service of a medical expert or such persons, whether relative to the parties or not, including a person professionally engage in promoting the welfare of the Families.

(5) Check infrequent Adjournment: The court should not give frequent adjournment as a matter of routine and should be an exception rather than the rule in an old case, ready for hearing, if, and adjournment becomes unavoidable, it should not be unduly long and it should be granted with a specific direction that no future adjournment will be granted on the next date fixed.

In the matter of Santhali Vs Vijay Venkeatesh, Tranfer petitions (Civil) NO. 422/2017, The Hon'ble Apex Court pleased to hold that the advancement of technology ought to be utilized also for service on parties or receiving

communication from the parties. Every district court must have at least Email I.D. Administrative instruction for directions can be issued to permit the litigants to excess the court, especially when litigant is located out side of the local jurisdiction of the court.

Further the Hon'ble Apex Court also issued directions in Santhali Case (Supra) which may provide alternative to seeking transfer of proceeding on account inability of a party to contest proceeding. It is also laid down in the said judgment (I) Availability of video conferencing facility. (ii) Availability of legal aid service. (iii) Deposit of cost for travel, loading and boarding in terms of order 25 CPC. (iv) E-mail address/phone number, if any, at which litigant from outstation may communicate.

Some other guideline has also given by the Hon'ble Apex Court in the cased of Anil Rai Vs State of Bihar 2001 (7) SCC 318 as follows: (I) the court working hour should be extend by at least half an hour. (ii) lawyer must curtail prolix and repetitive argument and should supplement it by written note. Lastly (iii) the judgment must be clear and free from ambiguity and should not generate further litigation.

The Hon'ble Supreme Court in its landmark judgment of All India Judges Association vs Union of India AIR 1992 SC 165 pleased to observe that the trial judge is the king pin in the hierarchical system of administration of justice. He directly comes in contact with litigants during the proceeding in court. So many

responsibilities of building up of the case appropriately and on his understanding of the matter, the personality knowledge judicial restraint, capacity to maintain dignity are the additional aspects which go into making court functioning successful.

Sir using the above tools and techniques the disposal of family matters pending in the Family Court may be enhanced.

Question No. 2: Sir, with reference to above noted question, it is submitted that the Family Court Act has been established for the speedy settlement of family disputes. The preamble to an act provide for the establishment of family Court with a view to promote conciliation and secure speedy settlement of dispute relating to marriage and family affairs and for matters connected within.

Several association of women, other organization and individual have urged, from time to time that family court be set up for the settlement of family disputes. Where emphases should be laid conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th report had also stressed that in dealing with dispute concerning the family the court ought an adopt an approach radically different from that adopted in ordinarily civil proceeding and it should make reasonable effort for settlement before the commencement of the trial.

In this regard I have to say that all the sections such as Sec. 4 of the

Family Court Act who deals about the appointment of judges, Sec. 5 of the Act provides for association of Social Welfare agencies. Similarly Sec. 6 of the Act provides that counselors, officers and other employee of family court, sec. 7 of the Act deals of the jurisdiction of the family court regarding the cases of marriage or decree of nullity of marriage, declaring the marriage to be null and void and annulling the marriage as the case may be or restitution of conjugal rights or judicial separations, dissolution of marriage etc. The family court has jurisdiction to pass an order of injunction in circumstances arising out of a marital relationship, declare legitimacy of any person and deal with proceeding for grant of maintenance, guardianship of a person or the custody of any minor etc apart from it the authority has to deals with the applications for grant of maintenance for wife and children and parents as provided as u/s 125 Cr. P.C.

Sec. 9 of Family Court Act provides the duty of the family court to make effort for settlement by rendering assistance and persuading the parties for arriving a settlement in respect with subject matter of the suit. If any suit or proceeding, at any stage, it appears to the court that there is a reasonable opportunity for settlement between the parties the suit may adjourn for such period as think fit to enable attempt to be made for settlement.

Similarly, Sec. 10 of the Family Court Act provides procedure of Family Court although, section of the act makes the procedure laid down under the code of civil procedure 1908 applicable to family court proceeding. It is also laid down that

the family court is free to evolve its own rule of procedure and once the Family Court lays down its own rule of procedure, they will be over right the rule of C.P.C.

Sir using the above tools the techniques as well as the manner as provided in the Family Court Act the goal of speedy disposal can be archived.

Question 3: Sir, a petition for divorce is not a petition as other suits. A divorce not only affects the parties, their children if any, and their families, but the society also feels its reverberation.

Sir, according to Se. 13(1)(i-a) of Hindu Marriage Act, any marriage solemnized whether before or after the commencement of this act, may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other parties has after the solemnization of the marriage treated the petitioner with cruelty.

According to Sec. 13(1)(i-b) of the Hindu Marriage Act, any marriage solemnized whether before or after the commencement of this act may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that other party has deserted the petitioner for a continuous period not less than one year immediately preceding the presentation of the petition.

In the present case the petitioner seeking divorce on the ground of cruelty and desertions. The respondent appeared and admitted desertion, but she

made counter allegation of cruelty against the petitioner. Now, the question arise that whether divorce can be granted on the parameters in this regard in the matter of *Pariwar Sewa Sansthan Vrs. Dr. (Mrs.) Veena Karla* AIR 2000, Delhi Hon'ble Court examined at length the provisions and the need for an admission unequivocal and positive the admission would obviously have the consequences of arriving at that conclusions without determination of any question and evidence.

According to Sec. 23(1)(a) of Hindu Marriage Act that a court can grant a decree under the said act, it must be satisfied that one or other of the statutory ground granting relief exists in the case. It is only on the court be so satisfied that it gets the jurisdiction to grant a decree under the said act and it cannot pass decree otherwise.

Thus, before granting decree on admission, the court has to satisfy that whether essentials requirements u/s 13(1)(i-b) of Hindu Marriage Act is satisfied or not.

The Hon'ble Apex Court and the High Court has been pleased to held that for establishing the claim of desertions so for as the deserting spouse is concerned, there should be two condition, first the factum of separation and second the intention to bring cohabitation permanently. Similarly, two elements are essentials so far as the deserted spouse is concern (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home, thus the petitioner who seeks divorce has to prove (1) there was

desertion for a continuous period of two years immediately preceding the presentation of the petition. (2) the desertion was without reasonable cause and without consent or against the wish against the petitioner.

Limitation of cooling period : The next part of the question is that whether the limitation of cooling off period apply under the facts of the aforesaid case. In this regard I would like to refer the Sec. 13(B) of the Hindu Marriage Act which deals with divorce by mutual consent.

(1) A petition for dissolution of marriage by a decree of divorce may be presented to the district court /civil court by both the parties of marriage jointly, whether such marriage was solemnized before or after commencement of the marriage law amendment act, on the ground that they have been living separately for a period of one year or more that they have not been able to live together and they have mutually agreed to that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier then six months after the date of the presentation of the petition referred in sub section one and not later than 18 month after the said date, if the petition is not withdrawn in the mean time the court shall, on being satisfied, after hearing the parties it thinks fit that a marriage has been solemnized and the averments in the petition is true pass a decree of divorce declaring the marriage to be dissolve with the date of decree.

Under the above facts and circumstances of the case if the statutory requirements as prescribed under Sec. 13(1(i-b) of Hindu Marriage Act is fulfilled,

then the divorce suit can be decreed on the ground of desertion on admission of the respondent, even, if there is no allegation of cruelty by the husband.

Question 4 : Sir according to Guardian and wards Act 1890. This act is secular law relating questions of guardianship and custody for all children within the territory of India irrespective of their religions. The Hindu and Minority and Guardianship Act is applicable to a person who is Hindu, Buddhist, Jain, or Sikh by religion. Similarly the Sec. 26 of Hindu Marriage Act, 1955 authorise court to pass interim order in any proceeding under the act with respect of custody, maintenance and education of minor children.

According to Muslim Law the father is the natural guardian, but custody vests with the mother until the son reach the age of 7 and the daughter reached puberty. The concept of hiznat provides all the persons the mother is the most suited to have the custody of her children up to a age of certain age. Both during the marriage and after its dissolution a mother cannot be deprived of right unless she is disqualified because of apostasy or misconduct and her custody is found to be unfavourable to the welfare of the child.

So far the parcy and Christian law is concern, Sec. 49 of the Parsy Marriage and Divorce Act. 1976 and Sec. 41 of the Divorce Act, courts are authorize to issue interim order for custody, maintenance and education of minor children in

any proceeding. According to Sec. 38 of Special Marriage Act 1954 the District Court to pass interim order during pendency of proceeding and make such provisions in the decree as it may seem to be fit just and proper with respect to the custody, maintenance and education of the minor children.

In the matter of Kamla Devi vs State of Himachal Pradesh AIR 1987 H.P 34 the Hon'ble Court has been pleased to hold that the court while deciding the child custody case, in its inherent and general jurisdiction is not bound mere legal right of the parents or guardian. Though the provisions of the special status which govern the right of the parents may be taken into consideration. The Hon'ble Court has further hold that child's ordinary comfort contentment, intellectual, moral and physical development, health, education and general maintenance and the favourable surroundings may also be considered.

In the matter of Gourav Nagpal Vs Sumedhaa Nagpal 2009 (1) SCC 42 the Hon'ble Apex Court has been pleased to observe that the provisions of special statute which governs the rights of the parents or guardian may be taken into consideration, there is nothing which can stand in way of the court exercising its jurisdiction arising in the case.

In the matter of Lahri Sekhmuri Vs Sobhan Kodaly 2019(7) SCC 311 The Hon'ble Court observed that the crucial factor which have to be kept in the minds of courts for gauging the welfare of the children and equality for the parents can be, inter alia delineated such as maturity and judgment, mental stability, ability to

provide access to school, moral character etc.

In the matter of Tejawshini Gour Vs Sekhar Jagdish Prasad Tiwari 2019

(7) SCC 41. The Hon'ble Apex Court observed that the welfare of the child shall include various factors like ethical upbringing, economic well being of the guardian child's ordinary comfort, containment, health, education etc.

Thus in the light of aforesaid judgment and preposition of law, it can be said that before deciding s to whether the custody should be given to the mother or the father are partially to the other or in shared parenting, the court must take into account the wishes of the child concerned, assess the psychological impact of the child if any, the court while dealing with the custody cases neither bound by statutes nor by strict rule of evidence or procedure nor by precedents. The court has to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comfort moral or ethical values cannot be ignored they are equally, or more important, essential and indispensable conditions.

Question 5: Sir generally the maintenance order is passed u/s 125 of the Cr. P.C and enforced u/s 128 Cr. P.C.

According to Sec. 128 of the Cr. P.C a copy of the order of maintenance or interim maintenance and expenses of the proceeding, as the case may be, shall be given without payment to the person in his favour it is made or to his guardian

and such order may be enforced by the Family Court in any place where the person against whom it is made may be, on such court being satisfied as to the identity of the parties and the non payment of the allowance or expenses or the case may be. But there is some practical difficulties in execution of order of Sec. 125 of Cr. P.C.

(1) Frequent change of address of respondent.

(2) Assessment of income of respondent if he is non-government employee or if he is non salaried person, because in most of the cases respondent used to take plea that he has no means or income to give maintenance to the petitioner.

(3) Non execution of D.Ws and in several cases service report of the warrant has not been received in spite of issuance of reminder.

(4) In case, the property is not in the sole name of respondent then it creates difficulties in attachment of property because the other co-sharer can claim over the property.

(5) In some of the cases, respondent adamant to not give maintenance to applicant and ready to go to jail.

When an application is made u/s 125(3) Cr. P.C for recovery of the mount, then it is the duty of the court to see the due compliance of the order. If, without sufficient cause, the respondent willfully avoided payment of maintenance, it has the power to issue a warrant for levy of the amount. The issue of warrant for

levy of the amount due is in the manner provided for levying fines. Any further delay on the part of respondent without there being a justified cause any lead to his imprisonment.

In the matter of Kuldeep Kaur Vs Surender Singh & Ors. AIR 1989 SC 232, the Hon'ble Supreme Court has to pleased to hold that a person without cause refused to comply with the order of the court to maintain his wife or child would not be absorbed of his liability merely because he prefers to go to jail. Sentencing a person to jail is only a more of enforcement and not a mode of satisfaction. The liability can be satisfied only by making actual payment of the arrears. Keeping the defaulting responding in jail is only an alternative for ensuring/facilitating regular recovery of the maintenance amount. The imprisonment that is ordered is not a punishment but merely a measure to make him pay the unpaid portion of maintenance. The imprisonment is not be concerned as a coercive method to effect recovery rather than a punishment for failure to make payment.

In the matter of Mehboob Basa Vs Nainima @ Hazra Bibi and Anr. The Hon'ble Apex Court observed that the power of the magistrate imposing imprisonment on the failure of the husband to pay maintenance has been restricted to only one month or until payment if soon or made. After the one month for every breach or non-compliance of the order of the magistrate wife can approach the magistrate once again for similar relief.

Hence, in the light of aforesaid provisions as well as decisions of the

Hon'ble Courts the principle emerge that whenever there is a failure of complying the order for payment of maintenance, then the person would be liable to sent jail for a period of one month. However, this restriction of one month under sub section 3 of Section 125 Cr. P.C cannot stand on the way even after one month period, if he continues to neglect the payment of arrears, one again the same very provision of Section 125 (3) Cr. P.C can be invoked by the court concerned, provided if the law is set in motion by filing an appropriate petition by the wife or the effected party. However, the court cannot send a person to jail beyond the period of one month at stretch or in one stroke for his failure to pay the maintenance of arrears.

Question 6: Sir Sec. 125 of the Cr. P.S legislated as a tool for social justice, it provided an affective remedy for neglected person to get maintenance. A person of any religion can apply for maintenance u/s 125 Cr. P.C. The object of this provision is to provide a summary remedy to the dependent wife, children and present from destitution and to serve a social purpose. In the matter of Ramesh Chandra Kaushl Vs Ms. Veena Kaushal and other AIR 1978 SC 1807. The Hon'ble Apex Court has been pleased to observed that it is a meant to achieve a social purpose the object is to prevent vagrancy and destitution. It provides special remedy for supply of food, clothing and shelter to the deserted wife. The aforesaid position was highlighted in the matter of Sabita ben Sombhai Bhati Vrs State of Gujarat and ors. 2005(2)

5000(3).

In the matter of Chaturbhuji Vs Sita Bai reported in 2008(2) SCC 316. It is observed by the Hon'ble Court that the object of maintenance proceeding 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. The object is not prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves.

In the matter of Bhagwan Vrs Kamla Devi AIR 1975 SC 83, It was held by the Hon'ble Apex Court that the wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with the status of a family. The expression unable to maintain herself does not mean that the wife must be absolutely destitute before she can apply for maintenance u/s 125 Cr. P.C.

So for the next part of question is concern, I would like to read Sec. 20 of the D.V Act while disposing of an application under sub-section of Section 12 the magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but not limited to,

(a) the loss of earning, (b) the medical expenses, (c) the loss causes due to the destruction, damage or removal of any property from the control of the aggrieved person and (d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under Section 125 Cr. P.C 1973(2 of 1974) or any other law for the time being in force.

According to Section 20(6) of the D.V Act upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

Sec. 26 of the D.V Act provides relief in other suits and legal proceedings as follows:-

(1) Any relief available under Section 18,19,20,21 and 22 may also be sought in any legal proceedings, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or

legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the magistrate of the grant of such relief.

Sec. 20(1) (d) of the D.V Act makes it clear that the maintenance, which can be granted under the said Act, can be in addition to an order of maintenance under Section 125 or Cr. P.C and or any other law for the time being in force. Whereas sub-section (3) of the Section 26 of said Act enjoins the duty on the aggrieved person to inform the magistrate, if she has obtained any relief available under section 18, 19, 20, 21 and 22 in any other legal proceeding filed by her before the Civil Court, Family Court or Criminal Courts.

Admittedly, there is no such provision, of aforesaid, under Section 125 of Cr. P.C. But Section 125 of Cr. P.C enjoins the duty upon the court to award fair and appropriate amount of maintenance, meaning thereby that it shall not be inadequate or insufficient and at the same time shall also not be excessive or unreasonable. In the circumstances, though there may not been any express provision under Section 125 Cr. P.C, it any not be impermissible to take into account the maintenance or interim maintenance, if any already awarded to the aggrieved person under the provisions of the D.V Act while finally determining the quantum of maintenance u/s 125 Cr. P.C and thus the amount of interim maintenance awarded

under D.V Act shall liable to be adjusted in the amount of maintenance finally awarded u/s 125 Cr. P.C. So long the aggrieved person is receiving such amount.

Sec. 24 of the Hindu Marriage Act deals with maintenance pendente lite and expenses as follows:

Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has not independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

In case of Sudeep Choudhary Vrs Radha Choudhary AIR 1999 SC 536, the Hon'ble Apex Court has laid down a law that the amount awarded u/s 125 Cr. P.C is adjustable against the amount awarded in the matrimonial proceedings u/s 24 of the H.M Act as alimony to wife.

In case of Nagender Rappa Natikar Vs Nilama AIR 2013 SC 1541, the Hon'ble Apex Court has held that an order passed u/s 125 Cr. P.C would not preclude wife from making claim u/s 18 of the 1956 Act similarly, in Vuikash Vs State of U.P 2014 DMC 373 Allahabad, the Hon'ble Court has held that the Family Court has the power to adjust the amount of maintenance already awarded by the magistrate u/s 125 Cr. P.C and the D.V Act.

In the matter of Sangeeta Kumari Vrs State of Jharkhand. The Hon'ble Jharkhand High Court has been pleased to hold that although the provision for granting maintenance u/s 125 Cr. P.C and Section 24 of Hindu Marriage Act are different, the husband does not oblige to pay maintenance twice rather he is only require to pay higher amount amongst the two. However, when there are order of maintenance both u/s 125 Cr. P.C and 24 of H.M Act the claimant shall not be entitled to get maintenance simultaneously, rather he/she would be entitled to get only the higher amount of maintenance out of both the provisions.

On the basis of above discussions, it can be said that the wife can claim maintenance u/s 125 Cr. P.C, under provisions of D.V Act and u/s 24 of the Hindu Marriage Act simultaneously, but it would not be permissible for the wife to claim the amount of maintenance awarded in each of the said proceedings independently and the amount so awarded is adjustable against the amount awarded in matrimonial proceedings or D.V. Act and the adjustment is permissible and can be allowed for the lower amount against the higher amount.

Question 7 : Sir while taking a decision regarding custody or other issues pertaining to a child welfare of the child is paramount consideration. In the matter of Gourav Nagpal Vs Sunedha Nagpal 2009 (1) SCC 42 the Hon'ble Apex Court has observed that to consider the parameters while determining the issue of custody of child and

visitation right, entire law on the subject was reviewed. It is further held by the Hon'ble Apex Court that it is not the welfare of the father, nor the welfare of the mother that is the paramount consideration for the court. It is the welfare of the minor.

Sir the Hindu Minority and Guardianship Act was established to empower the Guardian and Wards Act 1890 and provide better right and protection to children instead of acting as a replacement of already reviled act. Under the Hindu Minority and Guardianship Act a person who is minor is incapable to take care of himself or handling his affairs and thus requires fail, then under such situation a guardian has bee appointed for the care of his body and his property. Prior to Guardian and Ward Act. 1890, there was no act dealing with the guardianship of the minor. The statutory law before 1890 of the subject of Guardianship consisted of Acts separately enforced in three presidencies, but the general law of guardianship however, remain unaffected. In Indian Law mainly three period of guardianship of minor with reference to the age of minor felt to be considered. In the first case a minor is a person under the specified age in regard to matter falling with personal law. The age varies but in case of Hindus at present is 18 years and according of Muslim Law Minority extends up to 15 years.

The Guardian and Ward Act and its object is to provide a law of Guardian and Wards Act as for as possible to all classes, subsequently, Hindu Minority and Guardianship Act 1956 has been brought in order to amend and qualify

law relation to minority and guardianship among Hindu. Under the Indian Majority Act a person attains majority on completing the age of 18 years but before the completing that age, he has a guardian appointed by the court. In this Act, the guardian may be divided in three parts. Natural Guardian, Testamentary Guardian and Guardian appointed or declared by the court. Mother is now as considered as natural guardian. Sec. 3 of the Hindu Minority and Guardian Act safes the jurisdiction of the courts wards. Similarly Sec. 20 of the court of Ward Act deals with appointment of Manager and guardian. The court may appoint one or more managers for property of any ward and one or more guardians for the case or the person of any ward under the charge of the court and may control and remove any manager or guardian so appointed. Provided that when any person other than a proprietor of whose property, the court has taken charge under u/s 6(1)(D) or a trusty of whose trust property, the court has taken charge under clause-E of the said sub-section becomes award, the court may s its discretion, confirm or refused to recognize any appointment of a person to be the guardian of such ward which may have been made by a will. Sec. 42 and Sec. 43 also deals with specific duty of the guardian appointed by the court. Section 52 of the Court of Ward Act provides deals power of court or ward to nominate another person to be next friend or guardian for suit and upon receiving coy of any such order of substitution, the civil court in which such suit is pending shall substitute the name of the next friend or guardian for the suit so appointed for the name of the manager of collector.

Question 8 : Sir *The term ‘Adoption’ has been defined U/s 2(2) of Juvenile Justice (C & T) Act 2015* which provides that adoption that “adoption” means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.

Differences in procedure for adoption by Indian Prospective Adoptive Parents (PAP) living in India and inter country adoption:-

Procedure for Indian Prospective Adoptive Parents (PAP):- Section 58 of the Juvenile Justice (Care & Protection of Children) Act provides Procedure for adoption by Indian prospective adoptive parents living in India which is run as follows :-

1. Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child may apply for the same to a Specialized Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.

2. The Specialized Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority.

3. On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

4. On the receipt of a certified copy of the court order, the Specialized Adoption Agency shall send immediately the same to the prospective adoptive parents.

5. The progress and well being of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the Authority.

Section 59 of the Juvenile Justice (Care & Protection of Children) Act,

2015 provides procedure for inter-country adoption of an orphan or abandoned or surrendered child :-

(1) If an orphan or abandoned or surrendered child could not be placed with an Indian or non resident Indian prospective adoptive parent despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption;

Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.

2. An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children.

3. A non resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

(4) The authorized foreign adoption agency, or Central Authority, or a concerned government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority.

(5) On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialized Adoption Agencies, where children legally

free for adoption are available.

(6) The Specialized Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency.

(7) On receipt of the acceptance of the child from the prospective adoptive parents the Specialized Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(8) On the receipt of a certified copy of the court order, the specialized adoption agency shall send immediately the same to Authority, State Agency and to be prospective adoptive parents, and obtain a passport for the child.

(9) The Authority shall intimate about the adoption to the immigration authorities of Indian and the receiving country of the child.

(10) The prospective adoptive parents shall receive the child in person from the specialized adoption agency as soon as the passport and visa are issued to the child.

(11) The authorised foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption in

consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority.

(12) A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority.

Regulation 12 of Adoption Regulation 2017 provides **legal procedure for adoption of child**. Clause 1 of Section 12 provides that the Specialized Adoption Agency shall file an application in the court concerned, having jurisdiction over the place where the SAA is located, with relevant documents in original as specified in Schedule-IX within 10 working days from the date of matching of the child with the PAP and in case of inter country adoption, from the date of receiving No Objection Certificate from the authority, for obtaining the adoption from the court.

Sir **Regulation 13 of Adoption Regulation 2017 provides** follow-up of progress of adopted child in country adoption and **Clause 1 of Regulation 13 provides** that the SAA which has prepared the Home Study Report shall prepared the post adoption follow-up report on 6th monthly basis for two years from the date of pre-adoption foster placement with the PAP, in the format as provided in Schedule-XII and upload the same and CARA and guidance system alongwith the photograph of the child. **Clause-4 of the Adoption Regulation provides** that SAA or

the DCPU as the case may be, shall arrange for counseling the adoptive parents and adoptee by social worker or link them to the counseling centre setup at the authority or state agency, whenever required. **Clause-5 of Regulation Adoption 2017 provides** that in case the child is having adjustment problem with the adoptive parents, the SAA shall arrange the required counseling centre set up at the authority or state agency wherever required. **Regulation 13(7) of Adoption Regulation** provides that in case of dissolution, the application for annulment of adoption order shall be filed in the court which issued the Adoption Order.

Regulation 14 of Adoption Regulation 2017 provides that non resident Indian to be treated at par with Indians living in India in terms of priority of adoption of Indian orphan, abandoned or surrendered children.

Regulation 15 of Adoption Regulation 2017 envisaged registration and home study report for PAP for inter country adoption.

Regulation 17 (1) of Adoption Regulation 2017 provides the legal procedure as provided in Regulation 12 shall **mutatis mutandis** be followed in cases of inter country adoption.

(2) In cases of the prospective adoptive parents habitually residing abroad and wanting the Specialized Adoption agency to represent on their behalf as well, the application shall also be accompanied by a Power of Attorney in favour of the social worker or adoption in charge of the Specialized Adoption Agency which is processing the case and such Power of Attorney shall authorise a social worker to

handle the case on behalf of the prospective adoptive parents.

Sec. 57 of the Juvenile Justice (care and protection of children) deals with eligibility of prospective adopting parents.

1. The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

2. In case of a couple, the consent of both the spouses for the adoption shall be required.

3. A single or divorced person can also adopt, subject to fulfillment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

4. A single male is not eligible to adopt a girl child.

5. Any other criteria that may be specified in the adoption regulations framed by the Authority.

Regulation 5 of Adoption Regulation 2017 provides following eligibility criteria for PAP :-

1. The prospective adoptive parents shall be physically, mentally and emotionally stable, financially capable and shall not have any life threatening medical condition.

2. Any prospective adoptive parents, irrespective of his marital status and

whether or not he has biological son or daughter, can adopt a child subject to following namely :-

(a) the consent of both the spouses for the adoption shall be required, in case of a married couple;

(b) a single female can adopt a child of any gender;

(c) a single male shall not be eligible to adopt a girl child;

(3) No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship.

(4) The age of prospective adoptive parents, as on the date of registration, shall be counted for deciding the eligibility and the eligibility of prospective adoptive parents to apply for children of different age groups shall be as under :-

Age of the child	Maximum composite age of prospective adoptive parents (couple)	Maximum age of single prospective adoptive parents
Up to 4 years	90 years	45 years
Above 4 and up to 8 years	100 years	50 years
Above 8 and upto 18 years	110 years	55 years

(5) In case of couple, the composite age of the prospective adoptive

parents shall be counted.

(6) The minimum age difference between the child and either of the prospective adoptive parents shall not be less than twenty five years.

(7) The age criteria for prospective adoptive parents shall not be applicable in case of relative adoptions and adoption by step-parents.

(8) Couples with three or more children shall not be considered for adoption except in case of special need of children as defined in sub-regulation (21) of regulation 2, hard to place children as mentioned in regulation 50 and in case of relative adoption and adoption by step-parent.

Regulation 3 of Adoption Regulation 2017 deals with following fundamental principles of governing adoption.

(a) the child's best interests shall be of paramount consideration, while processing any adoption placement;

(b) preference shall be given to place the child in adoption with Indian citizens and with due regards to the principle of placement of the child in his own socio-cultural environment, as far as possible;

(c) all adoptions shall be registered on Child Adoption Resource Information and Guidance System and the confidentiality of the same shall be maintained by the Authority.

In **Sewa Bharty Matruchhaya, Durg through its Secretary Dilip Desmukh (Crl. Rev. No.97/2018)**, the Hon'ble High Court of Chhatisgarh, Bilaspur in

Para-18 of the Judgment pleased to issue certain directions to the court concerned and the SAA, while dealing with an adoption case under J.J Act 2015 shall henceforth positively comply with the following directions :-

(1) While deciding an adoption application, the Court shall strictly adhere to the time limit of two months as provided by Section 61(2) of the Juvenile Act, 2015, Rule 46 of the Model Rules, 2016 and Regulation 12(6) of the Adoption Regulations, 2017.

(2) If an adoption case is not disposed of within the aforesaid period of two months, the Court shall record a specific reason therefor.

(3) The Court shall conduct proceedings of an adoption case in camera.

(4) The Court shall not treat an adoption case as an adversarial litigation.

(5) While deciding an adoption case, the Court shall strictly adhere to Rule 45(2) of the Model Rules, 2016 with regard to applicability of the procedure laid down in the Juvenile Act 2015 and the Adoption Regulations, 2017.

(6) Looking to Regulation 12(7) of the Adoption Regulation, 2017, the adoptive parents shall not be asked to execute any bond or make any investment in the name of the child.

(7) Since an adoption case is a non-adversarial litigation in nature, the Specialized Adoption Agency shall not make any opposite party or Respondent in the adoption application. Along with an application for adoption, names and details of PAPs shall be kept in a covered and sealed envelope.

(8) Though as provided in Regulation 19(1) of the Adoption Regulations, 2017, in a case of inter-country adoption, it is mandatory that the Authorized Foreign Adoption Agency or the Central Authority or Indian Diplomatic Mission or Government Department concerned, as the case may be, shall report progress of the adopted child for two years from the date of arrival of the adopted child in the receiving country, on a quarterly basis during the first year and on a six monthly basis in the second year. I deem it appropriate to direct that in addition to the above a welfare report and a detailed educational report of the adopted child shall also be obtained on a six monthly basis till the adopted child attains majority and such reports shall be monitored properly.

Submitted with regards
Manoj Srivastava
Principal Judge, Family Court,
Jamtara.

Q. No. 1. Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the Family Court. Discuss the impediments and possible remedies.

Ans.- The objectives of setting up Family Courts i.e. reconciliation, expediting cases and amicable resolution of family disputes. The aim of family court is dispute resolution rather than bringing family together. It was stated that since representation by lawyers is not necessary under Section 13 of the Family Courts Act, 1984 therefore there was resistance from lawyers everywhere.

The Family Court judge though situated in an adversarial system is expected to adopt a problem-solving approach. It is the need for Family Courts to adopt a therapeutic approach to resolve the dispute as well as address the underlying causes for the dispute. The challenges in adopting a proactive role by Family Court judges were pointed out and emphasis was placed on balancing the authoritative role of a judge with the role played by a Family Court judge who mediates the dispute. No uniform standard can be devised in view of the varying situations in different jurisdictions. The judges need to deliver justice taking into account the social realities and to keep Article 21 of the Constitution of India at the forefront while adjudicating family disputes.

Personality traits and skills of a judge plays a vital role. There is a need for proficiency in communication skills comprising of traits including tone of voice, respect to litigants, neutrality in judging, empathy, timely response and helpfulness in adjudication of family disputes. Assertive communication skills of the judges sets the agenda and atmosphere, filtering, deferring, redirecting, neutral re-framing and reflecting. Questioning skills like open ended questions, close ended questions, circular questions, convergent questions, divergent questions and strategic questions and the methods to elicit a response from the litigants. Similarly listening skills like listening attentively to the statements and assertions made by the parties, not being distracted while in court, not selectively listening to only some statements of the parties is important. The power of empathy in family disputes helps the parties to easily share their problems with the judges.

The objective of Family Courts Act, 1984 is reconciliation and settlement of family dispute. Conflict is usual part of life and the judge should strive to understand the different facets of the conflict in their effort to resolve it. While addressing conflict, the judges should think creatively and adopt different methods for resolving disputes between the parties. Earlier disputes were resolved by the elder members of the family. However, now a plethora of cases are filed by the parties in a dispute which further creates differences between the parties. Thereafter mediation as ADR tool and its advantages in settlement of

family disputes. Mediation has a focus on the future wherein there is advantage for everyone and facilitates the parties in arriving at a settlement wherein the interest of both parties are taken into account. The essential attributes of a mediator i.e. effective communication, impartiality, patience, creativity and sensitivity. The role of a mediator is facilitative and a non-judgmental role and should act as neutral third party to facilitate an amicable settlement. The mediator should actively listen to the statements of the parties; maintain appropriate body language; empathize with the parties and should frame the questions in a neutral manner. There is a pivotal role of referral judges for referring cases to mediation. The referral judge should ascertain whether the case is suitable for mediation and pass the appropriate referral order.

Based on different situations, a judge has to take resort of advice, counselling and therapy using gentle persuasion, mild tone and empathy as tools in couple therapy. Advice is a useful tool in cases where the dispute is small, the advice giver is in a position of authority or is a close relative and the party is ready to listen. Counselling is suitable in cases where there is need to go behind the words to understand the cause of the dispute. Therapy is generally used as a tool to bring about modifications in behaviour pattern, beliefs, mindset and practices of an individual. The objective of couple therapy is not to bring about a change but to make the parties aware of the problem, its causes and its result. Confidentiality, Equity, Awareness of automatic thoughts, Understanding and respect of cultural background of the parties has to be borne in mind while resorting to any of the above means of couple therapy. Tools such as re-framing and neuro-linguistic programming has been adopted in couple therapy.

Every individual has a different perception of an event. The root cause of any dispute is the difference in understanding and perception of any text or statement. Disputes and conflict between individuals or families mostly occur due to difference in interpretation of a situation or statements. Societal influences, upbringing, family environment and personal relations as factors which influence and shape an individual's mindset. The judges should bear in mind not to carry mental baggage and provide psychological intervention in conflict situations to identify and address the root causes of the conflict and to provide long term solutions to the same.

The duty of the Family Court judge is to make all endeavour for settlement and to adjourn the matter if there is a reasonable possibility of settlement. There should be speedy disposal of divorce cases so that the parties to the case achieve closure in a reasonable time. The duty of the Family Court Judge is to make endeavour for settlement in the first instance, depending upon the nature and circumstances of the case. If the judge is of the opinion that there is a possibility of settlement then he should adjourn the matter to give time to the parties to attempt to settle the matter. Family courts can adopt their own procedure under Section 10 to arrive at a settlement between the parties. Section 14, 15 and 16 of the Act which provides power to the Family court judge relating to appreciation of evidence, however, conciliation should not be pursued in cases of suspected physical violence or assault. Section 10 of the Family Courts Act,

1984 enable the Family Court to adopt innovative procedures and methods to facilitate settlement and Section 14 enable the Family Court to adopt relaxed rules of evidence.

Two important considerations in maintenance i.e. quantum of maintenance and the income used as a basis for calculation of maintenance. Judges should try to ascertain the veracity of salary slips given in maintenance proceedings since sometimes husband produce doctored salary slips to pay less maintenance amount to wife. Maintenance is neither dole nor charity but is rather the value of contribution of a spouse to the marriage. No arithmetic formula for determination of maintenance can be devised and it depends upon the needs of the wife.

The issues in adjudicating personal rights and proprietary rights in property involved in the marital setup in India and the challenges in determining proprietary rights on the basis of contribution to the marriage and marital property should be dealt using the concept of 'shared household' in Protection of Women from Domestic Violence, Act, 2005 and the rights over a shared household.

In matters of child custody the family court should develop a child-centric rather than a parental rights centric approach. The concept of first strike and closest contact in determining jurisdiction .Various factors which should be considered while ascertaining guardianship which includes age, gender and religion of minor, character and capacity of guardian, closeness of relationship,wishes of deceased parents keeping in view the concept of 'Best Interests of a Child' .Various factors which should be taken into account by the court to ascertain the best interest of the child. These include wishes of the child,mental and physical health of the parents home environment,age and gender of child ,evidence of drug addiction or sexual abuse use of force by either parent, employment status of parents, ability and willingness of the parents to provide stability to the child negligence on part of parents, special needs of the child, previous living arrangements etc. The concept of "best interest of the child" is gender neutral and the welfare of the child is of paramount importance. The humans have a tendency to stereotype. The bias arises from various factors which include extraneous information, previous experience, lack of knowledge etc. These bias affect the adjudication of cases since it affects interpretation and appreciation of evidence. The judges need to develop a mindset free of gender bias so that they are able to adjudicate neutrally.

The role of the Family Court was not to protect the institution of marriage at all costs but to adjudicate taking into account the best interest of parties in a marriage. The judges need to adjudicate keeping in mind the unequal relations and position in a marriage but should not be biased or unduly sympathetic to either party in a matrimonial dispute. Maintenance amount should be determined keeping mind the wife's contribution, monetary or otherwise, to the marriage.

The constraints in the process were - non-cooperation by advocates, problem posed by unit system in recognising and appreciating efforts made in mediation and counselling, filing of baseless complaints against family court judges, delays caused by advocates and litigants, inadequacy of legal aid provided to litigants, practice adopted by advocates of determining their fees as a percentage of permanent alimony granted to wife, non-availability of counsellors, delay in payment or no payment to counsellors, delay in execution of the orders of the court, contravention of visitation orders and non-availability of children's room in court.

Video conferencing should be utilized in family court for examination of witness. The judges could invoke section 12 to take help of counsellors if no counsellors are attached with the Court. It was advised that the judges should seek assistance of amicus to assist them under Section 13. Visitation can be supervised by the DLSA so that there is no contravention of the orders of the court.

Suggestions to various problems faced by Family Courts

1. Family Court should work in homely environment not like a regular court rather like a Juvenile Justice Board.
2. Section 125(3) of the Code of Criminal Procedure does not provide for part payment of maintenance and part payment should not be considered as a ground to release the person imprisoned under Section 125(3).
3. In cases where no property is found for realisation of maintenance amount, the statute does not prohibit the court from taking making an order of rigorous imprisonment to ensure that the payment received by the husband in jail can be used to provide maintenance to the wife action. If the husband shows no income and no property, then the court can ascertain his income by assessing his lifestyle to determine maintenance amount for his wife. Measures for partition and attachment of coparcenary property for payment of maintenance, the share in a coparcenary property is attachable and maintenance can be ordered as a charge on the share in the coparcenary property.

In the case of Lahari Sakhamuri Vs Sobhan Kodali reported in 2019 0 AIR(SC) 2881 and 2017 179 AIC 123, the role of judge of Family Court with regard to custody of child was considered and it was held in Para 49 as hereunder

“The crucial factors which have to be kept in mind by the Courts for gauging the welfare of the children equally for the parent's can be inter alia, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual”

Similarly in the case of Santhani Vs Vijaya Venketesh reported in 2017 0 AIR(SC) 5745 is a landmark judgment in which Hon'ble Supreme Court has discussed the role of the judge of a family court as well as the mechanisms required by the family court. While discussing the scope of Section 9,11,12 of Family Courts Act, Section 22,23,26 of Hindu Marriage Act, the Hon'ble court has held "The principal thrust of the law in family matters is to make an attempt for reconciliation before processing the disputes in the legal framework. Reconciliation is not mediation. Neither is it conciliation. No doubt, there is conciliation in reconciliation. But the concepts are totally different. Similarly, there is mediation in conciliation but there is no conciliation in mediation. In mediation, the role of the mediator is only to evolve solutions whereas in reconciliation, the duty-holders have to take a proactive role to assist the parties to reach an amicable solution. In conciliation, the conciliator persuades the parties to arrive at a solution as suggested by him in the course of the discussions. In reconciliation, as already noted above, the duty-holders remind the parties of the essential family values, the need to maintain a cordial relationship, both in the interest of the husband and wife or the children, as the case may be, and also make a persuasive effort to make the parties reconcile to the reality and restore the relationship, if possible. The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation. However, reconciliation is not always the restoration of status quo ante; it can as well be a solution as acceptable to both parties."

To conclude all tools and techniques used should serve the end goal of reaching the parties to an acceptable and amicable settlement at the earliest so that unnecessary rigor of litigation is saved.

Q. No. 2. In what manner and to what extent the procedure in family courts can be evolved for speedy disposal of cases? Explain with reference to the relevant provisions of The Family Courts Act and Rules.

Ans.- The concept of family court essentially implies to do away the traditional adversarial procedure. This means that different rules of procedure are to be devised. Thus, the rules of procedure should be worded simply and should indicate the whole range of procedure from the commencement of an action to its conclusion, including means to enforce judgments and orders, procedure should be flexible and reflect and diverse problems involved in family matters, pleadings should stay away from the traditional adversary or fault oriented approach, pretrial processes should be laid down, designed to provide dignified means for parties to reconcile their differences and to reach amicable settlements without the need of trial, free advice should be made available as to rights of the parties as well as their responsibilities and obligations, and where children are involved, steps for immediate protection of their interest and rights should be taken, and issues should be determined without any prejudicial delay. The language, conduct, documents and legal representation should be simple without any technicalities. The pre-trial documentation of the pleadings should be such that issues between the parties are clearly defined, this will help in avoiding frivolous litigation, encourage pre-trial debate and settlement.

Since one of the main objectives of the family court system is to encourage and enable parties to go into a process of reconciliation, failing which, of conciliation, the family Court judge should be able to pass consent orders if parties have been able to come to some settlement, without any formality of formal hearing or trial of issues.

The Family Court Act provides for a less formal procedure. Section 10 makes the procedure laid down under the Civil Procedure Code applicable to the family court, it is laid down that the family court has power to evolve its own rules of procedure which will over-ride the rules of procedure laid down in the Civil Procedure Code and the Criminal Procedure Code whenever made applicable. Sections 14, 15 and 16 of the Act provide for the informality of the procedure. Thus any document, report, statement, information relevant for the trial will be admissible in the family court even though the Indian Evidence Act makes such documents, etc. inadmissible. The family court judge need not record the full evidence as is done in adversarial system. He may just prepare a memorandum of substance of evidence. All formal evidence will be tendered by affidavits, though wherever necessary a deponent may be orally examined.

In view of the Section 21 of the Family Courts Act 1984, the Hon'ble High Court of Jharkhand framed the Family Courts (Jharkhand High Court) rules 2004 which prescribes how the proceeding shall be instituted and it

has provided the format of petition , role of councillor , it prohibits unnecessary adjournment and emphasis has been given for amicable settlement.

Thus the success of Family Court depends on following facts

1. Petition should be filed in the format prescribed under the rules framed by Hon'ble Jharkhand High Court.
2. Participation of advocate should be relief oriented .
3. The Family Court must be supported with a competent support service which includes family councillor, legal aid service, reconciliation service and same must be resorted to pretrial procedure.
4. Evidence should be received as prescribed under Section14,15, 16 of the Family Courts Act.
5. The hearing of the family court should be fixed as per the convenience of the parties.
6. Special mediation drive should be conducted and much stress is to be given on settlement of cases on the basis of mediation and reconciliation.

Q. No. 3. In a matrimonial suit for divorce filed by the husband on the grounds of cruelty and desertion the wife appears and admits desertion but matters counter allegation of cruelty. Can the divorce suit be decreed on the ground of desertion on admission? Will the situation be different if there is no allegation of cruelty by the husband? Whether the limitation of cooling off period apply in such cases.

Ans.- As regards the ground of desertion, under Section 13(1)(i-b) of Hindu Marriage Act, the party has to prove (i) that there was desertion for a continuous period of two years immediately preceding the presentation of the petition, ii) the desertion was without reasonable cause and without the consent or against the wish of the party herein. The desertion requires four important elements, viz., (i) factum of separation (ii) necessary intention to put an end to matrimonial consortium and cohabitation permanently, (iii) want of reasonable cause and (iv) want of consent or against the wish of the other spouse.

"Desertion" for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words, it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things,. Desertion, therefore, means withdrawing from the matrimonial obligations i.e., not permitting or allowing and facilitating cohabitation between the parties. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. The party seeking divorce on the ground of desertion is required to show that he or she was not taking the advantage of his or her own wrong. (vide SAVITRI PANDEY VS. PREM CHANDRA PANDEY

It has been held relying upon Section 23 of Hindu Marriage Act by the Hon'ble Supreme Court, wherein, it has been specifically observed that the wife was forced to live because of ill-treatment, it cannot amount to desertion.

Applying the above ratio in the fact of present case, it is evident that the defendant wife had pleaded desertion coupled with counter allegation of cruelty which shows that her pleading envisages that she was compelled to desert her husband, under such circumstances the divorce suit cannot be decreed on ground of desertion on admission.

In a situation where there is no allegation of cruelty by the husband and wife admits desertion despite these facts the petitioner husband is required to prove animus deserendi i.e. factum of separation and without any reasonable cause necessary intention to bring cohabitation permanently to an end coupled with the fact that there was desertion for a continuous period of two years preceding the presentation of the petition hence despite the admission of the

respondent .The petitioner is required to prove these facts to succeed the case. I find this view supported from the case law reported in 2015 0 Supreme(Mah) (Meenal Nigam vs Ravi Kalsi) wherein Hon'ble Bombay High Court held that "under Order 8, Rule 6, it is well settled that both the plaintiff as well as the defendant must be held bound by the statement of facts in their respective pleadings. But under the proviso to Order VIII, Rule 6, the Court may, in its discretion require any fact admitted to be proved otherwise than by such admission. The proviso to section 58 of the Evidence Act is also to the same effect. In matrimonial proceedings, there can be no judgment by default or admission. Even in the case of Pranjali Bingi (supra), the learned Single Judge of this Court held in paragraph 10 that merely because both the parties have prayed for same reliefs of divorce, on the basis of different set of facts, the Court does not get jurisdiction to pass order under Order 12, Rule 6, Civil Procedure Code. It was also held that on a Petition for divorce, the Court has to record its satisfaction under section 23 of the Act, even if Petition is undefended. In other words, in the proceedings under the Act, the Court can arrive at the satisfaction contemplated by section 23 on the basis of legal evidence in accordance with the provisions of the Evidence Act and it is quite competent for the Court to arrive at the necessary satisfaction even on the basis of the admissions of the parties alone. Admissions are to be ignored on grounds of prudence .

The limitation of cooling off period does not apply in such cases as petitioner has to prove the continuous separation for a period of two years before filing of petition for dissolution of marriage.

Q. No. 4. Due to strained relations between the parents, a child who ideally needs the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective considerations to be kept in mind in awarding "Shared Parenting" orders. Discuss in the light of latest case laws on the point.

Ans.- When the atmosphere in a house, vitiated and rendered surcharged with tension as a result of bitter squabbles between husband and wife causes misery and unhappiness to a child, who has to live in constant psychological strain in such a broken home in view of the bitter relationship between her parents for each of whom child has great affection, the healthy and normal growth of the child is bound to be seriously affected. In the interest and for the welfare of the child in such a case, the child is necessarily to be removed from such unhealthy environment of a broken home surcharged with tension. In such a case, the proper and best way of serving the interest and welfare of the child will be to remove the child from such atmosphere of acrimony and tension and to put the child in a place where the embittered relationship between his parents does not easily and constantly effect his tender mind.

In a broken family or in a family where parents are in estranged relationship, the child of that family is the biggest sufferer. The child wants company of both parents but they are unable to provide the child a better atmosphere and such discord between the parents give the natural effect which hinders the child's normal development. In such circumstances the court has to make a balance between welfare of child, his/her custody and safeguard of right of both the parents. This evolved the theory of Shared Parenting based on parental alienation syndrome.

The Hon'ble Supreme Court in Vivek Singh vs. Romani Singh, (2017) 3 SCC 231, has discussed the term "Parental Alienation Syndrome". In paragraph No.18 of the judgment, following was observed:-

"18..... Psychologists term it as "The Parental Alienation Syndrome". It has at least two psychological destructive effects:

(i) First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked to choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.

(ii) Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone who is

devoid of any positive characteristics. Both of these assertions represent one parent's distortions of reality.

The Hon'ble Supreme Court in *Gaurav Nagpal vs. Sumedha Nagpal*, (2009) 1 SCC 42, had occasion to consider the parameters while determining the issues of child custody and visitation rights, entire law on the subject was reviewed. The Hon'ble Court referred to English Law, American Law, the statutory provisions of Guardian and Wards Act, 1890 and provisions of Hindu Minority and Guardianship Act, 1956, and laid down following in paragraph Nos. 43, 44, 45, 46 and 51:

"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.

"44.....The aforesaid statutory provisions came up for consideration before Courts in India in several cases. Let us deal with few decisions wherein the courts have applied the principles relating to grant of custody of minor children by taking into account their interest and well-being as paramount consideration.

"45..... In *Saraswathibai Shripad Ved v. Shripad Vasanji Ved*, ILR 1941 Bom 455 : AIR 1941 Bom 103; the High Court of Bombay stated;

".....It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the Court. It is the welfare of the minor and of the minor alone which is the paramount consideration....."

In a case of this nature, welfare of the minor child is the first and paramount consideration and the jurisdiction exercised by the Court vests on its own inherent equality powers where the Court acts in "Parens Patriae Jurisdiction. The minor child ideally needs the company of both the parents, however strained relationship between the parents has the effect of stress and tension on the upbringing of the child. In the the case of *Gaurav Nagpal v. Sumedha Nagpal* reported in (2009) 1 SCC 42, the Hon'ble Apex Court has explained the expression "Welfare" which occurs in Section 13 of the Hindu Minorities and Guardianship Act, 1956 and observed that it is to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its Parens Patriae Jurisdiction arising in such cases. The Hon'ble Apex Court has also relied upon the case of *Rosy Jacob v. Jacob A. Chakramakkal* reported in (1973) 1 SCC 840. In the aforesaid case, it was held that the object and purpose of the Guardianship and Wards Act of 1890 is not merely physical custody of the minor but due protection of the right of his guardian, to properly look after the ward's health, maintenance and education. The power and duty of the Court under the Act is the welfare of the minor. It has

further observed that the children are not mere chattels; nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children, has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society. The guardian court in case of a dispute 'between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. In a recent judgment rendered in the case of Vivek Singh v. Romani Singh reported in (2017) 3 SCC 231), the Hon'ble Apex Court had the occasion to deal with the dilemma of the Court in such cases. The Hon'ble Court also took note of the law on the subject. The Court held that there are twin objectives to be served in furtherance of the principles that the welfare of the minor child is the first and paramount consideration in such cases. Para 12, 13 and 15 containing the opinion of the Court in the aforesaid judgment is quoted hereunder:—

“12..... In the first instance, it is to ensure that the child grows and develops in the best environment. The best interest of the child has been placed at the vanguard of family/custody disputes according the optimal growth and development of the child primacy over other considerations. The child is often left to grapple with the breakdown of an adult institution. While the parents aim to ensure that the child is least affected by the outcome, the inevitability of the uncertainty that follows regarding the child's growth lingers on till the new routine sinks in. The effect of separation of spouses, on children, psychologically, emotionally and even to some extent physically, spans from negligible to serious, which could be insignificant to noticeably critical. It could also have effects that are more immediate and transitory to long lasting thereby having a significantly negative repercussion in the advancement of the child. While these effects do not apply to every child of a separated or divorced couple, nor has any child experienced all these effects, the deleterious risks of maladjustment remains the objective of the parents to evade and the court's intent to circumvent. This right of the child is also based on individual dignity.

"13.....Second justification behind the “welfare” principle is the public interest that stands served with the optimal growth of the children. It is well recognised that children are the supreme asset of the nation. Rightful place of the child in the sizeable fabric has been recognised in many international covenants, which are adopted in this country as well. Child-centric human rights jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation. It has been emphasised by this Court also, time and again, following observations in *Bandhua Mukti Morchav. Union of India*7:(SCC p. 553, para 4)

“14.....The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of the society. Children

are the greatest gift to humanity. Mankind has the best hold of itself. The parents themselves live for them. They embody the joy of life in them and in the innocence relieving the fatigue and drudgery in their struggle of daily life. Parents regain peace and happiness in the company of the children. The children signify eternal optimism in the human being and always provide the potential for human development. If the children are better equipped with a broader human output, the society will feel happy with them. Neglecting the children means loss to the society as a whole. If children are deprived of their childhood — socially, economically, physically and mentally — the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The Founding Fathers of the Constitution, therefore, have emphasised the importance of the role of the child and the need of its best development.”

"15.....It hardly needs to be emphasised that a proper education encompassing skill development, recreation and cultural activities has a positive impact on the child. The children are the most important human resources whose development has a direct impact on the development of the nation, for the child of today with suitable health, sound education and constructive environment is the productive key member of the society. The present of the child links to the future of the nation, and while the children are the treasures of their parents, they are the assets who will be responsible for governing the nation. The tools of education, environment, skill and health shape the child thereby moulding the nation with the child equipped to play his part in the different spheres aiding the public and contributing to economic progression. The growth and advancement of the child with the personal interest is accompanied by a significant public interest, which arises because of the crucial role they play in nation building.”

From the aforesaid pronouncement of the Hon'ble Apex Court, it is thus clear that welfare of the minor child is the first and paramount consideration for the Court exercising the 'Parens Patriae' jurisdiction. However at times the prevailing circumstances are so puzzling that it becomes difficult to weigh the conflicting parameters and decide on which side the balance tilts. The whole When the atmosphere in a house, vitiated and rendered surcharged with tension as a result of bitter squabbles between husband and wife causes misery and unhappiness to a child, who has to live in constant psychological strain in such a broken home in view of the bitter relationship between her parents for each of whom the ward has great affection, the healthy and normal growth of the child is bound to be seriously affected. In the interest and for the welfare of the child in such a case, the child is necessarily to be removed from such unhealthy environment of a broken home surcharged with tension. In such a case, the proper and best way of serving the interest and welfare of the child will be to remove the child from such atmosphere of acrimony and tension and to put the child in a place where the embittered relationship between his parents does not easily and constantly effect her tender mind. Object of sending the child to the Boarding School is to provide him a neutral environment conducive for her upbringing and good education.

In the case of Sheoli Hati Vs Somnath Das reported in 2019 (6) Supreme 353; the Honorable court considering the scope of sharing parentage approved that the wards will live in boarding school for her grooming and she will visit her parents in annual vacation and both parents will have access to her. The parents cannot understand the ward as their own property. The interest of the child will be best served by removing her from the influence of home life and by directing that she should continue to remain in boarding school.

The above discussion clearly stipulates that the welfare of the child is of paramount and the welfare includes the moral and the ethical welfare of the child which must weigh with the court as well as its physical well being. The provisions of the act which govern the rights of the parents may be taken into consideration and there is nothing which can stand in the way of the court exercising its parens-patriae jurisdiction arising in that case.

Q. No. 5. What are the practical difficulties in execution of an order for grant of maintenance under section 125 Cr.P.C? Discuss the available options in law before a family judge for the realisation of the maintenance amount awarded under section 125 Cr.P.C. with special reference to the case laws.

Ans.- When the order of granting maintenance is not complied with for months together, what is the remedy ? The remedy is readily provided in [Section 125\(3\)](#) and 128 [Criminal Procedure Code](#), which reads thus:

"If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one month or until payment if sooner made."

Section 128 reads- S.128 : Enforcement of order of maintenance

A copy of the order of 1[maintenance or interim maintenance and expenses of proceeding, as the case may be] shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to 2[whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be] is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the 3[allowance or as the case may be expenses, due].

2. The manner for levying fines is provided in Section 421, Criminal Procedure Code. [Section 421](#) reads as follows :

"Warrant for levy of fine:

(1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) The Hon'ble Supreme Court has abundantly made it clear that the provisions given in Chapter IX of the Code of Criminal Procedure comprising of [Sections 125 to 128](#) constitute a complete Code in itself. It further held that the proceedings referred to in Chapter IX of the Code of Criminal Procedure are basically of civil nature, that they

are certainly not punitive and that the rights of the parties have got to be determined with reference to the object, which the proceedings are expected to serve, as held in *Nandlal Misra v. Kanhaiyalal Misra*, and *Mst. Jagir Kaur v. Jaswant Singh*. In Civil Law some of the sections provide for the procedure for attachment of intangible movable property, such as, debt, share, share in movables, salary or allowances of the Government servants or of Railway employees or of employees of the local Authority and of private employees. Similarly, the Criminal Court also has got powers to attach intangible movable assets for the purpose of recovery, out of the same, of certain amounts. Therefore, the necessary conclusion that can be arrived at from these provisions, is that the movable property, whether tangible or intangible or even a debt can be attached by a Criminal Court in accordance with the abovesaid provisions of law.

Maintenance order can be enforced like any other order of the Civil Court under the provisions of CPC “But difficulties of a litigant in India begins when he has obtained a decree” is a very apt expression of situation that prevails in our country regarding execution of orders .

The following problems are observed practically in executing the maintenance orders

1. The maintenance amount ordered is in favour of the weak ; generally a destitute lady or helpless children with limited means to ensure the enforcement in case of defaulters.
2. It is generally observed that the maintenance case is filed from the city / place of her maternal residence. The husband resides in another city either at her matrimonial residence or his place of work. Matters are worse when he is a labourer without any permanent abode. Thus neither the law enforcing agency nor she is aware of the current residential address of the husband. Warrant for realisation of maintenance amount due to incorrect address is thus generally not served.
3. In most of the cases, the wife has no idea of husband’s real income . For salaried persons , realisation of maintenance amount from salary is comparatively easy but it is very difficult in case of people in private jobs or daily wages earners. Defaulters in cases of daily wages earner is high as he has no money for payment of the maintenance amount. Parties often transfer property to avoid paying maintenance.
4. Often it is observed that there is a reluctance from officer incharge of realisation warrant .In some cases there is even a lack of knowledge of procedures hence the maintenance orders are not executed.
5. It is practically seen that the intra district (within the same district) realisation service report or follow up action there but in cases of inter district realisation service report is either not available or is very poor.

Q. No. 6. What are the principles for computation of maintenance in a case under section 125 Cr.P.C. ? How will the quantum of maintenance vary in case the competent court has awarded maintenance under Domestic Violence Act and /or under section 24 of the Hindu Marriage Act.

Ans.- For better appreciation it is worth to revisit section 125 Cr.P.C which reads as follows;

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

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) 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 his wife or such child, father or mother, at such monthly rate 1[***] as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct.

The Hon'ble Court in the case law reported in 2008 1 Crimes(SC)74,(Chaturbhuj versus Sita Bai) held that The object of the 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. The phrase "unable to maintain herself" in the instant case would mean that 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 desertion to survive somehow. Section 125 Cr. P.C. is a measure of social justice and is specially enacted to protect women and children.

In Bhagwan v. Kamla Devi, (AIR 1975 SC 83) it was observed that the wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 Cr.P.C.

The Hon'ble Supreme Court in *Reema Salkan vs. Sumer Singh Salkan* in CrI.A.No.1220/2018 in judgment dated 25.09.2018 relying on the earlier judgment of the Hon'ble Supreme Court in *Bhuvan Mohan Singh vs. Meena*, (2015) 6 SCC 353 held that "the concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created where under she is compelled to resign to her fate and think of life "dust unto dust". It is totally impermissible. In fact, it is the sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour. Keeping it in the background, The Hon'ble Delhi High Court allowed 30% of salary of husband after necessary deduction as maintenance to wife in the case of *Babita Bisht Vs. Dharmender Singh Bisht* reported in 2019 0 Supreme(Del) 1465. In the case of *Kalyan dey Choudhary Vs Rita Dey Choudahry*, Civil Appeal No. 5369/2017, (Arising out of SLP (C) 34653/2013 where Hon'ble Supreme Court has decided that limit on how much alimony a man is to pay his estranged wife, and it should be 25 per cent of his net salary. In the Case Law reported in (2019) 12 SCC 303 (*Reema Salkan Versus Sumer Singh Salkan*), the Hon'ble Court held in para 15 and 16 of the Judgment about quantum to be fixed as maintenance and it was held that living standard of husband and his family, his past conduct is to be considered.

In view of the aforesaid discussion, it can be summarised that there is no straightjacket formula to fix the quantum of maintenance and it has to be seen that the claimants must enjoy the position which they were enjoying earlier and in case of wife, her efforts for survival cannot be considered as capable of earning or as her earning. It is further to be seen that in total income of the husband the necessary deduction is to be deducted and the liability of husband is also to be taken into consideration but the voluntary deduction which is deducted from salary in advance in the form of loan which he is now repaying in the form of loan deduction cannot be considered.

Maintenance awarded u/s 125 cr.p.c and other Acts

In the case of *Sudeep Chaudhary Vs Radha Chaudhary* reported in AIR 1999 SC 536, the Hon'ble court while considering the scope of maintenance amount awarded under Section 125 Cr.P.C. and under Section 24 of the Hindu Marriage Act held that the amount awarded under the Section 125 of Cr.P.C. for maintenance was adjustable against the amount awarded in the matrimonial proceeding and was not to be given over and above the same and the Hon'ble court comprehends both the amount awarded. The Hon'ble Jharkhand High

Court in the case law reported in 2017 0 Supreme(Jhk) 1267 (sangeeta kumari Versus The State of Jharkhand & Anr.) held that “when there are orders of maintenance both under Section 125, Cr PC and Section 24 of the Hindu Marriage Act, 1955, the claimant shall not be entitled to get maintenance simultaneously, rather, he/she would be entitled to get only the higher amount of maintenance out of both the provisions”

On the basis of above ratio, it can be concluded that maintenance awarded in different proceedings between the same parties is adjustable and a party cannot be allowed to pay maintenance in each proceeding separately.

Q. No.7. What is the difference in jurisdiction of the courts under the Courts and Wards Acts and Minority & Guardianship Acts in appointment of Guardians of a minor?

Ans.- Before discussion on this point, it is first to see the scope of both Acts which are as hereunder:

(i) Guardians and Wards Act, 1890.

The Guardians and Wards Act, 1890 is a secular law regulating questions of guardianship and custody for all children within the territory of India, irrespective of their religion. It authorizes the District Courts to appoint guardians of the person or property of a minor, when the natural guardian as per the minor's personal law or the testamentary guardian appointed under a Will fails to discharge his/her duties towards the minor. The Act is a complete code laying down the rights and obligations of the guardians, procedure for their removal and replacement, and remedies for misconduct by them. It is an umbrella legislation that supplements the personal laws governing guardianship issues under every religion. Even if the substantive law applied to a certain case is the personal law of the parties, the procedural law applicable is what is laid down in the Guardians and Wards Act, 1890. Section 7 authorizes the court to appoint a guardian for the person or property or both of a minor, if it is satisfied that it is necessary for the 'welfare of the minor'.

Section 17 lays down factors to be considered by the court when appointing guardians.

"Section 17(1) states that courts shall be guided by what the personal law of the minor provides and what, in the circumstances of the case, appears to be for the 'welfare of the minor'.

Section 17(2) clarifies that in determining what is for the welfare of the minor, courts shall consider the age, sex and religion of the minor; the character and capacity of the proposed guardian and how closely related the proposed guardian is to the minor; the wishes, if any of the deceased parents; and any existing or previous relation of the proposed guardian with the person or property of the minor.

Section 17(3) states that if the minor is old enough to form an intelligent opinion, the court 'may' consider his/her preference.

Section 19 of the Guardians and Wards Act, 1890 deals with cases where the court may not appoint a guardian. & Section 19(b) states that a court is not authorized to appoint a guardian to the person of a minor whose

father or mother is alive, and who, in the opinion of the court, is not unfit to be a guardian.

The earlier Section 19(b) prevented the court from appointing a guardian in case the father of the minor was alive. This clause was amended by the Personal Laws (Amendment) Act, 2010 and was made applicable to cases where even the mother was alive, thus removing the preferential position of the father.

Section 25 of the GWA deals with the authority of the guardian over the custody of the ward." Section 25(1) states that if a ward leaves or is removed from the custody of the guardian, the court can issue an order for the ward's return, if it is of the opinion that it is for the 'welfare of the ward' to be returned to the custody of the guardian.

Reading the above provisions together, it can be concluded that, in appointing a guardian to the person or property of a minor under the Guardians and Wards Act, 1890 courts are to be guided by concern for the welfare of the minor/ward. This is evident from the language of Sections 7 and 17. At the same time, the implication of Section 19(b) is that, unless the court finds the father or mother to be particularly unfit to be a guardian, it cannot exercise its authority to appoint anyone else as the guardian. Thus, power of the court to act in furtherance of the welfare of the minor must defer. For instance, Section 2 of the Hindu Minority and Guardianship Act states that its provisions are 'supplemental' to and 'not in derogation' of the Guardians and Wards Act, 1890, which reads that In the case of a minor, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property or both, which is valid by the law to which the minor is subject.

(ii) **Hindu Minority and Guardianship Act, 1956**

Classical Hindu law did not contain principles dealing with guardianship and custody of children. In the Joint Hindu Family, the Karta was responsible for the overall control of all dependents and management of their property, and therefore specific legal rules dealing with guardianship and custody were not thought to be necessary. However, in modern statutory Hindu law, the Hindu Minority and Guardianship Act, 1956 (hereinafter, HMGA) the father is the natural guardian of a minor and after him, it is the mother. Section 6(a) of the HMGA provides that: a in case of a minor boy or unmarried minor girl, the natural guardian is the father, and after him, the mother; and the custody of a minor who has not completed the age of five years shall " ordinarily' be with the mother. In *Gita Hariharan v. Reserve Bank of India*, the constitutional validity of Section 6(a) was challenged as violating the guarantee of equality of sexes under Article 14 of the Constitution of India. The Hon'ble Supreme Court considered the import of the word 'after' and examined whether, as per the scheme of the

statute, the mother was disentitled from being a natural guardian during the lifetime of the father. The Court observed that the term 'after' must be interpreted in light of the principle that the welfare of the minor is the paramount consideration and the constitutional mandate of equality between men and women. The Court held the term 'after' in Section 6(a) should not be interpreted to mean after the lifetime of the father, 'but rather that it should be taken to mean "in the absence of the father. "The Court further specified that 'absence' could be understood as temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise however it was held that in the above specific situations, the mother could be the natural guardian even during the lifetime of the father.

Section 13 of the HMGA declares that in deciding the guardianship of a Hindu minor, the welfare of the minor shall be the paramount consideration' and that no person can be appointed as guardian of a Hindu minor if the court is of the opinion that it will not be for the welfare' of the minor." The following can be concluded with respect to guardianship under the HMGA. First, the father continues to have a preferential position when it comes to natural guardianship and the mother becomes a natural guardian only in exceptional Circumstances, as the Supreme Court explained in Gita Hariharan. Thus, even if a mother has custody of the minor since birth and has been exclusively responsible for the care of the minor, the father can, at any time, claim custody on the basis of his superior guardianship rights. Gita Hariharan, therefore, does not adequately address the original problem in Section 6(a) of the HMGA.

Second, all statutory guardianship arrangements are ultimately subject to the principle contained in Section 13, that the welfare of the minor is the "paramount consideration." In response to the stronger guardianship rights of the father, this is the only provision that a mother may use to argue for custody/guardianship in case of a dispute.

Guardians and Wards Act, 1890 Vs Hindu Minority and Guardianship Act, 1956

The point of difference between the GWA and the HMGA lies in the emphasis placed on the welfare principle. Under the GWA, parental authority supersedes the welfare principle, while under the HMGA, the welfare principle is of paramount consideration in determining guardianship. Thus, for deciding questions of guardianship for Hindu children, their welfare is of paramount interest, which will override parental authority. But for non-Hindu children, the court's authority to intervene in furtherance of the welfare principle is subordinated to that of the father, as the natural guardian.'

In the case law reported in 2019 7 SCC 42 (Tejaswini Gaud vs Shekhar Jagdish Prasad Tiwary), the Hon'ble Supreme Court while interpreting both Acts held that " In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians

and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. It was further held that the law relating to custody of a child is fairly well settled and in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court 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. In selecting a guardian, the court is exercising *parens patriae* jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor"

Thus the paramount consideration before the court shall always be the welfare of child.

8. What are the major differences in procedure for adoption by Indian prospective adoptive parents living in India and inter country adoption? What are the eligibility criterion for prospective adoptive parents? Discuss with relevant provisions of law and latest case laws.

Ans.- The Juvenile Justice (care and protection) Act 2015 Chapter VIII deals with adoption. Section 56 sub-section (1) provides that adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of the Act, the rules made thereunder and the adoption regulations framed by the authority. Section 57 deals with eligibility of prospective adoptive parents, which is as follows:-

"57.....Eligibility of prospective adoptive parents-

(1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

(2) In case of a couple, the consent of both the spouses for the adoption shall be required.

(3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

(4) A single male is not eligible to adopt a girl child.

(5) Any other criteria that may be specified in the adoption regulations framed by the Authority

6. Section 58 deals with procedure for adoption by Indian prospective adoptive parents living in India, which is to the following effect:-

58. Procedure for adoption by Indian prospective adoptive parents living in India.-

(1) Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a Specialised Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.

(2) The Specialised Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority.

(3) On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(4) On the receipt of a certified copy of the court order, the Specialised Adoption Agency shall send immediately the same to the prospective adoptive parents.

(5) The progress and well-being of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the Authority.

The next provision, is Section 59, which provides for procedure for inter-country adoption of an orphan or abandoned or surrendered child, which is as follows:-

59. Procedure for inter-country adoption of an orphan or abandoned or surrendered child.-

(1) If an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parent despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption:

Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.

(2) An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children.

(3) A non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

(4) The authorised foreign adoption agency, or Central Authority, or a concerned Government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority.

(5) On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialised Adoption Agencies, where children legally free for adoption are available.

(6) The Specialised Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency.

(7) On receipt of the acceptance of the child from the prospective adoptive parents, the Specialised Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(8) On the receipt of a certified copy of the court order, the specialised adoption agency shall send immediately the same to Authority, State Agency and to the prospective adoptive parents, and obtain a passport for the child.

(9) The Authority shall intimate about the adoption to the immigration authorities of India and the receiving country of the child.

(10) The prospective adoptive parents shall receive the child in person from the specialised adoption agency as soon as the passport and visa are issued to the child.

(11) The authorised foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption, in consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority.

(12) A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority.

Thus section 58 and 59 provides for two different mechanisms for adoption. As per Section 59(1), if an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive

parents despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date, the child has been declared legally free for adoption, such child shall be free for inter-country adoption. Thus, sixty days period has to be elapsed from the date when the child has been declared legally free for adoption This has been laid down in the case law reported in 2019 0 AIR(SC) 1316 Union of India Vs. Ankur Gupta and another.

As per section 59 (12) of the JJ Act 2015, a foreigner prospective adoptive parent has to apply with no objection certificate from the diplomatic mission of his country in India but since it was not complied hence the adoption was not allowed in the case of Karina jane creed v union of india in SLP© No.13627/2019.

Submitted By:

Niraj Kumar Srivastav,
Additional Principal Judge,
Additional Family Court,
Jamshedpur

Q.1. Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the Family Courts. Discuss the impediments and possible remedies.

Ans:

Tools and techniques for speedy disposal of matrimonial and other matters :

The Family Courts Act 1984 was enacted with an object for speedy disposal of cases by providing the opportunity of conciliation to the litigants. Earlier the matrimonial matters were being taken up by regular courts dealing with civil suits and sessions cases. The jurisdiction of family court is guided by section 7 of the Family Courts Act and it includes cases for dissolution of marriage, restitution of conjugal rights, decrees of nullity of marriage, guardianship, Maintenance etc. There are several reasons for delay in disposal of matrimonial matters, but the first and foremost reason is the very inherent nature of case as the non-applicant party always wants to delay the proceedings. In many cases the parties are not even ready to participate in conciliation or mediation proceedings. On a careful analysis of several proceedings conducted in the Family Court, I have faced following impediments and I also suggest the following possible remedies for speedy disposal of such matters:

Impediments:

- **Interlocutory Applications:** The major area of concern is the filing of Interlocutory Applications. The frequently filed petitions are that of the petitions for interim maintenance, interim custody of the child and return of articles. In certain cases, the need of the spouse for interim maintenance would be inevitable and such claims are made in desperate situations, but in most of the cases, where the husband has filed the main petition for divorce and the wife opposes it, the petition for interim maintenance is filed by wife despite having sufficient means to maintain herself, with an only motive to either harass the husband, or to prolongs the litigation on the firm belief that the husband would rejoin her. But a psychological approach would make us to understand that the husband gets annoyed on such petitions for interim maintenance as he knows the financial capacity of the wife and moreover, these unnecessary applications in many cases prolong the litigation to indefinite period.
- **Petitions for DNA test:** Another area of concern is the filing of interlocutory applications for conducting of DNA tests for determination of paternity of the child, both in the matrimonial matters where the marriage is denied and also in the cases of maintenance.
- **Unnecessary adjournments:** Last but not the least seeking of unnecessary adjournments by the Advocates is another area of concern for the courts.

Possible Remedies:

- **Re. Interlocutory applications:** The filing of the interlocutory applications has to be approached in a sensitized way by the advocate, who has to advise his client accordingly. Instead, more counselling sessions, or mediation sessions could be encouraged. The court should be ready to concede to such requests of reference to counselling sessions, or mediation. Though it may be a genuine need of the wife, the Lawyer has to carefully analyze the circumstance before filing such interim petition such that the main objective of the litigant is not defeated. A slow pedaling and assessing the mindset of the other party has to be done by the lawyer. Thereafter, such petitions could be brought in without emphasizing much allegations. Invariably we could see interim petitions filed with lots of allegations which are no way relevant to satisfy the requirements mandated under the provisions for interim relief.
- It is also invariably seen that the filing of petitions for interim relief contain lengthy pleadings and include every averment of the original petition which is totally

unwarranted. The crux of the petition alone could be explained in the affidavit. Thus, the Lawyer has to be very much sensitized so that he realizes his social responsibility than that of the legal obligation.

- **Re. DNA test applications:** So far as interlocutory applications for DNA test are concerned, it is noteworthy that the Indian Evidence Act has no role to play in Family Court matters. In case of expert opinion like DNA test, the invoking of the provisions under section 45 of the Evidence Act is unwarranted. Section 12 of The Act (r/w rule 14 of The Jharkhand Family Courts Rules, 2018) , deals in respect of approaching an expert to assist the court. Hence the courts as well as the Lawyers should be sensitized to settle the issue at the very budding stage itself by adopting subtle methods else, the small wear and tear may lead to the eruption of a volcano.
- **Re. Unnecessary adjournments:** While granting adjournments the Family Courts should keep in mind the concerns expressed by Hon'ble Apex Court over prolonged proceedings in Family Courts in the case of *Bhuvan Mohan Singh Vs Meena, (2015) 6 SCC 353, K.A. Abdul Jaleel v. T.A. Shahida, (2003) 4 SCC 166, Farooqui Vs Shahid Khan, (2015) 5 Supreme Court Cases 705*. Thus it becomes the duty of the Judge of the Family Court as well as the Lawyers to ensure that there is no miscarriage of justice on account of delayed adjudication and by virtue of mechanical and unnecessary adjournments.
- The other dilatory tactics by the parties should be dealt with by the court by encouraging them with positive persuasion or else by discouraging them by imposing costs.
- **Other Remedies :** The pre-litigation counselling could be one of the best solution which the Lawyers could adopt and advice their clients. The role of lawyers in assisting the Courts in referring the matters to mediation centers or to the counselling sessions assume much significance. Where a litigant is not able to understand the importance of settlement through counselling, mediation or conciliation it becomes incumbent on an advocate to explain to his/her client, the importance of such proceedings which would help the litigants to avoid the unpleasant adversarial procedure by which the second round of litigation by way of appeal could be avoided.

Q 2. In what manner and to what extent the procedure in family courts can be evolved for speedy disposal of cases? Explain with reference to the relevant provisions of the family Courts Act and Rules.

Ans:

Manner and extent to which procedure in family courts can be evolved for speedy disposal of cases and the relevant provisions of The Family Courts Act and Rules.

The Family Court is provided with Special Powers under section 10 of the Family Courts Act, 1984 wherein the court can formulate his own ways and means within the scope of Law, to help the litigants to arrive at a settlement. The court can also take help of the following provisions of the Act as well as the rules framed in this regard by Hon'ble High Court of Jharkhand.

- Section 13 of the Act denies the rights of the parties to be represented by a legal practitioner as a matter of right. However, The object of the legislation was not to take away the rights of the parties and the provision to the above section empowers the Court to seek the assistance of a legal practitioner as amicus curiae. The section is also silent about engagement of a pleader as amicus curiae by the parties themselves. However, this issue has been set to rest by many judicial pronouncements and the courts have been empowered to appoint amicus-curiae for the parties, if the parties so desire.
- This in away helps the Court to have a direct interaction with the litigants. The Family Courts constituted under the Act, shall have to avail the services of the Counsellors. In simple words, when the respondent receives summons from Court, he/she shall have to make the appearance mandatory before the Judge of the Family Court. The Judge without

insisting them to file their counter/written statement would refer them to the counsellor for undergoing the process of counselling. This is because at times, when the respondent/defendant is compelled to file the written statement/counter, it may lead to aggravation of circumstances.

- The Judge of a Family Court shall prepare a list of counsellors who are well versed in counselling and such list shall be submitted to the Honourable High Court. On receipt of the list, the Honourable High Court would approve the panel of counsellors for the year. Such counsellors shall be attached with the respective Family Courts. The number of Counsellors shall be determined by the State Government in consultation with the High Court. The provision of section 6 of the Act deals with the above subject. (reference may also be had to *Rule 8, 10 & 11 of The Jharkhand Family Courts Rules, 2018*).
- The counsellor shall send a report indicating whether the settlement could be arrived or not. In certain cases the counsellor could indicate as to the necessity of consulting a psychologist or a psychiatrist. This would help the Court to take a further decision without entering into the adversarial procedure.
- In case where the case is not settled at the Mediation Center, the case is referred back to the Court, the Judge of the Family Court has ample powers under Section 10(3) of the Act to have a conciliation with the parties. The ethics prevents the Judge from hearing to the facts of the case during conciliation. The apprehension is that the Judge having heard the facts of the case during conciliation and discussion, might get prejudiced. Such apprehension should not be in the minds of the litigants. Hence, the Judge has to motivate the parties to arrive at a settlement by explaining them the importance of the Family and its bondage and shall also encourage them with the ground reality of adversarial procedures and its consequences and to explain about the win-win situation in case of arriving at a settlement.
- Even after this attempt if the Judge is not able to make the parties arrive at a settlement, then the adversarial procedure commences. Thereafter the Judge shall have to direct the defendant/ respondent to file the written statement/counter within the time frame fixed by the Court. The provisions of section 10 (1) of the Act would indicate that the procedures laid down under the Code of Civil Procedure 1908 have to be followed.
- Section 16 of the Act lays down that in suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record.
- Section 16 of the Act lays down procedure for Evidence of formal character on affidavit and sub section (1) says that the evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Family Court and sub section (2) says that the Family Court may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding summon and examine any such person as to the facts contained in his affidavit.
- The above provisions though do not lay down the right to cross-examination of a witness, but the procedure of cross-examination is followed so as to cull out the truth. The Code of Civil Procedure is very much applicable to this Act as per the section 10 (1) of the Act. According to the Code of Civil Procedure, the right to cross-examination is envisaged under Order XVIII Rule 4 (2) Thus the procedure of cross-examination of a witness could be permitted at Family Courts, but care should be taken that no lengthy cross-examination should be allowed in each and every case.
- The proceedings under 125 CrPC are cases of summary nature and there also it has to be borne in mind that the number of witnesses is not important to prove a case and therefore, parties should be discouraged to examine unnecessary witnesses.

- As regards to the marking of documents, the application of Evidence Act cannot be invoked. The provisions of section 14 of the Act, lays down that any piece of paper could be received in evidence, whether or not it is relevant or admissible under the Indian Evidence Act 1872. Therefore, court can take help of this section to bring on record any document preventing unnecessary delay in taking formal proof of such documents.
- In the case of *Amardeep Singh Vs Harveen Kaur, (2017) 8 SCC 746*, wherein a question which arose for consideration before the Hon'ble Apex Court was as to whether the mandatory period of six months stipulated under Section 13 B(2) of the Hindu Marriage Act, 1955 (the Act) is mandatory for making the second motion or can be relaxed in any exceptional situations. The Hon'ble Apex Court on considering number of judge-made Laws, in order to determine the question whether the provision is mandatory or directory, applied the principles laid down in *Kailash Versus Nanhku and others* and finally concluded that the provisions are not mandatory but directory. The Honourable Apex Court has formulated certain guidelines to the Subordinate Courts dealing with such matters in para 19 of the above Judgment.
- The above guidelines can be followed by the courts, if the case of dissolution of marriage by divorce by mutual consent meets the criterion set in the above guidelines.
- The Hon'ble Apex Court, while dealing with *Santhini Vs Vijaya Venkatesh, (2018) 1 SCC 1*, has in 2:1 majority has held that the absence of a party shall not hamper the proceedings and that the evidence could be recorded through video conferencing. However the condition precedent is that the parties should agree for recording the evidence through video conferencing and shall file a joint memorandum or application to the Court.
- Apart from that, the Hon'ble Apex Court has also observed that in conducting such proceedings the Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice. Hence it becomes the duty of the Advocate to explain the above position, so that the spouses would not take too much stress about the waiting period of further six months, even in genuine cases also.

Q.3. In matrimonial suit for divorce filed by the husband on the ground of cruelty and desertion the wife appears and admits desertion but makes counter allegation of cruelty. Can the divorce suit be decreed on the ground of desertion on admission? Will the situation be different if there is no allegation of cruelty by the husband? Whether the limitation of cooling off period apply in such cases?

Ans:

In the question in hand the suit has been brought by the husband and the wife admits the factum of desertion and also makes counter allegation of cruelty, then following two situations may arise:

- If the wife successfully proves the allegation of cruelty and she has a valid reason to live separately from her husband and further she has also made counter-claim for dissolution of marriage, the marriage between the parties can be dissolved in terms of section 23A of the Hindu Marriage Act, 1955.
- If the wife does not make counter-claim of dissolution of marriage, but if she admits factum of desertion and has also proved counter-allegation of cruelty, then she has sufficient ground to stay separately from her husband and the suit brought by the husband would fail as he cannot be allowed to take advantage of his own wrong or matrimonial offence. (reference may be had to the case of *Chetan Dass vs Kamla Devi, (2001) 4 SCC 250*).

The second part of the question gives a situation when there is no allegation of cruelty by the husband, but he has brought the suit for divorce on the grounds of desertion and the allegation of desertion is admitted. Again, in such cases following two situations would arise:

- If the wife admits that she herself is responsible for desertion and *animus deserendi* is there, the suit can be decreed in terms of Order 12 Rule 6 CPC.
- If the wife admits desertions, but pleads that she does not have any intention to bring the cohabitation permanently to an end (absence of *animus deserendi*) then the suit will fail, if she successfully proves her plea. (reference may be had to the case of ***Bipinchandra Jaisinghbhai Shah Vs. Prabhawati, AIR 1957 SC176***)

No cooling off period has been prescribed for suit for dissolution of marriage on the ground of desertion as provided under section 13(1)(i-b) of the Hindu Marriage Act and the cooling off period of six months applies only in regard to cases filed under section 13(B) of Hindu Marriage Act, 1955 seeking divorce on mutual consent.

Q 4. Due to strained relation between the parents, a child who ideally needs the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective considerations to be kept in mind in awarding “Shared Parenting” orders. Discuss in the light of latest case laws on point.

Ans:

Objective considerations to be kept in mind in awarding 'shared parenting' orders:

Shared Parenting is a recent concept for deciding the custody of child. The following objective considerations should be kept in mind while awarding shared parenting orders:

- The court should ensure benefit to the child of having spent equal or substantial or significant time to develop a meaningful relationship with both the child's parents and to ensure him their overnight access so that the child not only gets love and affection of both the parents, but also of grandparents, uncles, aunts, cousins etc thereby ensuring that the family heritage is maintained; and
- The court should ensure the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.
- The above satisfaction can be arrived at by the courts by allowing interim-visitation rights to the non-custodial parent to have access to his/her child in a planned manner.
- The 'best interest of the child' should be given paramount consideration.

Case law:

- In the case of ***Yashita Sahu vs State of Rajasthan, (2020) SCC OnLine SC 50***, Hon'ble Apex Court has held that child has a human right to have the love and affection of both the parents and the court must pass orders ensuring that the child is not totally deprived of love, affection and company of one of his/her parents.
- In the case of ***K.M. Vinaya vs B.R. Srinivas, (2015) 16 SCC 405***, Hon'ble Apex Court had issued direction for broad joint custody of the child so that he grows up with both the parents.

Q 5. What are the practical difficulties in execution of an order for grant of maintenance u/s 125 CrPC? Discuss the available options in law before a family judge for the realisation of the maintenance amount awarded u/s 125 CrPC with special reference to the case laws.

Ans:

The petition for enforcement of the order of maintenance is filed under section 128 CrPC. The process to be adopted in case of non-compliance of the order of payment of maintenance is laid

down in section 125 (3) of CrPC and it stipulates that, for every breach of the order, warrant can be issued for the amount due in the manner provided for levying fines, and the defaulting party can be sentenced, for the whole or any part of each month's allowance for maintenance remaining unpaid after execution of the warrant, to imprisonment for a term which may extend to one month or until payment is sooner made.

Practical difficulties in enforcing the order for grant of maintenance allowance are as follows:

- The distress warrant issued u/s 125 (3) CrPC is mostly returned unexecuted with endorsement to the effect that no movable property of defaulting party was found.
- The police normally arrests the defaulting person and produces him before the court and if the person fails to comply with the order of the court without any sufficient cause, he is sentenced to imprisonment in the manner as stated above. Unfortunately, in cases, concerning poor persons, where the wife is in dire need of money and the husband is also not in a position to pay the maintenance amount, he prefers to serve out the sentence, which defeats the very purpose of this beneficial legislation.
- The court faces difficulty in ensuring expeditious compliance of maintenance orders where the husband is residing in neighbouring or in some other state.
- The procedure for levying the fines is provided in section 421 CrPC and it provides, firstly, for issuance of warrant for attachment and sale of any movable property of the offender and secondly, to issue a warrant to the collector of the district, authorizing him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter. The schedule appended to the CrPC contains 'Form 19', prescribed for issuance of warrant to enforce the payment of maintenance by attachment and sale of movable property of defaulter. The 'Form 43 and 44' contained in the schedule are prescribed for warrant to levy a fine by attachment and sale (of movable property) and warrant for recovery of fine (by attachment of immovable property), respectively. However, 'Form 44' for attachment of movable property is limited only for the purpose of realisation of fine amount, when the offender is sentenced to fine. Therefore, the statute does not prescribe any format for warrant for attachment of movable property of defaulter in case grant of maintenance u/s 125 CrPC.

Case laws:

- In the case of *Shahada Khatoon & Ors. Vs Amjad Ali & Ors., (1999) 5 SCC 672*, Hon'ble Apex Court has held that Magistrate has no power to impose sentence for more than one month.
- In the case of *Pongodi & Anr. Vs Thangavel, (2013) 10 SCC 618*, Hon'ble Apex Court has held that the first proviso to S. 125 (3) CrPC does not extinguish or limit entitlement to arrears of maintenance.

Q. 6. What are the principles of computation of maintenance in a case u/s 125 CrPC? How will the quantum of maintenance vary in case the competent court has awarded maintenance under Domestic Violence Act and/or under section 24 of the Hindu Marriage Act.

Ans:

Principles of computation of maintenance under section 125 CrPC:

Section 125 CrPC is silent on the factors to be considered for computation of maintenance amount and it only lays down that Magistrate may order of maintenance as he thinks fit. However, help can be taken of section 23 of The Hindu Adoption & Maintenance Act, 1956 for computation of Maintenance amount apart from some judicial pronouncements in this regard. The following factors should be considered in computation of maintenance amount u/s 125 CrPC:

- Status of the parties

- Reasonable wants of the claimant.
- The independent income and property of the claimant.
- The number of persons, the non applicant has to maintain.
- Non applicant's liabilities, if any.
- Provisions for food, clothing, shelter, education, medical attendance and treatment etc. of the applicant.
- Payment capacity of the non-applicant.
- Some guess work is not ruled out while estimating the income off the non-applicant when all the sources or correct sources are not disclosed.
- The non-applicant to defray the cost of litigation.
- The amount awarded under section 125 CrPC is adjustable against the amount awarded u/s 24 of the Hindu Marriage Act.
(reference may be had to *Bharat Hegde vs Saroj Hegde, 2007 SCC OnLine Del 622*)

Quantum of maintenance if maintenance already awarded under Domestic Violence Act and /or under section 24 of Hindu Marriage Act.

If maintenance is already awarded under Domestic Violence Act and/ or under section 24 of Hindu Marriage Act, 1955, then while awarding the maintenance allowance u/s 125 CrPC the amount already awarded to the wife petitioner under any or both the above provisions are required to be adjusted against the amount to be awarded under section 125 CrPC.

- In the case of *Sudeep Choudhary vs Radha Choudhary (1997) 11 SCC 286*, the Hon'ble Apex Court has laid down the above guideline of adjustment of the maintenance amount awarded under section 24 Hindu Marriage Act and the amount of maintenance awarded u/s 125 CrPC and the same principle has been reiterated by the Hon'ble High Court of Jharkahnd in the case of *Sangeeta Kumari vs State of Jharkhand & Anr, 2017 SCC Online Jhar 3046*.
- In the case of *Manish Jain vs Akanksha Jain, (2017) 15 SCC 801* the Hon'ble Apex Court considered the amount granted under section 24 of Hindu Marriage Act in addition to that awarded u/s 23(2) of Domestic Violence Act by the Hon'ble High Court to be on higher side and accordingly reduced the amount awarded u/s 24 of HM Act.

Q. 7. What is the difference in jurisdiction of courts under the Courts and Wards Acts and Minority and Guardianship Act in appointment of Guardians of a minor.

Ans:

There appears to be an inadvertent typing mistake in the question and either it is 'Court of Wards Act' or 'Guardian and Wards Act'. Since the question relates to the appointment of guardian of a minor, therefore, I take it to be Guardian and Wards Act and Hindu Minority and Guardianship Act, as intended in the question.

The following are the difference in jurisdiction of courts under Guardian and Wards Act and Hindu Minority and Guardianship Act:

- Section 7 of Guardian and Wards Act gives power of courts to make order as to guardianship of a minor regarding his person and property and it is not confined only to Hindu.
- Whereas, Hindu Minority and Guardianship Act, 1956 has been enacted to amend and codify certain parts of the law relating to minority and guardianship among Hindus. Section 13 of the Act lays down that in the appointment or declaration of any person as

guardian of a Hindu minor by a court, the welfare of minor shall be the paramount consideration. Section 6 of the Act defines the natural guardian of a minor in respect of his person and property. It says that so long as father is alive mother cannot claim the status of a natural guardian.

- The Hindu Minority and Guardianship Act was enacted to empower the Guardian and Wards Act and to provide better right and protection to children instead of acting as a replacement of already prevalent Act.
- The Guardian and Wards Act is a secular law, whereas, the Hindu Minority and Guardianship Act applies only to Hindu, Jain, Sikh, Buddhist.

Q. 8. What are the major differences in procedure for adoption by Indian Prospective Adoptive Parent living in India and inter-country adoption? What are the eligibility criterion for prospective adoptive parents? Discuss with relevant provisions of law and latest case laws?

Ans:

Difference in procedure for adoption by Indian PAPs living in India and inter-country adoption.

Section 58 of the Juvenile Justice (Care & Protection of Children) Act, 2015 for Indian PAPs living in India and section 59 of the Act lays down the procedure for inter-country adoption. The Central Adoption Resource Agency (CARA) has framed adoption guidelines, which was notified by Ministry of Women and Child Development on 04.01.2017. The guideline lays down the procedure for adoption by Indian Prospective Adoptive Parents (PAPs) living in India and inter-country adoption. The following are the broad differences in the above two procedures:

- The Indian PAPs living in India, irrespective of their religion, interested in adoption of orphan or abandoned or surrendered child may apply to Specialized Adoption Agency (now it has to be done online with CARA), but in the case of inter-country adoption it has to be done with authorised foreign adoption agency, or Central Authority or a Government department of the concerned country of habitual residence of PAPs.
- In case of adoption by Indian PAPs living in India the child can be given in adoption after he/she has been declared legally free for adoption, but in case of inter-country adoption, the child is free for inter-country adoption only after he/she could not be placed in adoption with any Indian or non-resident Indian PAP within sixty days from the date when the child was declared legally free for adoption.
- In case of inter-country adoption, preference is given to children with physical and mental disability, siblings and children above five years of age over other children, but there is no any preference scheme in case of adoption by Indian PAPs living in India.
- The PAPs have to put their signature of acceptance on Home Study Report (HSR), Child Study Report (CSR) and the Medical Examination Report of child (MER) in case of adoption by both the Indian and foreigner PAPs, but in case of the later, the notarized copy of these documents, duly apostilled by the competent authority have to be submitted before the authorised foreign adoption agency, or Central Authority or a Government department of the concerned country, which will forward it to CARA at India.
- In the case of adoption by Indian PAPs living in India the child has to given in pre-adoption foster care awaiting adoption order from the court, but it is not mandatory in the case of inter-country adoption [regulation 16 (2) of CARA].
- In case of inter-country adoption application for adoption can be presented by Power of Attorney Holder of PAPs [regulation 17 (2) of CARA], but it cannot be done in case of adoption by Indian PAPs living in India.
- In case of adoption by Indian PAPs living in India, after getting the certified copy of the court order, the Specialised Adoption Agency shall immediately send the same to PAPs, but in the case of inter-country adoption the SAA should immediately send the same to CARA and the PAPs to obtain a passport for the child and after preparation of the

passport the PAPs shall receive the custody of the child.

Eligibility criterion for PAPs:

Section 57 of Juvenile Justice (Care & Protection of Children) Act, 2015 lays down the eligibility criterion for PAPs, which are as follows:

Section.57

- (1) The PAPs shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.
- (2) In case of a couple, the consent of both the spouses for adoption shall be required.
- (3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the authority.
- (4) A single male is not eligible to adopt a girl child.
- (5) Any other criteria that may be specified in the adoption regulations framed by the authority.

The additional criterion of adoption are incorporated in Regulation 4 framed by CARA, which are as follows:

Regulation 4:

- (1) The PAPs shall be physically fit, mentally and emotionally stable, financially capable and shall not have any life threatening medical condition.
- (2) Any PAP, irrespective of his marital status and whether or not he has biological son or daughter, can adopt a child subject to following:
 - (a) the consent of both the spouses for adoption shall be required, in case of married couple;
 - (b) a single female can adopt a child of any gender;
 - (c) a single male shall not be eligible to adopt a girl child;
- (3) No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship.
- (4) The age of PAPs, as on date of registration, shall be counted for deciding the eligibility of PAPs to apply for children of different age groups shall be as under:

Age of the child	Maximum composite age of the PAPs (couple)	Maximum age of single PAP
Upto 4 years	90 years	45 years
Above 4 and upto 8 years	100 years	50 years
Above 8 and upto 18 years	110 years	55 years

- (5) In case of couple, the composite age of the PAPs should be counted.
- (6) The Minimum age difference between the child and either of the PAPs shall not be less than 25 years.
- (7) The age criteria for PAPs shall not be applicable in case of relative adoption and adoption by step parent.
- (8) Couple with three or more children shall not be considered for adoption except in case of special need children as defined in sub-regulation (21) of regulation 2, hard to place children as mentioned in regulation 50 and in case of relative adoption and adoption by step-parent.

Case law: Hon'ble High Court of Chhattisgarh has laid certain guidelines in the case of **Seva**

Bharti Matruchhaya Vs xxxx in Cr. Rev. No. 97 of 18 and it has been held that regulation 12(5) of Adoption Regulations, 2017 specifically states that since an adoption case in non adversarial in nature, the Specialised Adoption Agency shall not make any opposite party or respondent in the adoption application.

Subitted by:

**NIKESH KUMAR SINHA
Principal Judge,
Family Court, Deoghar.**

Dated: 07.05.2020

Q. No.1:- Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the Family Court. Discuss the impediments and possible remedies.

And. Delayed justice in matrimonial cases causes litigants constant emotional disturbance. Keeping the case pending by one of the litigant, amounts to harassment to the other side and it is deliberately resorted to as a method of punishment to the other side. The speedy disposal of the case is the right of the party.

Following are the tools and techniques that should be adopted by the Family Court for speedy disposal of matrimonial case:-

1. The matter should be referred to mediation immediately after appearance of both the parties, so that there would be a very well opportunity to dispose of the case at the earliest.
2. Notice must be served on the other side for appearance promptly and without delay and also used the substituted service of notice like publication in Newspaper.
3. If the opposite party would not appear in time after getting the service of notice then the ex-parte proceeding should be started against the opposite party.
4. The opposite party should not be given long time for giving his or her show cause/ written statement.
5. The adjournment should not be given to the parties while giving the evidence and the matter should be posted for day to day proceeding.
6. The Family Court holds both the criminal as well as civil power, so the provision of Sec.309 of Cr.P.C. must be invoked very strictly for granting the adjournment and also heavy cost should be imposed and also provisions of granting adjournment should also be strictly maintained as per the provision enumerated in Order XVII of the Code of Civil Procedure, 1908.
7. The interlocutory application like interim maintenance u/s 125 of Cr.P.C. and 24 of Hindu Marriage Act should be disposed off without any delay.
8. The judgment should be delivered in a very short time and in a very consign way after hearing both the parties.

Other tools and technique for speedy disposal are;

1. There should be full utilization of Court working hours. This would mean both the Advocates and Judges should arrive on time and that there should not be unnecessary adjournments that should be asked for by the lawyers.
2. The cases filed on similar points should clubbed together and decided accordingly. This can be achieved with the help of technology.
3. The Judges must deliver judgments within reasonable time.
4. Lawyer should not repeat arguments and should be very precise with the points they may. Further the Judges should also endeavour to write their judgments in such a way that it does not give way to further litigation on the same matter by way of appeal or revision of the case.

The following are the impediments:-

1. Generally notices are not served in time to the opposite party and also it is very difficult to serve the notice to the other side who are residing at the far away District and also other States.
2. Sometimes the petitioner has not been given correct present address of other party, so that the Notice was not properly served due to incorrect address.
3. Even through the notices sent by Speed Post it was returned undelivered with the connivance of the Post Department.
4. Even after proper service of Notice other party has not promptly appeared in the case and if appeared did not file show cause or written statement on time rather only want to take the adjournment.
5. During the evidence also other side intentionally did not cross- examine the witnesses and taking the 4-5 days time to fully cross-examine the witnesses.
6. The Lawyer of the other side has not appeared in the Court to cross-examine the witnesses and only taking time that he is engaged in another Court and only wanted adjournment on the frivolous

ground.

7. Even the first party also filed a long examination-in-chief in the affidavit and also filed a voluminous documents which are not essential so far as the proceeding of the Family Court is concerned.

8. The other side for delaying the proceeding used to file a frivolous petition for delay of the disposal and when the petition was disposed off by an order then also time petition to go to other Court for revision and for that purposes they wanted unnecessary adjournment.

Following are the remedies that should be taken to remove the impediments:-

1. The petitioner must be given correct address of the opposite party.
2. Notices to the other side must be served on time promptly by the Nazarat of the Civil Court or by any Notice Serving Agency to the other side.
3. When opposite party will not appear inspite of serving of the Notices or publication in Newspaper then the ex-parte proceeding against the opposite party must be started.
4. The opposite party should not be given much more time to file his show cause or written statement and the time will be granted with the heavy cost.
5. When the case comes on the evidence then it will good for day to day proceeding and both the parties must be given list of witnesses.
6. Both the parties should not be granted adjournment at the time of evidence and only a reasonable time should be given to both the parties to adduce the evidence.
7. For the cross-examination of the witnesses the other side or his/her Learned Advocate will not allow adjournment and must be strictly followed the provision of Sec. 309 of Cr.P.C. that the fact the pleader engage in the other Court, shall not be a ground of adjournment and where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in the Court is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness as the case may be.
8. The Family Court must also strictly comply the provisions mention in order XVII of Code of Criminal Procedure 1908.
9. The interlocutory petition also disposed off as possible as earlier and should not be granted adjournment long for bringing the revision order except as per the Rule provided.
10. The mediation or reconciliation should be taken for early disposal of the case but it should not be allowed to be taken as a tool by the other side only for delaying the matter or prolong the matter.

Q. No. 2:- In what manner and to what extent the procedure in family courts can be evolved for speedy disposal of case? Explain with reference to the relevant provisions of The Family Court Act and Rules.

Ans. According to Sec. 7(1)(b) of the Family Court Act, 1984 a Family Court shall be deemed for the purpose 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 jurisdiction of Family Court extends.

According to Sec. 7(2)(a) of the Family Court Act, 1984 a Family Court shall also have and exercise ;

1. The jurisdiction exercisable by a Magistrate 1st Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973.

According to Sec. 7(2)(b) of the Family Court Act, 1984 a Family Court shall also have an exercise such other jurisdiction as may be conferred on it by another enactment.

According to Sec. 10(1)& (2):- (1) Subjection to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings (other than proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a Civil

Court and shall have all powers of such Court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973, (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of the Code before a Family Court.

So according to reading of whole Section 7 & 10 of the Family Court Act, 1984 it is clear that the Family Court has the jurisdiction of criminal matters and civil matters. So, the provisions regarding the speedy disposals as enumerated in Code of Civil Procedure, 1908 and the Code Criminal Procedure, 1973 shall be applied.

Hence, the other side should not be allowed to take unnecessarily adjournment for prolonging the cases for giving his reply or written statement, so the provision of Order VIII Rule 1 of Code of Civil Procedure must be followed for the speedy disposal of the cases.

Order VIII Rule 1 says:- 1. Written Statement.____ The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

So the other side should not be given more time to file show cause or written statement beyond the period prescribed in Order VIII Rule 1 of C.P.C.

The Family Court should also strictly apply the provision of Order XVII regarding granting of adjournments for speedy disposal of the cases. The Family Court should also apply strictly the provisions of Sec.309 of Cr.P.C. for speedy disposal of the cases that :-

- (a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;
- (b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;
- (c) where a witness is present in Court but a party or his pleader is not present or the party of his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.

The Family Court is not an ordinary Civil Court, the Family Court should dispose of the matter as expeditiously as possible and adjournment should be restricted.

Sec. 9 of the Family Court Act says:- (1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstance of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(2) If, any any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of, any other power of the Family Court to adjourn the proceedings.

So, the first duty of the Family Court is to make efforts for settlement and for which the ADR mechanism must be applied. If, the party has come on the settlement at the first instance then it helps for the earlier disposal of the cases. The mediation and conciliation, LOK ADLAT are the better ADR mechanism to be used for the settlement of the family disputes between the parties and for speedy disposal of the case. It is bounded duty of the Family Court to use ADR mechanism through mediation, reconciliation and Lok Adalat for early disposal of the cases. The prime object is to promote and preserve the secret union of parties to a marriage. So, Family Court must make an attempt for reconciliation between the parties for disposal of the case amicably and

expeditiously.

Sec. 10(3) of the Family Court Act, 1984 says:- Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.

So, the Family Court has a power to lay down own procedure, by ignoring all the procedure, with a view to arrive at a settlement in respect of the subject matter of the suit or proceeding or at the truth of the fact alleged by one party and denied by the other. Which helps for speedy disposal of the case by ignoring some of the complicated procedure.

Sec. 12 of the Family Court Act, 1984 says:- In every suit or proceedings, it shall be open to a Family Court to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act.

So, according to this provision the Family Court should take assistance of medical and welfare experts which helps in speedy disposal of the cases.

Sec. 14 of the Family Court Act, 1984 say:- A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872).

This Sec. 14 of the Family Court Act, 1984 helps the Family Court for speedy disposal of the case, because strictly the provisions of Indian Evidence Act, 1872 are not applying in the Family Courts and the complicity of the marking of the exhibits on the document and also taking evidence became easier and it will not go into the complicity which helps that the trial and proceeding of the case will go speedily and helps in the speedy disposal of the case.

Sec. 15 of the Family Court Act, 1984 says:- In suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record.

So, this provision helps the Family Court not to record the evidence at length only memorandum of substance of the deposition of the witnesses should be recorded which save the time against the lengthy recording of the evidence which helps the early disposal of the cases.

Sec.16 of the Family Court Act, 1984 says:- (1) The evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Family Court.

(2) The Family Court may, if it think fit, and shall, on the application of any of the parties to the suit or proceeding summon and examine any such person as to the facts contained in his affidavit.

The Rule 23 of Family Courts (Jharkhand High Court) Rule 2004 says also regarding the memorandum of evidence that the Court shall record only the substance of that witness and prepare a memorandum accordingly which shall be read and explain to the witness and the memorandum of the said substance recorded by the Court shall be signed by the witness and the presiding officer of the Court and shall form part of the record. The evidence taken on affidavit, if any, shall also form part of the record.

So, evidence of the witnesses given by the affidavit save the time of the Court which helps the speedy disposal of the cases.

Sec.17 of the Family Court Act, 1984 Says:- Judgment of a Family Court shall contain a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision.

The Rule 23 of Family Courts (Jharkhand High Court) Rules 2004 in the later part has also said the judgment shall content a concise statement of the case, the point for determination, the decision thereon and the reason of such decisions. So, according to the above

provisions the Family Court should not pass a lengthy and complicated judgment. The judgment should be so precise and so clear that a common man or a litigant must understand the judgment. The language of judgment should be sober, temperate and clear.

So, when the judgment would not be lengthy and complicated which saves the time and helps the speedy disposal of the cases.

Rule 22 of Family Courts (Jharkhand High Court) Rules 2004 says._ The petition so fixed shall not be adjourned by the Court unless there are circumstances justifying such adjournment and to meet the ends of justice. The Court shall record its reasons for adjourning a matter.

The petition of interim maintenance u/s 125 Cr.P.C. and the petition u/s 24 of the Hindu Marriage Act, 1955 regarding maintenance pendente lite and expenses of the proceeding should be disposed off expeditiously without granting time and petition u/s 24 of the Hindu Marriage Act, 1954 must be disposed off within 60 days from the date of service of Notice on wife or husband, as the case may be.

The other interlocutory petition must be disposed off without granting much adjournment.

The above provisions and rules which may help for speedy disposal of the cases of the Family Court.

Q. No. 3:- In a matrimonial suit for divorce filed by husband on the ground of cruelty and desertion the wife appears and admits desertion but makes counter allegation of cruelty. Can the divorce suit be decreed on the ground of desertion on admission? Will the situation be different if there is no allegation of cruelty by the husband? Whether the limitation of cooling off period apply in such cases.

Ans:- In this question there are three parts the first part is the situation a suit for divorce filed by the husband on the ground of cruelty and desertion the wife appears and admit desertion but makes counter allegation of cruelty. Can a divorce suit be decreed on the ground of desertion on admission? In this first circumstances the divorce cannot be granted on the ground of desertion on admission, because Court has to examine the full facts whether the desertion on the part of the wife was due to the cruelty happened on her and forced her to leave the husband to live together. The desertion must be willful and without any causes and thereafter it can be accepted. But here in this case in the first circumstances the wife has also alleged counter allegation of cruelty against the husband. So Court has to evaluate the evidence and circumstances of both the parties that real who has committed cruelty, because sometimes desertion is the result of cruelty. When wife has to be established cruelty on her by the evidence and so that she was forced to leave the husband's house due to the cruelty committed on her and her life will be endanger due to the cruelty done on her at the matrimonial house. Personal liberty is the paramount consideration as enumerated under Article 21 of Indian Constitution.

Explanation given in Sec. 13 of Hindu Marriage Act, 1955.____ In this subsection, the expression “desertion” means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly. So, the explanation of desertion, the desertion must be without reasonable cause. So in this circumstances even the desertion is admitted, but she has counter allegation of desertion, so on admission of desertion divorce cannot be granted.

The second part of this question is “will the situation be different, if there is no allegation of cruelty by the husband.” In this circumstances, if the wife admits desertion without reasonable cause and without consent or against the wish of the husband then on admission of desertion divorce can be granted on admission.

The third part is “Whether limitation of cooling off period apply in such

case.” The answer is that the cooling off period is mentioned in Sec. 13B (2) of Hindu Marriage Act, 1955 and the cooling off period is applied when the case of divorce according to Sec. 13B(1) is filed by both the parties on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that have mutually agreed that the marriage should be dissolved. So, when both the spouses living separately without allegation and counter allegation against each other by adjustment and they are not able to live together and then file a case for mutual divorce without allegation and counter allegation against each other and in that circumstances the cooling period apply. But in the instance to circumstances given to above the limitation of cooling off period is not applied, because one party has alleged and counter alleged in the first circumstances and the second circumstances the wife admitted allegation of desertion levelled by the husband.

Q. No. 4:- Due to strained relation between the parents, a child who ideally needs the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective considerations to be kept in mind awarding “Shared Parenting” orders. Discuss in the light of latest case laws on the point.

Ans:- Section 13 of Hindu Minority and Guardianship Act, 1956 says;
Sec. 13 Welfare of minor to be paramount consideration :- (1) In the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

In *Gaytri Bajaj v. Jitan Bhalla* the Hon'ble Supreme Court of India has also discussed the case of *Mausmi Moitra Ganguli v. Jayant Ganguli* that it is the welfare and interest of the child and not the rights of the parents which is determined factor for deciding the question of custody. It was the further view that the question of welfare of child has to be considered in the contest of the fact of each case and decided case on issue may not be appropriate to be considered as binding precedents. It was observed by the Hon'ble Court in that case that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.

While determining the question as to which parent's care and control of the child should be given, and the paramount consideration remains welfare and interest of the child nor the rights of the parents under statute. While determining the welfare of the child the moral and welfare of the child must also weigh with the Court as well physical well being. The child cannot be treated as a property or commodity and therefore such issues have to be handled by the Court with care and caution love and affection and applying the human touch to the problems. The issue of welfare covers;

- a. economical capacity of the parents
- b. love and affection given and taken from the side of parents and the child,
- c. the suitability and availability of parents and child
- d. residence distance between residence of the parents of the child

- e. the cause for separation between the parents,
- f. relevant factors which affects the health, safety and education of the child
- g. the circumstances in which parents are living
- h. the wishes of the parents and of the child
- i. the age and sex of the child
- j. authoritative and direction control and capacity of the parents
- k. nature of parents and child
- l. educational holidays etc.
- m. choosing tendency of the child.

Joint legal custody means that both the parents have the legal authority to make major decision for the child. These includes decision regarding education, religion and health care. These include decision regarding education, religion and health care. Parents should have been aware, too, that the legal custody is separate from physical custody. In other wards, it is possible for co-parents to share legal custody but not share physical custody.

When a couple goes on warpath that leads to separation or divorce. It is the children who pay the heaviest price as they are shattered when the court tells them to go with the parent whom he or she deems best.

The following are the salient points for the needs of the shared parenting:-

- i. Children's rights need to be respected. A child is entitled to love of both parents.
- ii. In the changing sociological scenario warring parents have become a common phenomenon , children are deprived of personal relation and direct contact with their parents on regular basis.
- iii. The breakdown of the marriage does not signify the end of parental responsibility.
- iv. Lexicon Matters. If “child custody” is replaced with “parenting the child” there will be substantial impact.
- v. Children suffer the most in a matrimonial dispute.
- vi. Present Acts like the Hindu Minority and Guardianship Act, the Guardian and Wards Act and the Juvenile Justice Act are inadequate to deal with the emotional needs of a child whose parents are separated or divorced.
- vii. Instead of serving to ensure proper parenting of the child the present legal frame is more focused on granting custody to one parent.

There should be following point of consideration while granting an order of shared parenting:-

1. Considering if the parents are mature and responsible.
2. Are they willing to reach a consciousness on what affects their children and their welfare?
3. Are parents capable of jointly agreeing on day to day plan to implement their scheme of joint parenting?
4. The moral standard conduct, and action of the parents.
5. How the parents have acted on the Child's best interest in the past.
6. Which parent is more likely to allow the child more frequent contact with other parent.
7. The quality of relationship between a parent and child.

The following are the decisions of the Hon'ble Supreme Court regarding the shared parenting. Jasmeet Kaur v. State (NCT of Delhi) and Ors. Decided on 12th December, 2019 and other judgment is Arathi Bandi v. Bandi Jagadrakshaka Rao and other decided on 16 July, 2013.

Q. No. 5:- What are the practical difficulties in execution of an order for grant of maintenance under section 125 Cr.P.C? Discuss the available options in law before a family judge for the realization of the maintenance.

Ans:- It is a very challenging for the Family Court to execute an order for grant of maintenance u/s 125 of Cr.P.C. The following are the practical difficulties in execution of an order for grant of maintenance u/s 125 Cr.P.C.:-

(I) It is very difficult to execute an order of maintenance against a person who is the daily Labourers and other person such as Driver of the Truck because their address is changing as they have to go different places for their earnings and whenever any how they have been brought in the Court on Distress Warrant they flatly refused to pay the maintenance.

(II) Generally the husband solemnized another marriage and they used to live in house of second in-laws in different places, so it is very difficult to execute the order against such person.

(III) Generally the husband are adamant not to comply the order of maintenance because of the ego.

(IV) Although the execution against service holder particularly against the Govt. servant is easier as the order of deduction of maintenance from the salary of Govt. Servant, against whom an order maintenance for his wife was granted, is being executed through the Head of the Department. But in such cases also sometimes it will be difficult because it has been experienced by the Court that to avoid the maintenance order the husband used to go a long absence without any leave and sometimes out of ego left the Service, so that the wife will not get maintenance and both the parties will be frustrated.

(V) Execution against the husband who employed in Public Sector or Private Sectors, against whom order of maintenance has been passed in favour of wife, also be difficult because they have take many other loans to get the net salary very less to avoid of maintenance to the wife. Although at the time of granting maintenance only the necessary deduction was deducting from the gross salary but practically such of the employee have taken a very clever step to avoid maintenance because they have taken many other loans voluntarily. When a letter of the Court was sent to Head of such employee for deduction of the maintenance amount from the salary of such person but it has come in the reply to the Court that such employee is getting less net salary than that amount of maintenance.

(VI) Generally as per the provision of Cr.P.C. as enumerated u/s 126(1) of the Cr.P.C. the wife used to file the case for maintenance u/s 125 Cr.P.C. where she resides. Whereas her husband is residing at far District or in the other States. So in such cases the execution of Notice or the execution of Distress Warrant become very difficult, because the Police of the order District or the State would not get priority to execute the Distress Warrant promptly.

(VII) Due to changing of living address of the husband particularly the labourers class and the truck drivers the execution of Distress Warrant become very difficult, as many times the Police returned the execution distress warrant without execution with the endorsement that such person is not living in that address.

Sec. 125 (3) of Cr.P.C. empowers the Court to execute the order of maintenance, so there is a provision in the Cr.P.C. u/s 125(3) for execution of the order of the maintenance.

According to Section 125(3) of Cr.P.C. If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be.] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any ground of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation:- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for this wife's refusal to live with him.

An application under sub-section (3) is an information to the Court of the breach of maintenance order. After the maintenance order is passed, it becomes the duty of the Court itself to see that payments are duly made. The only legal obligation placed on the wife or the minor or parents in whose favour the order is made, is to present an application within one year from the date on which the amount becomes due. When that is done, it is for the Court to get its own order enforced and see that it is complied with. The proceedings from that stage cannot be treated as a case between the two original parties. Non-appearance of a party or its non-prosecution does not necessarily entail the dropping of the proceeding. The Court is bound to enquire into the reasons for non-compliance of the order and to issue a warrant for levying the amount due.

It has been held in *Duga Singh Lodhi v. Prem Bai*, 1990 CrLJ 2065 that mere absence of visible means or real estate will not entitle such a person to escape the liability to pay maintenance awarded.

According to Hon'ble Madras High Court and Hon'ble Calcutta High Court, the imprisonment in default of payment of maintenance award is not limited to one month. The maximum that can be imposed is one month for each month's arrears, and, if there is a balance representing the arrear of a portion of a month, a further term of a month's imprisonment may be imposed of such arrears.

It has been held in *K.V. Rudraiah v. R.S. Mudala Gangamma*, 1985 CrLJ 707 (Kant.) that salary could be attached. It has been held in *Surekha Mrudangia v. Ramahari Mrudangia*, 1990 CrLJ 639; 1990(1) Crimes 331, 334 (Ori). Order of attachment.____ Once the Court has issued a writ of attachment of salary in default of payment of the arrears or current maintenance, without sufficient cause, the salary when becomes due or any part thereof shall be liable for attachment. If during any particular month, maintenance is paid, the writ of attachment shall remain dormant. In any case of default, until the salary becomes payable to the husband at the end of the month, the writ of attachment shall continue to remain dormant so as to revive at the end of the month.

Q. No. 6:- What are the principles for computation of maintenance in a case under section 125 Cr.P.C? How will the quantum of maintenance vary in case the competent court has awarded maintenance under Domestic Violence Act and/or under section 24 of Hindu Marriage Act.

Ans:- Even where the petitioner has not mentioned the particular amount she/he wants as maintenance, the amount would be determined by the Court. There is no specific restriction u/s 125 Cr.P.C. that the Court cannot award more than the amount claimed in the petition. It has been held in *Sushilaben Mohanlan v. Mali Chumilal Hargovind*. 1991(2) Crimes 736, 738 (Guj); *Sabera Bibi v. Dr. Syed Habibur Reheman*, 2003 (3) Crimes 424(Ori.DB) that quantum of maintenance is to award on the basis of income and the earning capacity of the husband, his liabilities, the basic needs of the applicant, the status of the parties and other relevant circumstances and also the income of the wife, if any. It has also been held in *Kamla Bai v. Ghanshyam Agarwal*, 1999 CrLJ1102; 1998(4) Crimes 122(MP). It has been held that status of both the claimant and the opposite party must be considered while fixing the maintenance allowances. It has been held in *Raibari Behera v. Manga Raj Behera* 1983 CrLJ 125(Ori.) that for determining the quantum of maintenance the needs and requirements of the wife for a moderate living, the earning of the husband and his capacity to earn and his commitments are the relevant factors. It has been held in *G. Mariah v. G. Vijayalakshmi*, 1979CrLJ 1226, 1228(AP) that the quantum shall be such which would not lead her to lead a luxurious life nor live her in a penurious state. It has been held in

Shyam Sundar Malik v. Geetika Malik 2006 (37) AIC 383 (Del) that maintenance u/s 125 of Cr.P.C. includes provision of food, clothing, residence, education as well as medical treatment as per financial status. It has been held in *Vinod Kumar Sikka v. Vandana, 1986 (3) Crimes 259* that in computing the quantum of maintenance the net salary is to be calculated after deducting from the gross salary only the statutory deductions and not the voluntary ones. So the main principle while computation of maintenance is to be that the wife would be placed on the same place if she would be lived with her husband.

The maintenance pendente lite and expenses of proceeding awarded u/s 24 of Hindu Marriage Act, 1955 and the maintenance awarded by a Court of competent jurisdiction u/s 20(1) (d) of Protection of Women from Domestic Violence Act, 2005 are completely a separate proceeding from the proceeding u/s 125 Cr.P.C. It has been held in *Binod Kumar Thakur v. State of Bihar 2006 (2) Pat. LJR 290 (pat)* and other decision that despite proceeding u/s 24 of Hindu Marriage Act, 1955 the proceeding under Sec. 125 Cr.P.C. are maintainable as the proceeding under this section are independent of the proceeding under the Hindu Marriage Act 24. However, has right to select under which of these provisions she would receive maintenance. It has been held in *Avinash Ch. Mondal v. Jyotsna Rani Mondal (2003) 2 Chn. 296* that in proceeding u/s 125 Cr.P.C. the Court is not bound by the finding of the Civil Court recorded about the income of the wife in the petition u/s 24 of Hindu Marriage Act, 1955.

But it has been held in *Ashok Singh Pal v. Manju Lata, 2008 CrLJ (NOC)* that there is nothing under the law which lays down as a mandatory requirement the principle for granting adjustment or deducting the amount of maintenance or alimony granted in proceeding under S. 125 Cr.P.C. or under S. 24 of the Hindu Marriage Act or vice versa. Maintenance under S. 125 of Cr.P.C. and alimony pendente lite under Sec. 24 of Hindu Marriage Act can be claimed by resorting to both these provisions and the Court is competent under these provisions to grant relief to the person concerned and the question of adjustment to be granted, has to be decided after taking into consideration the totality of the circumstances, the amount granted and the capacity of the person directed for making the payment. There is nothing to suggest that as a thumb-rule, adjustment to the amount is to be granted in each and every case.

In some of the decisions, it has also been held that maintenance allowances granted u/s 24 of Hindu Marriage Act, 1955 and maintenance awarded u/s 20(1)(d) of the Protection of Women from Domestic Violence Act, 2005 should be adjusted towards the amount granted u/s 125 of Cr.P.C.

Q. No. 7:- What is the difference in jurisdiction of the courts under the Courts and Wards Acts and Minority & Guardianship Acts in appointment of Guardians of a minor?

Ans:- Section 9 of Guardians and Wards Act deals with the Court having jurisdiction to entertain application. ____ (1) *If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.*

(2) *If the application is with respect to the guardianship of the property of the minor, it may be made either to the District court having jurisdiction in the place where the minor ordinarily resides, or to a District Court having jurisdiction in a place where he has property.*

(3) *If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.*

It has also been held by the Hon'ble Apex Court in *Ruchi Majoo v. Sanjeev Majoo, (2011) 6 SCC 479* that the test to determine the jurisdiction of the Court to entertain the application

of Guardianship of minor is the place of ordinary residence of a minor. So, according to Sec. 9(1) of Guardian and Wards Act in respect of Guardianship of a person of a minor will be entertained the District Court having jurisdiction in the place where the minor ordinarily resides.

But according to Sec.9(2) if the application with respect of the property of the minor it may be made either to District Court in whose jurisdiction the minor ordinarily resides or the District Court having jurisdiction in a place where has a property. So, if the guardianship of the property of a minor is involved then the either Court in which jurisdiction the minor ordinarily resides or the property of the minor is situated.

It only application is filed to the guardianship of the person of the minor the Family Court will entertain such petition where the minor ordinarily resides. But, if, the guardianship of the property of the minor is also involved then the District Judge of having jurisdiction will entertain the petition.

In Hindu Minority and Guardianship Act, 1956 the natural guardian of a Hindu minor has been define in Sec.4(c) means any of the guardian mention in Sec. 6. So, the Sec. 6 of Hindu Minority and Guardianship Act, 1956 deals with natural guardians of a Hindu minor. So, the Court having jurisdiction to entertain the petition for appointment of the guardian in whose jurisdiction the natural guardian is residing and is doing business and it has also been held in a case of Manmohan Suri v. Sunil Kr. Arora AIR 205 Del. 269.

But according to Sec. 8(6) of the Hindu Minority and Guardianship Act, 1956 when the immovable property of the minor is involved then the District Court within the local limit of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one Court, means the Court within local limit of whose jurisdiction any portion of the property is situate.

Q. No.8:- What are the major differences in procedure for adoption by Indian prospective adoptive parents living in India and inter country adoption? What are the eligibility criterion for prospective adoptive parents? Discuss with relevant provisions of law and latest case laws.

Ans:- The major difference in procedure for adoption by Indian Prospective Adoptive Parent living in India and inter country adoption:-

(1) Sec. 58(1 to 5) of the Juvenile Justice (Care & Protection of Children) Act, 2015 deals with the procedure for adoption by Indian Prospective Adoptive Parents living in Indian and Sec. 59 (1 to 11) deals with the procedure for Inter Country Adoption.

(2) Indian Prospective Adoptive Parents living in India irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child may apply for the same to the specialized agency, in the manner as provided in adoption regulation framed by the Authority. Wherein the case of a non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parent living in abroad, irrespective of their religion, if interested, to adopt an orphan or abandoned or surrendered child from India may apply for the same to an authorized Foreign Adoptive Agency, or Central Authority or concerned Govt. Department in their Country of habitual residence, as the case may be, in the manner as provided in adoption regulation framed by the authority.

(3) In case of Indian Prospective Adoptive Parents living in India the next procedure is that the specialized adoption agency shall prepare the Home Study Report of the Prospective Adoptive Parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the Child Study Report and Medical Report of the child, in the manner as provided in the adoption regulation framed by the authority. Whereas in the case of inter country adoption the next procedure is that the authorized foreign adoption agency, or central authority, or

concerned Govt. department, as the case may be, shall prepare the Home Study Report of such Prospective Adoptive Parents and upon finding them eligible will sponsor their application to the authority for adoption of a child from India, in manner as adoption regulation framed by the authority.

(4) In case of Indian Prospective Adoptive Parents living in India the next procedure is that on the receipt of acceptance of the child from the Prospective Adoptive Parents along with the Child Study Report and the Medical Report of the child signed by such parents, the specialized adoption agency shall give the child in pre-adoption foster care and file an application in the Court for obtaining the adoption order, in the manner as provided in the adoption regulation framed by the authority. Whereas, in the case of inter country adoption the next procedure is that on the receipt of the application of such prospective adoptive parents, the authority shall examine and if it finds the applicant suitable, then it will refer the application to one of the specialized adoption agency where the children legally free from adoption are available. The specialized adoption agency will match a child with such prospective adoptive parents and send the Child Study Report and the medical Report of the Child to such parents, who in turn may accept the child and return the Child Study and Medical Report duly signed by them to the said agency. On receipt of acceptance of child from the prospective adoptive parents, the specialized adoption agency shall file an application in the Court for obtaining the adoption order, in the manner as provided in adoption regulations framed by the authority.

(5) In case of adoption by Indian Prospective Adoptive Parents living in India the next procedure is that on receipt of a certified copy of the Court order, the specialized adoption agency shall send immediately to the prospective adoptive parents. Whereas in the case of Inter Country Adoption on receipt of a certified copy of the Court Order the specialized adoption agency shall send immediately the same to the authority, State agency and to prospective adoptive parents and obtain a Passport for the child. The authority shall intimate about the adoption to immigration of Authority of India and the receiving Country of the child. The Prospective Adoptive Parents shall receive the child in person from the specialized adoption agency as soon as the Passport and Visa are issued to the child.

(6) The next step in case of Indian Prospective Adoptive Parents living in India the process and well being of the child in adoptive family shall be followed up as provided in the adoption regulation framed by the authority. Whereas, in case of Inter Adoption the authorized Foreign Agency, or Central Authority or the concerned Govt. Department, as the case may be, shall ensure the submission of progress report about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption, in consultation with the authority and concerned Indian Diplomatic Mission in the manner as provided in adoption regulation framed by the authority. In case of a foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if, interested to adopt a child from India, may apply to the authority for the same along with a no objection certificate from the Diplomatic Mission of his Country in India, for further necessary action as provided in the Adoption Regulation framed by the authority.

Sec. 60 of the Juvenile Justice (Care & Protection of Children) Act, 2015 deals with the procedure for Inter Country relative adoption. According to Sec. 60 Procedure for inter-country relative adoption.____ (1) A relative living abroad, who intends to adopt a child from his relative in India shall obtain an order from the court and apply for no objection certificate from Authority, in the manner as provided in the adoption regulation framed by the Authority.

(2) The Authority shall on receipt of the order under sub-section (1) and the application from either the biological parents or from the adoptive parents, issue no objection certificate under intimation to the immigration authority of India and of the receiving country of the child.

(3) The adoptive parents shall, after receiving no objection certificate under sub-section (2), receive the child from the biological parents and shall facilitate the contact of the adopted child with his siblings and biological parents from time to time.

According to Sec. 57 of the Juvenile Justice (Care & Protection of Children) Act, 2015 the following are the eligibility of Prospective Adoptive Parents are:-

(1) The Prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

(2) In case of a couple, the consent of both the spouses for the adoption shall be required.

(3) A single or divorced person can also adopt, subject to fulfillment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

(4) A single male is not eligible to adopt a girl child.

(5) Any other criteria that may be specified in the adoption regulations framed by the Authority.

Central Adoption and Research Authority commonly known CARA under Ministry of Women & Child Development Govt. of India has given the detail guidelines to be followed up for the adoption procedure for Indian Prospective Adoptive Parents living in India, for non-resident Indian, Overseas Citizen of India and Foreign Prospective Adoptive Parents regarding the registration and Home Study Report and no objection certificate of the authority and pre-adoption foster care and passport and visa intimation to immigration authorities, conformity certificate and birth certificate.

In SHABNAM HASHMI v. UNION OF INDIA reported in AIR 2014 SC in which the Hon'ble Supreme Court of India has decreed that the Prospective Parents irrespective of their religious background are free to adopt children after the prescribed procedure and the right to adopt a child by person as the provisions of Juvenile Justice Act would prevail over all personal laws and religious courts in the country. The other notable judgment of the Hon'ble Supreme Court of India is given in UNION OF INDIA & Anr. Etc. v. Ankur Gupta and Ors. reported in AIR 2019 SC regarding the adoption by the Prospective Adoptive Parents who was migrated to United State of America.

With regards,

submitted by
Peeyush Kumar
Principal Judge, Family Court,
Ranchi.

Question No.1:- Tools and techniques for speedy disposals of matrimonial matters...impediments and remedies.

Answer of question no. 1

Creation of family court and its objective

The matrimonial disputes have grown too large that it drew the special attention of the Legislators. Prior to 1984, the matrimonial disputes were tried by Civil Courts having original jurisdiction. And indeed, the Civil Courts are usually very much burdened with multi-various cases. The litigants to the matrimonial disputes are loaded with much of emotions and mental pressure. With such a stressful mind, when they enter the Court, seeking some remedy, they were made to wait for a long time.

The intervention of the Lawyers by flanking the litigants lead to some unpleasant decisions as the opportunity for conciliation was not even offered. Hence, in order to provide an opportunity to conciliate the disputes in a fair manner, it was considered fit, that the litigants should be given chance to have direct interaction. It was also emphasized for speedy disposals of matrimonial disputes.

When a case is filed for a relief, such as divorce, or nullity of marriage or for restitution of conjugal rights, the summons, are ordered to be issued on the other party. The importance of conciliation was felt very much. The prime reason was that of the reporting of the frequent dissolution of the marriages which are considered to be sacramental. The apprehension that the society is moving towards a wrong direction of dissolving the bond so lightly was the main concern. The relationship between the spouses would be the mixture of emotions, sentiments, feelings etc. The scenario prior to the Family Courts Act 1984, was that the respondent on his/her appearance through the pleader would be required to file the written statement/counter within the stipulated time. Thereafter, the trial/enquiry would commence. The adversarial procedure would be adopted and the parties were examined in chief and cross examination was done. The arguments would be made either in the presence or absence of the parties. The pick of lacuna from the evidences of the parties alone would help the court to arrive at a decision. Thus, the case concludes leading to the second round of litigation by way of appeal.

The change in the mindset due to modernization also leads to the inflow of more number of matrimonial cases. Hence the necessity for a separate frame work where the matrimonial issues could be dealt with was felt. Thus came into existence the Family Courts

Act 1984 (in short The Act)

The main object of the Family Courts Act 1984 was to provide the opportunities of conciliation to the litigants and to pave way for speedy disposal. The Courts are provided with Special Powers under section 10 of the Act, wherein the Judge can formulate his own ways and means within the scope of law to help the litigants to arrive at a settlement.

The prime salient feature of the Act is that of **section 13**, which declines the rights of the parties to be represented by a legal practitioner as a matter of right. The object of the legislators was not to take away the rights of the parties in total. Instead the provision to the above section empowers the Court to seek the assistance of a legal practitioner as amicus curiae. The section is silent also about engagement of a pleader as amicus curiae by the parties themselves.

Every litigant cannot be expected to have exposure to Law, practice and procedure. Certainly they require the assistance of a legal practitioner. The exact phrase employed in section 13 of the Act is that **“as of right, to be represented by a legal practitioner”**. **This does not take away the right of the Lawyer in total. In short, the object of the legislators was that the litigants should not stay away from Court proceedings so as to be represented by their lawyers and such exercise shall not be taken up as a matter of right. This in a way helps the Court to have a direct interaction with the litigants.**

The Family Courts constituted under the Act, shall have to avail the **services of the Counselors**. In simple words, when the respondent receives summons from Court, he/she shall have to make the appearance mandatory before the Judge of the Family Court. The Judge without insisting them to file their counter/written statement would refer them to the counselor for undergoing the process of counseling. This is because at times, when the respondent/defendant is compelled to file the written statement/counter, it may lead to aggravation of circumstances.

The prime requisite quality of a counselor is to have the quick understanding ability of the issue and to act unbiased and to provide necessary advise to the litigating spouses so as to enable them to arrive at a settlement. The counselors are not bound to disclose the minutes of the discussion between the spouses who are before them for counseling. The counselor will send a report indicating whether the settlement could be arrived or not. In certain cases the counselor could indicate as to the necessity of consulting a psychologist or a psychiatrist. This would help the Court to take a further decision without entering into the adversarial

procedure.

The mediator attached with the mediation center would preferably be an advocate who would be well trained in the field of mediation. The role of mediator is to bring down the emotions of the litigating spouses and neutralize them and place them on the pan of equity. The litigating spouses should be explained with the importance of mediation. Once reference is made, the mediation would go on for a maximum of 60 days which is extendable till 90 days. When the parties arrive at a settlement, the mediator sends the report to the Court along with the memorandum of understanding entered by the parties. Thus, the case concludes amicably by virtue of inquisitorial process without adversarial adjudication. In case where the case is not settled at the Mediation Center, the case is referred back to the Court. Now again the Judge of the Family Court has ample powers **under Section 10(3) of the Act** to have a conciliation with the parties. The ethics prevent the Judge from hearing to the facts of the case during conciliation. The apprehension is that the Judge having heard the facts of the case during conciliation and discussion might get prejudiced. Such apprehension should not be in the minds of the litigants. Hence, the judge has to motivate the parties to arrive at a settlement by explaining them the importance of the Family and its bondage and shall also encourage them with the ground reality of adversarial procedures and its consequences and to explain about the win-win situation in case of arriving at a settlement. Even after this attempt if the Judge is not able make the parties arrive at a settlement, then the adversarial procedure commences. Thereafter the judge shall have to direct the defendant/respondent to file the written statement/counter within the time frame fixed by the Court. **The provisions of section 10 (1) of the Act would indicate that the procedures laid down under the Code of Civil Procedure 1908 have to be followed.**

The provisions of Order VIII Rule 1 of the Code of Civil Procedure 1908 envisages that the written statement shall be filed within 30 days from the date of receipt of summons and such time could be extended up to 90 days, as the case may be, by recording the reasons thereon. But as regards to the matrimonial disputes, the process of counseling, mediation and conciliation involve large span of time. At times it may go even up to a year. However, the practical application of Order VIII Rule 1 of the Code of Civil Procedure would come into play when the Judge decides that the matter could not be settled. Thus, the leniency of extension of time for written statement/counter could be availed by virtue of the powers conferred under section 10(3) of the Act.

The role of a Lawyer is also very vital during the counseling, mediation or the conciliation processes. They assist the parties out of Court. Thereafter when the matter is

posted for written statement/counter, the entry of a Lawyer is made through section 13 of the Act. The litigating spouses could take the assistance of a Lawyer in preparation of written statement/counter. In support of the petition under section 13 of the Act, they shall have to file an affidavit narrating the reasons for taking the assistance of a pleader. The admission of such petition is purely the discretion of the Court, and the same could be withdrawn by the court at any time, when there is an apprehension of miscarriage of justice.

After the filing of counter also, there are possibilities to attempt for a settlement.

The Judge may advise the parties to conciliate on their own. In case if the settlement is not possible thereafter also, the respondent may file a better counter statement under Order VIII Rule 9 of the Code of Civil Procedure before the commencement of trial. After the pleadings on either side are completed, the enquiry is commenced with the petitioner. The chief examination of the petitioner is done by way of an affidavit. The provisions of section 15 and 16 of the Act lay down that the evidence shall not be lengthy and shall contain the memorandum of substance alone. A careful perusal of the above provision would make us to understand that there is no way made out for cross examination of a witness. The evidence shall have to be in formal character.

As regards to the marking of documents, the application of the Evidence Act cannot be invoked. The provisions of section 14 of the Act, lays down that any piece of paper could be received in evidence, whether or not it is relevant or admissible under the Indian Evidence Act 1872. The relevant provisions are extracted hereunder; the right of a lawyer to cross examine the witness is yet another area to be addressed. The provision of section 13 of the Act emphasizes the parties to appear on their own. At the most, the Court could seek the assistance of a legal expert as amicus curiae to assist the parties. But very rarely such circumstances are dealt with. The word —assistance of a legal expert|| employed in the provisions of Section 13 of the Family Courts Act 1984 has to be given a clear interpretation. The word assistance takes different dimension from case to case, party to party, and at times even from Court to Court. There should be a uniform approach. The word —assistancel|| is literally taken up to the level of cross examination of a witness and also for making arguments on behalf of the parties as the parties would tend to represent to the Court that they are unable to understand the legal procedures.

The advocate assists the litigant out of Court in preparation of the Proof Affidavit in respect of the evidence in Chief. The party presents his chief affidavit at Court and he is examined as a witness. Now the question of defending the allegations arises, for which the respondent/defendant seeks the assistance of a Lawyer for cross examination of the witness.

Admittedly, the defending spouse lacks legal knowledge. Further the presence of mind is also very much essential and the cogency in bringing out a fact or truth could be very well done by the legal practitioner alone.

The above issue is dealt with by the Division Bench of the Honorable High Court of Rajasthan in **Sarla Sharma Versus State of Rajasthan & Others**. The Courts strongly leaves against a construction which reduces the Statute to a futility. The Court shall read the Statute so as to make it effective and operative unless the words used in the Statute cannot be given any other meaning. Statute is designed to be workable and the interpretation thereof by the Courts should be to secure that object, unless crucial omission or clear direction makes that end unattainable. This, in view, can be read as the main part of Section 13 to include the Family Court's authority to permit engagement of a Lawyer/Advocate of party in exceptional circumstances. Rule 22 of the Rules of 1994 shall be in conformity of Section 13 of the Act of 1984. To save the Statute from declaring illegal, it is permissible for the Court to reading down the provision. Rule 22 of the Rules of 1994 reads thus:-

Permission for representation by a Lawyer—the Presiding Officer of a Family Court, in his discretion may permit a Lawyer/Advocate to appear in the court, wherever, he feels that it is necessary in the interest of justice. Instead thereof we need to read rule like rule 22. **Permission for representation by a Lawyer**—the Presiding Officer of a Family Court, in his discretion in exceptional circumstances may permit a Lawyer/Advocate to appear in the Court, wherever, he feels that it is necessary in the interest of justice. The Rule 22 as above would permit Family Court in its discretion to allow a party to engage Lawyer or Advocate in a suit or proceeding pending before Family Court, in exceptional circumstances if it feels that any engagement of Lawyer or Advocate is necessary in the interest of justice. Discretion to be exercised by the Family Court is judicial discretion and, therefore, it should reflect from the order permitting such engagement. Judicial discretion which shall be exercised by the Family Court shall be guided by reasons. It should not be vague, arbitrary and fanciful but should be exercised reasonably in good faith keeping in view that order will be passed only in exceptional circumstances to meet the ends of justice. While exercising such discretion of permitting Lawyer or Advocate to appear in the Court for a party, the Court must keep in mind that normal rule is no intervention of the Lawyer/Advocate in the proceeding before Family Court. It is only in the exceptional circumstances, which must appear from the order of the court; a party can be permitted to engage a Lawyer/Advocate to appear on its behalf in the suit or proceedings pending before the Family Court.

Thus by virtue of the above decision, an advocate can be permitted to appear before the Family Courts with certain limitations. The provisions of Section 13 would give an understanding that an amicus curiae cannot be permitted to do all the acts as done by an advocate.

A Division Bench decision of the Bombay High Court in **Leela Mahadeo Joshi v. Dr. Mahdevo Sitaram Joshi** has also held thus- that the advocate assisting a spouse has a limited role in Family Courts. However, a Lawyer should be very careful in cross examination of a witness. His aim and objective is to shatter the crux of the evidence of the witness and not to shatter the character of the witness. Hence any amount of character assassination would have the direct impact on the litigant/client for whom the cross examining lawyer defends.

The proceedings of the Family matters shall have to be mandatorily dealt in-camera. The party who sues or who is sued, flies abroad and he/she may not be in a position to attend the Court proceedings. The reasons may be genuine. The Honourable Apex Court, while dealing with **Santhini v Vijaya Venkatesh** has in **2:1 majority** held that the absence of a party shall not hamper the proceedings and that the evidence could be recorded through video conferencing. However the condition precedent is that the parties should agree for recording the evidence through video conferencing and shall file a joint memorandum or application to the Court. The operative portion of the judgment is extracted hereunder:

In view of the aforesaid analysis, we sum up our conclusion as follows:-

- (i) In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera.*
- (ii) After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through video conferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer.*
- (iii) After the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that video conferencing will sub-serve the cause of justice, it may so direct.*
- (iv) In a transfer petition, video conferencing cannot be directed.*
- (v) Our directions shall apply prospectively.*
- (vi) The decision in Krishna Veni Nagam(supra) is overruled to the aforesaid extent.¶*

Thus the advancement of technology has a bit encroached upon the privacy of the litigants. This is because there is no secured internet connection so as to believe that there are no intruders. Inevitably, the person handling the video conferencing gadget shall have to be

permitted to be present in the in-camera proceedings. However the Governments shall have to respond to the request of the High Courts in providing the appropriate video conferencing gadgets with secured High Speed internet connection and adequate training to the Judges, Court staff and also to the advocates so that the video conferencing is carried out without affecting the objective of the in-camera proceedings.

The piece meal cross examination is yet another vital aspect which has to be avoided by the lawyers concerned. Time and again the Honorable Apex Court has come down heavily where the cross examinations are done in piece meal. The advocate shall be very much determined with his defense. Mostly, the practice of lengthy and piece meal cross examination is made so as to make an attempt to shatter the confidence of the witness. Further this would lead to miscarriage of justice, which the Judges should not be silently witnessing and allowing the lengthy or piece meal cross examinations or both. This is not permissible as per the provisions of section 15 of the Act.

In Vinoth Kumar vs State of Punjab, the Honorable Apex Court has laid down the dictum for Sessions Cases, where the witnesses have to be cross examined at a stretch on the same day itself. The Trial Court Judges who were handling the Sessions cases are given with strict guidelines to be followed while examining the witnesses and that the cross examination of the witness shall be completed on the same day.

As regards to the matrimonial disputes, a series of decisions from the Honourable Apex Court would make us understand the sorry state affairs and the insensitivity of the Judge handling the Family Court, who allows the advocate or the litigant to dominate the Court process.

In Bhuwan Mohan Singh Vs Meena and others, the Honourable Apex Court has expressed the anguish for having kept the litigation for a long time on board. The objective of the Family Courts Act has been emphasized in Para 12 of the above decision. The Honourable Apex Court has again reiterated the above position in Shamima Farooqui Vs Shahid Khan 8 and has expressed very serious concern in respect of delayed adjudications and unnecessary adjournments leading to prolonged pendency of cases. The relevant portions of the above decision are extracted hereunder:

An application for grant of maintenance has to be disposed of at the earliest. The family courts, which have been established to deal with the matrimonial disputes, which include application under Section 125 CrPC, have become absolutely apathetic to the same. The concerns and anguish that were expressed by this Court in Bhuwan Mohan Singh v. Meena and Ors., were to the following effect:-

*"13. The Family Courts have been established for adopting and facilitating the conciliation procedure and to deal with family disputes in a speedy and expeditious manner. A three-Judge Bench in **K.A. Abdul Jaleel v. T.A. Shahida 10** while highlighting on the purpose of bringing in the Family Courts Act by the legislature, opined thus:-*

"The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected there with."

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

As far as the first aspect is concerned, it is the duty of the Courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the Court. As regards the second facet, it is the duty of the Court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands

"still" on some unknown bank of the river. It cannot allow it to sing the song of the brook. "Men may come and men may go, but I go on forever." This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a pro-active approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. For the present, we say no more.

Thus it becomes the duty of the Judge of the Family Court as well as the Lawyers to ensure that there is no miscarriage of justice on account of delayed adjudication and by virtue of mechanical and unnecessary adjournments.

It is also invariably seen that the filing of petitions for interim relief contains lengthy pleadings and include every averment of the original petition which is totally unwarranted. The crux of the petition alone could be explained in the affidavit. Thus the Lawyer has to be very much sensitized so that he realizes his social responsibility than that of the legal obligation. It is also the prime duty of a lawyer to ensure that the allegations which are leveled against the opposite party contain some truth and it is supported by some material evidence. In most of the cases where there is a small suspicion the allegations are made in a very grave manner. While doing so the party leveling allegation considers that his/her case is strengthened. It has to be taken care that the position of law as settled in various decisions in this context gives a note of caution to the spouses who level allegations without substantiation. Obviously when a person levels certain grave allegation on the other spouse as regard to the fidelity or chastity, the duty is cast on the person leveling such allegation to prove those allegations. In case if such allegations remain unproved, such leveling of unproved allegations by itself is deemed to is cruelty caused on the other spouse. There are series of Judgments in this aspect.

In Malar Vijay vs. Kanthan and another wherein it has been observed that:

22. In Manisha Sandeep Gade v. Sandeep Vinayak Gade 14 a Division Bench of the Bombay High Court, while considering the question as to whether the unsubstantiated and unproved allegation of adultery leveled against the husband by the wife would amount to mental cruelty, has held that it will amount to mental cruelty. It was a case where the husband has sought for divorce on the ground of cruelty and while defending the petition, the wife in her written statement, apart from defending her and refuting the allegations made against her, had made several allegations against her husband and one such allegation was that he had illicit relationship with one Leena, wife of Vivek, and in fact, he wanted to marry her. While

considering the legal effect of such an allegation, the Division Bench has held as follows:-

"30. What we have to note is that when one party to the petition has sought divorce on some ground and the respondent to that petition does not merely defend it to get it defeated, but makes further serious allegations against the petitioner, it becomes a clear step towards the dissolution of the marriage. In the present matter, the petitioner has approached the Court seeking dissolution of his marriage. It is his case that there is a failure of the marriage and he seeks to point it out by invoking a ground available under the law. At that point of time, if the respondent makes a counter allegation in the written statement, that by itself shows a prima facie failure of the marriage.

31. In a matrimonial matter, one cannot apply the standard of stricter evidence. Nothing prevented her from establishing her allegations. The respondent could not have established the negative by leading any further evidence that the allegations made by the wife were false. The appellant had made the allegations. The burden was on her. She had failed to prove those allegations. Once she fails to prove those allegations and if those allegations are not in consonance with matrimonial relationship, and the husband complains that they have caused him agony, the inference that they constitute cruelty has to follow.

32. In the circumstances we are satisfied that the learned Judge was right in coming to the conclusion that the allegations made by the appellant wife were baseless and false and constituted a cruelty. He was, therefore, right in granting the decree of divorce on that ground. ..."

The Law is in respect of the petitions filed for divorce by mutual consent. The Act(s), though it be, The Hindu Marriage Act, The Special Marriage Act or The Divorce Act, mandates that where the spouses consent for divorce by mutual consent and file their petition, such filing of the petition amounts to their first motion to the Court. Thereafter the second motion in pressing their consent divorce petition shall have to be made after the lapse of the six months waiting period. The intention of the Legislators was in anticipation that the emotional stress of the spouses may come down and this waiting period of six months may cool them and enable the spouses to rethink over their decision of separation and thus the sacramental matrimonial tie could be saved. However this causes agony in certain cases where the marital tie could not work out anymore and where the spouses are separate for a long duration and where the wedlock has become a dead lock. The further waiting would agonize them. In such cases there was no ventilation to the estranged spouses.

*In this context it becomes incumbent to cite the decision of the **Honourable Supreme Court of India in Amardeep Singh Vs Harveen Kaur 19** wherein a question which arose for*

consideration was that whether the mandatory period of six months stipulated under Section 13 B (2) of the Hindu Marriage Act, 1955 (the Act) is mandatory for making the second motion or can be relaxed in any exceptional situations. The Apex Court on considering number of judge-made Laws, in order to determine the question whether the provision is mandatory or directory, applied the principles laid down in 2017 SCC ONLINE SC 1073 Kailash Versus Nanhku and others 20 and finally concluded that the provisions are not mandatory but directory. The Honourable Apex Court has formulated certain guidelines to the Subordinate Courts dealing with such matters in para 19 of the above

Judgment as follows:

- i) The statutory period of six months specified in Section 13 B(2), in addition to the statutory period of one year under Section 13 B(1) of separation of parties is already over before the first motion itself;*
- ii) All efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC /Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;*
- iii) The parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;*
- iv) The waiting period will only prolong their agony.*

In such cases, the waiver application can be filed after seven days of the first motion by stating the reasons for claiming the waiver of cooling period. When the above conditions are satisfied, the waiver of the waiting period of six months for the second motion could be waived off by the concerned Court, which will be at the discretion of the concerned Court.

The Apex Court has left it open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation. However such exercise of the discretion shall be in par with the above guidelines only. In cases where the spouses are litigating for years together, and where it is apparent that they are separated for more than one and half years, and where the records would show that the spouses have undergone mediation or conciliation and resulted in a failure in the pending proceedings, the exercise of the discretionary powers in waiving the statutory period of six months could be very well exercised, when the spouses finally settle down with the option to get separated by divorce through mutual consent. In case, where the parties have approached the Court for the first time seeking divorce by mutual consent, and when they request to waive the six months cooling period, the duty of the Judge and the Advocate is to verify whether the separation is

more than one and half years. Then comes the question of mediation or conciliation. The parties might appear determined. However the decision taken by the parties to get separated should be ascertained by referring them to mediation centre. Even after mediation, if it is found from the report of the mediator that the parties could not re-unite, then the Courts could proceed further to allow the waiver petition and put an end to the agony of the spouses.

Apart from that the Apex Court has observed that in conducting such proceedings the Court can also use the medium of **video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason** as may satisfy the Court, to advance the interest of justice. Hence it becomes the duty of the Advocate to explain to the above position, so that the spouses would not be taken too much stress of thinking about the waiting period of further six months, even in genuine cases also.

Another area of concern is that of the filing of Interlocutory Applications. The frequently filed petitions are that of the petitions for Interim Maintenance, Interim Custody of the Child, and return of articles. In certain cases, the need of the spouse for interim maintenance would be inevitable. Under desperate situation, such claim would be made. But in most cases, where the husband has filed the main petition for divorce and the wife opposes it, the petition for Interim Maintenance is filed by wife despite having sufficient means to maintain herself, with an only motive to either harass the husband, or to prolong the issue on the firm belief that the husband would rejoin her.

In some cases, the wife aims for lapse of certain period of time so that the husband might come up for a settlement. But a psychological approach would make us to understand that the husband gets aggravated on such petition for interim maintenance as he knows the financial capacity of the wife. This has to be approached in a sensitized way by the advocate, who has to advise party accordingly. Instead, more counseling sessions, or mediation sessions could be requested. The Courts are ready to concede to such requests of reference to counseling sessions, or mediation. The Evidence Act has no role to play in Family Court matters. In case of expert opinion like DNA test, the invoking of the provisions under section 45 of the Evidence Act is unwarranted. Section 12 of The Act deals with respect of approaching an expert to assist the Court. Hence the Courts as well as the Lawyers should be sensitized very much. The issues should be attempted to be settled at the budding stage by adopting subtle methods else, the small wear and tear would lead to the eruption of volcano.

The pre-litigation counseling could be one of the best solution which the Lawyers could adopt and advice their clients. The role of lawyers in assisting the Courts in referring

the matters to mediation centers or to the counseling sessions assumes much significance. Where a litigant is not able to understand the importance of settlement through counseling, mediation or conciliation it becomes incumbent on an advocate to explain to his/her client, the importance of such processes which would help the litigants to avoid the unpleasant adversarial procedure by which the second round of litigation by way of appeal could be avoided. Last but not the least, the Lawyers are the guiding lights to the litigants who struggle in dark in search of justice. It is also to be remembered that the best Judgments come from the bench where there is Good Bar. The litigants should be enlightened in respect of their rights, if not the Law would not come to their rescue would be worth quoting the legal maxim “Ignorantia facti excusat, Ignorantia Juris non excusat” which means that the Law excuses the ignorance of facts and not the ignorance of Law. Thus the role of a Lawyer becomes laudable when the righteous approach is made towards Justice by balancing the Equity coupled with Humanity.

Question No.2:- Procedures with reference to the relevant provisions of the family courts...

Answer no.2-

As I have already discussed in giving response to question no. 1 that:-

The main object of the Family Courts Act 1984 was to provide the opportunity of conciliation to the litigants and to pave way for speedy disposal. The Courts are provided with Special Powers under section 10 of the Act, wherein the Judge can formulate his own ways and means within the scope of Law, to help the litigants to arrive at a settlement.

The Family Court Act deals with the following procedures in achieving the object of creation of the family courts in deciding the family matters. The following relevant provisions of the Family Court acts which helps the court for speedy disposal of the case;-

- I. Section-6 provides for Counselor/ Officers and other employees of the court,
- II. Section-7 deals with the jurisdiction of the Family Court. It confers powers in a Family Court to exercise jurisdiction exercisable by any District Court or any subordinate Civil Court relating to a proceeding between the parties to a marriage or a decree of nullity of marriage, restitution of conjugal rights, authority to declare as to validity of the marriage. It has also the jurisdiction to pass an order or injunction in

circumstance arising out of marital relationship.

- III. Section-9 prescribes the duty of the Family Court to make efforts for settlement, for its settlement procedure has been laid down by the High Courts such as appointment of Counselors and Arbitrator. If in any suit or proceedings, at any stage, it appears to the family court that there is reasonable opportunity of settlement between the parties, it may adjourn the proceedings for such period.
- IV. section 10 of the Act, wherein the Judge can formulate his own ways and means within the scope of Law, to help the litigants to arrive at a settlement
- V. Section-11 provides for proceeding to be held in camera. On a plain reading of the aforesaid provision, it is limpid that if the family court desires, the proceeding should be held in camera and it shall be held if either of the parties so desires. It means once one party makes a prayer, it is obligatory on the part of the family court to do so. At this juncture, it is profitable to refer to certain provisions of the 1955 Act. Section 22 of the said act provides for proceedings to be in camera and stipulates that the proceedings may not be printed or published. Section 23 (2) of the 1955 Act enjoins that before proceedings to grant relief under this act, it shall be the duty of the court in the first instance, in every case, where it is possible to do so consistently with the nature and the circumstances of the case. It is worthy to note here that the reconciliatory measures are to be taken at the first instance and emphasis is on efforts for reconciliation failing which the court should proceed for adjudication.
- VI. Section-12 stipulates for assistance, medical and welfare expert for assisting the Family Court in discharging the function imposed by the Act.
- VII. The prime salient feature of the Act is that of **section 13**, which declines the rights of the parties to be represented by a legal practitioner as a matter of right. The object of the legislators was not to take away the rights of the parties in total. Instead the provision to the above section empowers the Court to seek the assistance of a legal practitioner as amicus curiae. The section is also silent about engagement of a pleader as amicus curiae by the parties themselves. Every litigant cannot be expected to have exposure to Law, practice and procedure. Certainly they require the assistance of a legal practitioner. The exact phrase employed in section 13 of the Act is that **“as of right, to be represented by a legal practitioner”**. **This does not take away the right of the Lawyer in total. In short, the object of the legislators was that the litigants shouldn't stay away from Court proceedings so as to be represented by their Lawyers and such exercise shall not be taken up as a matter of right. This**

in a way helps the Court to have a direct interaction with the litigants.

The provisions of section 10 (1) of the Act would indicate that the procedures laid down under the Code of Civil Procedure 1908 have to be followed. As regards to the marking of documents, the application of Evidence Act cannot be invoked.

The provisions of section 14 of the Act, lays down that any piece of paper could be received in evidence, whether or not it is relevant or admissible under the Indian Evidence Act 1872. The relevant provisions are extracted hereunder;

14. Application of Indian Evidence Act, 1872

A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872). Thus, it is inferred that the objections to the marking of the documents cannot be raised while the documents are being marked. At the most the party can nullify the veracity or the evidential value of the document during cross examination only.

The provision of section 15 and 16 of the Act lays down the procedure for recording evidence. The provisions lays down that the evidence shall not be lengthy and shall contain the memorandum of substance alone. A careful perusal of the above provision would make us to understand that there is no way made out for cross examination of a witness. The evidence shall have to be in formal character.

The provisions of section 15 and section 16 are extracted for a cursory glance:-

15. Record of oral evidence In suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record.

16. Evidence of formal character on affidavit

(1) The evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Family Court.

(2) The Family Court may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding summon and examine any such person as to the facts contained in his affidavit.

The above provisions though not lays down the right to cross examination of a witness, the

procedure of cross examination is followed so as to cull out the truth. The Code of Civil Procedure is very well applicable to this Act as per the section 10(1) of the Act. According to the Code of Civil Procedure, the right to cross examination is envisaged under Order XVIII Rule 4 (2). Thus the procedure of cross examination of a witness could be permitted at Family Courts.

Section-26 deals with the custody of child. It empowers the court from time to time to pass such interim order 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. (Santhini Vs. Vijay Venkatesh, pronounced by Hon'ble Supreme Court in Transfer Petition No. 422 of 2017).

Apart from the above act, Jharkhand high court has also framed rules for the disposal of the family court. The important rules are such as

- Rule 5(2) deals with the service of notices and summons to the parties through nazarat of civil court as per relevant rules laid down by the high court and in the manner as laid down by order 5 of the CPC, 1908.
- Rule 7 talks about creation of the counselling center attached to the family court.
- Rule 14 talks about securing of service of medical experts by the family court.
- Rule 15 says about the assistance of medical and welfare experts.

Question No 3:- Can the divorce suit be decreed on admission...

Answer No. 3.- Section-13(1) (i) (a) (i) (b) of Hindu Marriage Act 1955 deals about the grounds of taking divorce on cruelty and desertion either by the husband or wife. Section 13B of Hindu Marriage Act deals with divorce by mutual consent of the parties. The question arises when other parties in his/her admits the claim of the parties, can a decree be granted on admission when a suit has been filed u/S. 13 of Hindu Marriage Act.

In this context a land mark judgment has been passed by **Bombay High court in writ petition number 6066 2104 and the case name was Minal Nigam V Ravi Kalsi**, I am quoting the relevant portion of the aforesaid judgment as Hon,ble High Court of judicature at Bombay before coming into the conclusion has discussed the judgment of several High courts and Supreme court i.e as follows:-

“I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the petitioner has

instituted Petition under Section 13(1)(i-a) of the Act for divorce on the ground of cruelty. The Petition is instituted on or about 06.09.2013. The respondent has filed written statement as also counter claim on or about 29.10.2013. In the counter-claim, respondent has sought dissolution of marriage under Section 13(1)(i-a) and / or (i-b) of the Act. In paragraph 1, it is contended by him that the intention of the petitioner is to torture and harass him.

It is contended that it is he who has suffered mental and physical agony and harassment at the hands of the petitioner as detailed in the counter claim. In paragraph 16, respondent contended that the marriage is now beyond any reasonable hope of reconciliation. Petitioner has filed application exhibit 22/A under Order 12, Rule 6 C.P.C. in march 2014. “3. The original Petitioner / Respondent in the Counter Claim however admits that she has withdrawn from the Petitioner's society and deserted the Petitioner for a period of more than two years preceding the Counter Claim.”

10. Perusal of paragraph 3 extracted hereinabove shows that the petitioner admitted that she has withdrawn from respondent's society and deserted the respondent for more than 2 years preceding the counterclaim. Mr. Lalwani submitted that this is a clear cut admission of petitioner of ground contemplated under Section 13(1)(i-b) of the Act. The Court, therefore, ought to have passed decree of divorce on that ground. He submitted that serious consequences flow from admission of the petitioner that she had deserted the respondent for a period of more than 2 years preceding the filing of the counter-claim. Because of her admission, she will not be entitled to claim permanent alimony also. In view of Order 12, Rule 6 C.P.C., the Family Court ought to have passed decree and dissolved the marriage.

11. In order to appreciate this submission, it is necessary to consider the provisions of Order 12, which deals with admissions. Order 12, Rule 1 lays down that any party to a Suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party. Rule 5 thereof lays down that a notice to admit facts shall be in Form No.10 and admissions of facts shall be in Form No.11 in Appendix C, with such variations as circumstances may require. Order 12, Rule 6 reads thus, “6. Judgment on admissions.- (1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

12. The above extracted provision can be analyzed as under:

(a) Where admissions of fact have been made either in the pleadings or otherwise, whether orally or in writing,

(b) the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such conditions

13. In my opinion, a decree on admission is not a matter of right but rather discretion of Court, which discretion must be exercised in accordance with known judicial canons. Section 23(1) of the Act lays down that in any proceeding under the Act, whether defended or not, if the Court is satisfied that any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief then the Court shall decree such relief accordingly.

14. As noted earlier, the petitioner has filed Petition under Section 13(1)(i-a) for divorce.

15. Apart from that, in my opinion, perusal of Order 12, and in particular Rule 6 thereof shows that if party A gives admission, it enable party B namely opposite party to request the Court to pass decree on admission of party A. In the present case, party A namely the petitioner has given admission in paragraph 3 of her application exhibit 22/A and the same party is requesting the Court to pass a decree of divorce on admission under Order 12, Rule 6 C.P.C.

16. In the case of Savitri Pandey (*supra*), the Apex Court held that in any proceedings under the Act whether defended or not the Court would decline to grant relief to the petitioner if it is found that the petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated under Section 23(1) of the Act. No party can be permitted to carve out the ground for destroying the family which is the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties. In the case of Gajna Devi (*supra*), the wife had presented a Petition for judicial separation under Section 10 of the Act on 05.11.1965. It was ex-parte decreed on 30.03.1966. The husband instituted Petition for divorce under Section 13(1-A) on 19.07.1972. The decree for divorce was passed under Section 13 (1-A).

In that case the question that was agitated before the Single Judge of the Delhi High Court was that Section 23(1) of the Act prohibits the Court from granting the relief to the husband if he is taking advantage of his own wrong

17. In the case of Ram Kali (supra), similar contention was advanced. Mr. Lalwani relied upon paragraph 12 of that report and submitted that the object of Section 13(1-A) is in consonance with the modern trend not to insist on the maintenance of union which has utterly broken down. It would not be a practical and realistic approach, indeed it would be unreasonable and inhuman, to compel the parties to keep up the facade of marriage even though the rift between them is complete and there are no prospects of their ever living together as husband and wife. In that case, appellant had obtained decree for restitution of conjugal rights against the respondent on 17.03.1961. Respondent thereafter filed a Petition under Section 13(1-A)(ii) for decree of divorce against the appellant on 23.01.1965. The ground on which the respondent sought dissolution of marriage by a decree of divorce was that there had been no restitution of conjugal rights after passing of decree on 17.03.1961. The trial Court held that there was no restitution of conjugal rights after passing of the decree dated 17.03.1961. In appeal, the learned Single Judge confirmed the finding of the trial Court that there has been no restitution of conjugal rights after passing of the decree on 17.03.1961. After considering Section 13(1-A) of the Act, the Full Bench observed that the effect of that Section was that not only the spouse in whose favor a decree for judicial separation or for restitution of conjugal rights had been granted was entitled to present a petition for dissolution of marriage but even the other spouse against whom the decree for judicial separation or for restitution of conjugal rights had been awarded was also clothed with the right to present such a petition.

18. Mr. Moray relied upon Section 21 and proviso to Section 58 of the Evidence Act. Section 21 lays down that admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the cases covered by-

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a

statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

19. Section 58 lays down that facts admitted need not be proved. Proviso thereto lays down that the Courts may, in its discretion, require the facts admitted to be proved otherwise than by such admissions. Order 8, Rule 5 C.P.C. provides that allegation of fact in the plaint has to be specifically denied. Proviso to sub-rule (1) thereof lays down that the Court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. I have already held that the admission of the petitioner in paragraph 3 of the application, exhibit-22/A is a self-serving admission.

20. In the case of Bai Kanku Vs. Shiva Toya, 17 Bmbay 624 (F.B.), the Full Bench of this Court held that a decree for dissolution of marriage cannot be made merely on admissions and without recording any evidence. In the case of Sushila Mahendra Nanavati Vs. Mahendra Manilal Nanavati, AIR 1960 Bombay 117, the Division Bench of this Court held that under Order 8, Rule 5, it is well settled that both the plaintiff as well as the defendant must be held bound by the statement of facts in their respective pleadings. But under the proviso to Order VIII, Rule 5, the Court may, in its discretion require any fact admitted to be proved otherwise than by such admission. The proviso to Section 58 of the Evidence Act is also to the same effect. In matrimonial proceedings, there can be no judgment by default or admission. Even in the case of Pranjali Bingi (supra), the learned Single Judge of this Court held in paragraph 10 that merely because both the parties have prayed for same reliefs of divorce, on the basis of different set of facts, the Court does not get jurisdiction to pass order under Order 12, Rule 6 C.P.C.

21. In the light of the aforesaid discussion, I am of the opinion that the reliance placed by Mr. Lalwani on the above-referred decisions does not advance the case of the petitioner. In my opinion, the Family Court was right in holding that the petitioner was trying to take advantage of her own wrong. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed. Rule is discharged. In the circumstances, however, there shall be no order as to costs.

In the above context an another judgment passed by Delhi High Court in **M.M. Kashyap Vs. Surekha Kashyap**, has also expressed the same view and the relevant portion of the judgment is reproduced as herein below:-

In *Samar Ghosh vs. Jaya Ghosh*, a Full Bench of the Supreme Court laid down instances which may be relevant in dealing with the cases on mental cruelty, they are :-

"74. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behavior which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

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

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

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

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

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

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

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

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for

grant of divorce on the ground of mental cruelty.

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

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

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

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

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

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

8. In, *Naveen Kohli v Neelu Kohli*, AIR 2006 SC 1675', it was observed in para 61 as under:-

"61. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. Because of the change of circumstances and for covering a large number of cases where the marriages are virtually dead and unless this concept is pressed into services, the divorce cannot be granted. Ultimately, it is for the Legislature, whether to include irretrievable breakdown of

marriage as a ground of divorce or not but in our considered opinion the Legislature must consider irretrievable breakdown of marriage as a ground for grant of divorce under the Hindu Marriage Act, 1955."

9. In „Sanghamitra Ghosh v. Kajal Kumar Ghosh, MANU/SC/5143/2006', Supreme Court granted divorce to the parties in exercise of its powers under Article 142 of the Constitution.

10. Similarly, in 'Manjula vs. K.R. Mahesh, AIR 2006 SC 2750', on a Transfer Petition, the Court granted divorce because of irretrievable breakdown of marriage in exercise of its power under Article 142 of the Constitution.

11. For consideration of an application under Order 12 Rule 6 CPC admissions have to be unambiguous, clear and voluntary. The Court can pass judgment on admission only after giving due opportunity to the other side to explain the admission, if any made. This admission should be made only in the course of pleadings and the Court at any stage of the suit can make such order as it think fit considering the nature of admission. Court need not necessarily proceed to pass an order on the basis of such admission and can call upon the party to prove its case independent of the admission.

In view of the aforesaid decision, it is clear that admission has got no relevancy in a case filed under section 13 of the Hindu Marriage Act and there is no application of cooling off period which is essential when an application of divorce has been filed under section 13B of the Hindu Marriage Act.

Question no. 4:- Shared parenting...

Answer No. 4:- The answer of this question has been dealt with in a Judgment passed by the Apex Court in **Sheila B. Das Vs. P.R. Sugasree in Appeal (Civil) No. 6626 of 2004 and the relevant portion of the judgment is as follows;-**

We, therefore, feel that the interest of the minor will be best served if she remains with the respondent but with sufficient access to the appellant to visit the minor at frequent intervals but so as not to disturb and disrupt her normal studies and other activities.

Ordered:-

1. The respondent shall make arrangements for Ritwika to continue her studies in her present school and to ensure that she is able to take part in extra-curricular activities as well.
2. The respondent shall meet all the expenses of the minor towards her education, health, care, food and clothing and in the event the appellant also wishes to contribute towards the

upbringing of the child, the respondent shall not create any obstruction to and/ or prevent the appellant from also making such contribution.

3. The appellant will be at liberty to visit the minor child either in the respondent's house or in the premises of a mutual friend as may be agreed upon on every second Sunday of the month. To enable the appellant to meet the child, the respondent shall ensure the child's presence either in his house or in the house of the mutual friend agreed upon at 10.00 A.M. The appellant will be entitled to take the child out with her for the day, and to bring her back to the respondent's house or the premises of the mutual friend within 7.00 P.M. in the evening.

4. In the event the appellant shifts her residence to the same city where the minor child will be staying, the appellant will, in addition to the above, be entitled to meet the minor on every second Saturday of the month, and, if the child is willing, the appellant will also be entitled to keep the child with her overnight on such Saturday and return her to the respondent's custody by the following Sunday evening at 7.00 P.M.

5. The appellant, upon prior intimation to the respondent, will also be entitled to meet the minor at her school once a week after school hours for about an hour.

6. The appellant will also be entitled to the custody of the minor for 10 consecutive days during the summer vacation on dates to be mutually settled between the parties.

7. The aforesaid arrangement will continue for the present, but the parties will be at liberty to approach the Family Court at Thrissur for fresh directions should the same become necessary on account of changed circumstance.

Question no 5:- Practical difficulties in execution of an order for grant of maintenance under...

Answer No. 5:- Section 125 (3) Cr.P.C. empowers to sentence a person who fails to pay maintenance under Subsection 1 of Section 125 for an imprisonment for a term exceeding one month. The difficulty arises for the court with respect to realization of the arrears became due to regular default in making payment of maintenance amount awarded u/S. 125 of Cr.P.C.

Section 125 (3) Cr.P.C. deals only imprisonment for one month to each default.

The question comes for consideration that whether the court in exercise of power under subsection 3 of Section 125 Cr.P.C. is empowered to sentence such persons to imprisonment for a term exceeding one month?

The Hon'ble High Court of Gujarat in a case *Suo motu Vs. State of Gujarat* has dealt this matter by referring the judgment of several high courts, the relevant portion of the above judgment is being reproduced here in below-

8. Short legal controversy arising in this reference is whether in exercise of powers under Sub-section (3) of Section 125 of the Criminal Procedure Code, is it open for the Magistrate to sentence a defaulting husband in excess of one month when the default in making the payment exceeds one month.

9. Learned Public Prosecutor Mr. Sunit Shah appearing with learned APP Mr. Dipen Desai painstakingly took us through large number of decisions of various High Courts as well as the Apex Court, reference to which will be made at appropriate stages. It was primarily his contention that Section 125 of the Criminal Procedure Code has been enacted for quick respite to destitute wives, minor children and aged parents who are unable to maintain themselves. Sub-section (3) of Section 125 though provides for imprisonment for a term which may extend to one month, the same should be read in the context of the power of the Magistrate to impose such sentence for every breach of the order.

10. Before interpreting the above provisions, we may note the decisions of the Apex Court as also the decisions of this Court on the issue.

10.1. In the case of *Shahada Khatoon*(supra), the Apex Court considering the question whether the learned Single Judge of the Patna High Court correctly interpreted the provisions of Sub-section (3) of Section 125 of the Criminal Procedure Code by directing that the Magistrate can sentence only for a period of one month or until payment, if sooner made, observed as already noted, that language of Sub-section (3) of Section 125 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.

10.2. In the case of *Shantha v. B.G. Shivnanjappa* 4 SCC 468, the Apex Court observed that it must be born in mind that Section 125 of the Criminal Procedure Code is a measure of social legislation and it has to be construed liberally for the welfare and benefit of the wife and daughter. It is unreasonable to insist on filing successive applications when the liability to pay the maintenance as per the order passed under Section 125(1) is a continuing liability. It may, however, be noted that in the said case earlier decision of *Shahada Khatoon* (supra), was not brought to the notice of the Apex Court.

10.3. In the case of *Kuldip Kaur v. Surinder Singh*, AIR 1989 SC 232, the Apex Court made the following observations:

'Sentencing a person to jail is a 'mode of enforcement'. It is not a 'mode of satisfaction' of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance

who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge.....

.....Monthly allowance is paid in order to enable the wife and child to live by providing with the essential economic wherewithal. Neither the neglected wife nor the neglected child can live without funds for purchasing food and the essential articles to enable them to live.'

10.4. Before the Apex Court delivered its judgment in Shahada Khatoon's case, learned Single Judge of this Court in the case *Bhana Rama v. Bal Ladu*, 1973 Cr.LJ 780, opined that the principle laid down by Section 488(3) is that the Magistrate has the jurisdiction to award imprisonment to a defaulting husband in respect of default in payment of each month's arrears. As long as that principle is not violated, the Magistrate has the power to deal with a consolidated application for recovery of arrears for more than one month in such reasonable and just manner as he thinks fit. It was held that there is no reason why the Magistrate cannot make on one application different orders for different periods of sentence thereby adjourning the matter from time-to-time and showing consideration and leniency to the defaulting husband. In the case, however, the learned Judge noted that it was not in dispute that had the wife made 12 independent applications for recovery of arrears of 12 months 12 orders could have been passed by the learned Magistrate in those applications directing the husband to pay the amounts claimed by the wife or in default of the payment awarding the husband independent sentences in respect of such 12 defaults.

10.5. As already noted, learned single Judge of this Court in the case of *Smt. Kalpana Jayeshkumar Thakkar*, (supra) was of the opinion that the Apex Court in *Shahada Khatoon's* case (supra), did not lay down that the Magistrate cannot impose imprisonment in excess of one month for default of payment of maintenance for several months.

10.6. In the case of *Vali Mahmed Abdul v. State of Gujarat* (supra), the ratio in the case of *Shahada Khatoon* was understood differently and the learned Single Judge was of the opinion that the Magistrate could not have sentenced the husband for a period exceeding one month.

10.7. In a judgment dated 23.8.2007, passed in Special Civil Criminal Application No. 894 of 2007, in the case of *Mariyamben Abdulbhai Mansuri v. State of Gujarat*, learned Single Judge of this Court observed that both the Courts below have materially erred in not passing the order of imprisonment of one month qua each default.

10.8. In an order dated 16.10.2007 passed in Special Criminal Application No. 1566 of 2007,

learned Single Judge of this Court made the following observations:

'3. Under Section 125(3) of the Criminal Procedure Code, powers of the competent Court to send the defaulting party to jail are restricted and apparently no consolidated order of sending the petitioner to jail for a period of one year could have been passed. On this short ground alone, the petition is required to be allowed. However, it does not mean that wife is remediless or that through other legal means, she cannot execute the order for payment of maintenance, if there are any arrears. The observations made in the previous paragraph also do not mean to suggest that if wife files periodical applications in case of default by the husband, the same cannot be entertained by the learned Magistrate even if case under Section 125(3) of the Criminal Procedure Code is made out.'

11. At this stage, we may note that before the decision of the Apex Court in the case of *Shahada Khatoon (supra)*, almost unanimously all High Courts of the country had taken the view that it is open for the Magistrate to sentence the defaulting husband for a period in excess of one month if the default exceeds one month and the limitation on the power of the Magistrate to impose such a sentence not exceeding one month is relatable only to each month of default for payment of maintenance. However, the situation changed completely post *Shahada Khatoon's* decision and various High Courts have understood the ratio of the decision to mean that in any case the Magistrate cannot pass order of sentencing the husband in excess of one month. We will advert to these decisions at a later stage.

12. Sub-section (1) of Section 125 makes a special provision for the Magistrate to award maintenance to a wife, parents, minor children or even major children not being a married daughter who by reason of any physical or mental abnormality or injury are unable to maintain themselves. Such a provision, as observed by the Apex Court in the case of *Shanthav. B.G. Shivananjappa(supra)*, is a measure of social legislation enacted for the welfare and benefit of wife, minor children, infirm major children and aged parents who are unable to maintain themselves.

13. Sub-section (1) of Section 125 empowers the Magistrate to provide for monthly allowance for maintenance at such monthly rate as the Magistrate thinks fit. The Magistrate can also award interim maintenance during the pendency of such proceedings as the Magistrate may consider reasonable.

14. Sub-section (1) of Section 125 thus provides for monthly allowance to be paid to the wife, children, mother or father, as the case may be, at such monthly rate as the Magistrate thinks fit. It can thus be seen that the maintenance that the Magistrate awards under Section 125(1) becomes payable every month. Sub-section (3) of Section 125 provides for summary

procedure for recovery of such maintenance allowance so fixed by the Magistrate, if any person so ordered fails without sufficient cause to comply with the order. It is provided that in such a case, for every breach of the order, the Magistrate may issue warrant for levying the amount due in the manner provided for levying fines and may sentence such person for the whole or any part of each month's allowance for the maintenance including interim maintenance remaining unpaid to imprisonment for a term which may extend to one month or until payment if sooner made. Sub-section (3) of Section 125 thus empowers the Magistrate to award sentence upto one month for the whole or part of each month's allowance remaining unpaid. Limitation on the power of the Magistrate to impose imprisonment for a term not exceeding one month, therefore, has to be viewed in the background of the purpose for which such imprisonment is provided. As already noticed, Section 125(1) refers to monthly allowance to be fixed by the Magistrate for maintenance of wife, child, father or mother on such monthly rate as the Magistrate thinks fit. Upon failure of a person to comply with such an order, it is open for the Magistrate for every breach of the order to issue warrant for levying the amount due and further to sentence such a person for the whole or any part of each month's allowance remaining unpaid to imprisonment for a term which may extend to one month. To our mind, therefore, the Legislature never intended that regardless of the extent of the default on the part of the husband, the Magistrate can impose sentence only up to one month. True interpretation of Section 125(3), in our view, would be that for each month of default in payment of maintenance, it is open for the Magistrate to sentence the defaulting person to imprisonment for a period of one month or until payment if sooner made.

In the case of *M. Rajkumar @ Muthaiah Vs. Commissioner* passed by Hon'ble Madras High Court has also discussed the point of sentence of imprisonment of one month and affirmed the view of the Hon'ble Gujarat High Court and passed thus-

That the legal position is very clear that the Magistrate can entertain separate applications from the persons who entitled to receive such maintenance or even entertain a common application for several months of default and pass an appropriate order and, if found unnecessary a defaulted person up to a maximum period of one month for each month of default.

Question no 6:- Principles of computation...

Answer No. 6:- Principles of Computation of maintenance U/s 125 crpc has been discussed by the Hon,ble High court in a decision reported in **Lalit Bhola vs Nidhi Bhola &**

Anr. on 12 February, 2013 in Crl.M.C.75/2012, the relevant part of the aforesaid judgment is reproduced here in below-

6. While awarding maintenance under Section 125 Cr.P.C. or maintenance pendente lite under Section 24 of the Hindu Marriage Act or the maintenance under Section 18 of the Hindu Adoption or Maintenance Act, Courts are not only guided by the income of the husband in determining the amount of monthly maintenance. The Higher Courts have held that several factors including the status of the parties, liabilities, if any, of the husband and number of persons to be maintained by the husband would be some of the factors to be taken into consideration. In Alok Kumar Jain v. Purnima Jain, 2007(96) DRJ 115, a co-ordinate Bench of this Court while examining grant of maintenance, pendente lite, observed as under:

"10. Law under [Section 24](#) of the Hindu Marriage Act is well crystallized. From the judicial precedents, factors which can be culled out as required to be kept in mind while awarding interim maintenance are as under

- (i) Status of the parties,
- (ii) Reasonable wants of the claimant,
- (iii) The income and property of the claimant,
- (iv) Number of persons to be maintained by the husband,
- (v) Liabilities, if any, of the husband,
- (vi) The amount required by the wife to live a similar life style as she enjoyed in the matrimonial home keeping in view food, clothing, shelter, educational and medical needs of the wife and the children, if any, residing with the wife and
- vii) Payment capacity of the husband.

11. Further, where it is noted that the respective spouses have not come out with a truthful version of their income, some guesswork has to be resorted to by the Court while forming an opinion as to what could possibly be the income of the 2 spouses. This guesswork has to be based on the status of the family, the place where they are residing and the past expenses on the children, if any." In Dev Dutt Singh v. Smt. Rajni Gandhi, AIR 1984 Del 320, the learned Single Judge of this Court(Avadh Behari

Rohtagi, J.) observed that there cannot be any mathematical formula for award of the maintenance amount such as 1/3rd or any other proportion of the husband's income. It was held that the law has to operate in a flexible and elastic manner to do complete justice between the parties. The factors to be taken into consideration were laid down in paras 12 to 15 of the judgment, which are extracted hereunder:

"12. The substance of these judgments is this. Each case must be determined according to its own circumstances. No two cases are alike. These cases do not lay down any proposition of law. On the facts of the particular case the Court adjudicated what allowance will be reasonable to award "having regard to the petitioner's own income and the income of the respondent". If the present case illustrates anything it is this that rigid adherence to "one-third" rule may not always be just. Section 24 is not a code of rigid and inflexible rules, arbitrarily ordained, and to be blindly obeyed. It leaves everything to the Judge's discretion. It does not enact any mathematical formulae of one-third or any other proportion. It gives wide power, flexible and elastic, to do justice in a given case.

13. In most cases the standard of living of one or both of the parties will have to suffer because there will be two households to support instead of one. When this occurs, the Court clearly has to decide what the priorities are to be and where the inevitable loss should fall. Generally speaking, wife is the financially dependent spouse. She is potentially likely to suffer greater financial loss from the dissolution of marriage than the husband. For her support the Court has to award a reasonable amount. The cases decided under the Act should not be followed slavishly. In the words of Searman L.J. :

"It would be unfortunate if the very flexible and wide- ranging powers conferred upon the Court should be cut down or forced into this or that line of decisions by the Courts." (Chamberlain v. Chamberlain, (1974) 1 All ER 33, 38 CA).

14. What is the right figure of periodical payment is essentially a practical decision on the facts. The ultimate evaluation is left to the adjudicator. On the statutory hypothesis it is an indefensible position to hold that the wife in the present case is not entitled to anything because she is already earning Rs.1,270/- per month which comes to one-third of the husband's income.

15. What is a proper proportion of the husband's income to be given to the wife as maintenance pendente lite is a question to be determined in the light of all the circumstances of a particular case; the very flexible and wide-ranging powers vested in the Court make it possible to do justice." Although, there is no strict formula to award a particular percentage of the husband's income towards maintenance of the wife, normally the Courts have been taking 1/3rd of the husband's income towards maintenance of the wife. This may be increased or decreased keeping in view the circumstances of each case, like the number of persons to be maintained by the husband and other liabilities. In *Sudhir Diwan v. Smt. Tripta Diwan & Anr*, 1/3rd of the husband's income was awarded towards the wife's maintenance. In *Jagdish Prasad Sharma v. Smt. Sangeeta Sharma*, a maintenance of `225/- per month was awarded in favour of the wife on the husband's income of `602/- per month.

It is also important to mention here that the object of the proceeding 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. It provides a speedy remedy for the supply of food, clothes and shelter to the deserted wife. The test is whether the wife is in a position to maintain herself in the way she usually used to in the place of her husband. In *Bhagwan V. Kamla Devi*, AIR 1975 SC 83, it was observed that wife should in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with the status of the family. The expression to maintain herself does not mean that the wife must be absolutely destitute before she can apply for maintenance u/S. 125 of Cr.P.C. The Apex Court in a case of *Manish Jain Vs. Akansha Jain* has held thus-

“An order for maintenance pendente lite or for case of a proceeding is continual. But the circumstances when the wife or husband who makes a claim over the same has no independent income sufficient for her/ his support or to meet the necessary expenses of the proceeding. The financial position of the wife's parent is also immaterial. The court must take into consideration the status of the parties and the capacity of the spouse to pay maintenance whether the applicant has any independent income sufficient for his/her support. Maintenance is always dependent upon factual situation. The court should therefore mould the claim for maintenance determining the quantum based on various factors brought before the court.

Section 24 of Hindu Marriage Act empowers the court in any proceeding under the Act, if it appears to the court that either the wife or the husband as the case may be

has no independent income sufficient for his/her support for necessary expenses of the proceeding. Heading of Section 24 of the Act is maintenance pendente lite and expenses of the proceeding. The section, however, does not use the word maintenance but the word support can be incorporated to mean as Section 24 is intended to provide for maintenance pendente lite. The court exercises a wide discretion in the matter of granting alimony pendente lite but the discretion is judicial and neither arbitrary nor capricious. It is to be guided on sound principle of matrimonial law and to be exercised within the ambit of provision of the Act and having regard to the object of the Act.”

Question No.7:- Difference in jurisdiction of the courts under the Courts and Wards Act and Minority and Guardianship act...

Answer No. 7:- Section 2 of the Hindu Minority and guardianship Act 1956 clearly reveals that the provision of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of the Guardians and Wards Act 1890. The section speaks that both Act are complementary. In view of the expression “ save as hereinafter expressly provided” the provisions of this Act have to be given effect to under section 28 of the Guardianship Act, a testamentary guardian can alienate the minor’s property, whereas, u/s 8(2) of Hindu Minority and Guardianship Act read with section 4(b) every guardian including a testamentary guardian must obtain prior permission of the court for alienating the property.

The procedure for making an application for the appointment of a guardian for the undivided interest of a minor in a Hindu undivided family is not provided in H.M.G.Act 1956, Procedure laid down in the Guardian And Wards Act has to be followed.

Differences in jurisdiction of the courts are concerned Hon,ble Apex court has given his view in **ABC V. State(NCT DELHI)** in Civil appeal No.5003/2015 in the context of Section 7 and 11 of Guardians and wards Act and section 6 to 8 of Hindu Minority and guardianship Act which is as follows-

‘Family and personal law- Guardian and wards Act section 7 and 11- interpretation of, should be in secular context and not in the light of tenets of parent’s religion-Even if Christians unwed mother seeking guardianship of her child born out side wedlock is in disadvantaged position in comparison to Hindu counterpart, who in view of section 6(b) of Hindu minority and guardianship Act is natural guardian, Guardianship Act has to be interpreted on the basis of legislative intent irrespective of religion of parties- Hindu Minority and guardianship act 1956,- section 6 to 8. Family and personal law- Guardian and Wards Act- section 7-

Appointment of guardian of child born outside wedlock-- if mother is sole caregiver of child while putative father remains uninvolved and unconcerned, mother application for declaring her as sole guardian deserves acceptance.

Further held that- Parents in section 11 should be construed to mean mother alone when she is sole caregiver of child, Section 11 being purely procedural can be construed to attain intendment of Act i.e to protect welfare of child.

The apex court has further held that- Guardian And Wards act 1890- Ss 7,11and 19- guardianship and custody matter- Parents under **Guardians and Wards Act 1890, Section-19 is of significance that deals thus;-**

Guardians not to be appointed by court in certain cases - Nothing in this chapter

Section-19 is of significance, even though the infant son does not independently own or possess any property, in that it specifically alludes to the father of a minor. It reads thus

" 19. Guardian not to be appointed by the court in certain cases.- Nothing in this Chapter shall authorise the court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person-

(a) of a minor who is a married female and whose husband is not, in the opinion of court, unfit to be guardian of her person; or

(b) of a minor whose father is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor, or

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor." (emphasis supplied)

8. We must immediately underscore the difference in nomenclature i.e. " parents in Section 11 and "father" in Section 19, which we think will be perilious to ignore.

9. It is contended on behalf of the State that Section 11 requires a notice to be given to the " parents" of a minor before a guardian is appointed; and that is postulated by Section 19, a guardian cannot be appointed if the fatqher of the minor is alive and is not, in the opinion of the court, unfit to be the guardian of the child. The impugned judgment is therefore in accordance with the Act and should be upheld. It seems to us that this interpretation does not impart comprehensive significance to Section 7, which is the quintessance of the Act, However, before discussing the intendment and interpretation of the Act, it would be helpfull to appreciate the manner in which the same issue has been death with in other statutes and spanning different legal systemts across the globe.

10. Section 6(b) of the Hindu Minority and Guardianship Act, 1956 makes specific provisions with respect to natural guardians of illegitimate children, and in this regard gives primacy to the mother over the father. Mohammedan Law accords the custody of illegitimate children to the mother and her relatives. The law follows the principle that the maternity of a child is established in the woman who gives birth to it, irrespective of the lawfulness of her connection with the begetter. However, paternity is inherently nebulous especially where the child is not offspring of marriage. Furthermore, as per Section 8 of the Succession Act, 1925, which applies to the Christians in India, the domicile of origin of an illegitimate child is in the country in which at the time of his birth his mother is domiciled. This indicates that priority, preference and pre-eminence is given to the mother over the father of the child concerned.

Question no. 8:- major differences in procedure for adoption...

Answer No. 8:- Hon,ble Apex court in **Union Of India & ors. V. Ankur Gupta I &ors** in Civil appeal no.2017-2020 of 2019 has discussed this which is as follows-

Eligibility of prospective adoptive parents.-

1. The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.
 2. In case of a couple, the consent of both the spouses for the adoption shall be required.
 3. A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.
 4. A single male is not eligible to adopt a girl child.
 5. Any other criteria that may be specified in the adoption regulations framed by the Authority
10. Section 58 deals with procedure for adoption by Indian Prospective adoptive parents living in India, which is to the following effect:-

Procedure for adoption by Indian prospective adoptive parents living in India.-

1. Indian Prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a Specialized Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.
2. The Specialized Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legal free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority.
3. On the receipt of the acceptance of the child from the prospective adoptive parents along

with the child study report and medical report of the child signed by such parents, the Specialized Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

4. On the receipt of a certified copy of the court order, the Specialized Adoption Agency shall send immediately the same to the prospective adoptive parents.

5. The progress and well-being of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the Authority

Procedure for inter-country adoption of an orphan or abandoned or surrendered child.-

1. If an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian Prospective adoptive parent despite the joint efforts of the Specialized Adoption Agency and State Agency within sixty days from the date the child has been declared free for adoption, such child shall be free for inter-country adoption.

Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.

2. An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children.

3. A non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

4. The authorised foreign adoption agency, or Central Authority, or a concerned Government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority.

5. On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialized Adoption Agencies, where children legally free for adoption are available.

6. The Specialized Adoption Agency will match a child with such prospective adoptive

parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency.

7. On receipt of the acceptance of the child from the prospective adoptive parents, the Specialized Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

8. On the receipt of a certified copy of the court order, the specialized adoption agency shall send immediately the same to Authority, State Agency and to the prospective adoptive parents, and obtain a passport for the child.

9. The Authority shall intimate about the adoption to the immigration authorities of India and the receiving country of the child.

10. The prospective adoptive parents shall receive the child in person from the specialized adoption agency as soon as the passport and visa are issued to the child.

11. The authorised foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption, in consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority.

12. A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority.

Pradip Kumar Choubey

Principal Judge

Family Court

Bokaro

Q1. *Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the Family Court. Discuss the impediments and possible remedies.*

Ans 1. **Tools & Techniques For Speedy Disposal**

1. *Sensitization of member of Bar to try to mediate the matter between the parties before moving to court at their instance or to take assistance of Mediators, Conciliators, psychologists for restoration of peaceful marriage life.*

2. *Advocate engaged starts with **prelitigation conciliation** after assessing the mindset of the party and intensity of dispute between them.*

3. *Counsel to avoid drafting humiliating or attacking kind of pleadings so that the parties not feel offended by its words at least at the first instance.*

4. *When matter arrived to Court the judge initially try to refer the matter to conciliators and to mediators. Try to avoid passing orders to file pleadings or reply till the matter returned back unsuccessfully from mediation or conciliation. The time of limitation to file W.S be relaxed on that ground. The object is that the replies in the W.S may enhance the acrimony between the parties.*

5. *Counsel to Avoid to file interim petition for maintainence till process of mediation / conciliation completed. In urgency an oral prayer be made to the Court to direct the Husband to pay reasonable amount for maintainence till the mediation / conciliation last on consent, as often such application ruin the prospect of reunion.*

6. *Once the matter failed to settle in mediation / conciliation the Court once more try from its own end to settle the matter as more often the parties consider more seriously the words of Court than of mediators and conciliators.*

Premlata Tripathi, Addl Principal Judge, Addl Family Court, Ranchi

7. *But in all cases of mediation / conciliation the Court must be vigilant that only reasonable and essential time be granted for the process.*

8. *Once the process is over without any success the Court take up the matter for its speedy trial and in course of it no unnecessary adjournment be granted.*

9. *Family Court has power to allow or disallow appearance of lawyer in Court and excercising that power it can regulate all the delay tactics and techniques like praying for unnecessary adjournments, filing of lengthy and frivolous petitions, disturbing of the smooth functioning of court, failed to proper counselling of parties etc. Either by the parties or their lawyers. If the Court feels that the Advocate concerned is not discharging its duty in accordance to the spirit of Family Court Act immediately he /she be warned and be replaced by appointing Amicus in their place.*

10. *The Court wherever applicable take evidence on affidavit and in ordinary course excercising its power under Family Court Act limits calling of the witnesses in Court if their presence is not required. In case if they called for no Lengthy crossexamination be allowed.*

11. *Depositions if recorded only in form of breif memorendum of substance and not word by word of the witnesses.*

12. *Considering the status of the parties evidence liberally be recorded on Video Conferencing which not only save time of the court but also save the parties from unnecessary harrasment of appearng in Court.*

13. *Evidences be recorded and completed within a prefixed time period. Before commencement of evidence, Court with the consent of the parties, considering their reasonable difficulties, prepare a time table for it, relegiously stick on the same and conclude the evidence within that period.*

14. *The same be the procedure for final arguments. If the parties shows any difficulties they were directed to file their written submissions and that having only relevant points.*

15. *Court must write a concise Judgment with reasons on the issues. Unnecessary dealing of statements of witnesses or documents, not relevant to the issue, be avoided.*

Impediments & Remedies

1. ***Personal appearance of parties*** : *Parties residing outside jurisdiction, women and women with children, persons in temporary job having no provisions of leave are facing serious problem when directed to appear in person in different stages moreso when legal practitioner be barred by the Court.*

Remedy is to permit agent including legal practitioner atleast for purposes of appearance if not to conduct the case. Even they be allowed to appear on behalf of parties initially at first instance at process of conciliation and mediation. Amicus/legal aid be provided to conduct cases of such litigants to help them out under strict monitoring of the Court to safeguard their interest.

2. ***Delays and backlogs*** : *Mandate of family court is to conduct cases in non adversarial equistarian mode with application of **conciliation** as its prime consideration but till date the object of the same has not yet been acheived. Still the matters are dealt in regular manner as an ordinary litigation of civil courts. It is too painful for the deserted ladies more particularly those with infants in their laps, poor, destitutes, illetrate or semi litterate, to face such litigation for such a long period and most of them finally succumb and their cases were dismissed on one or other reasons.*

Premlata Tripathi, Addl Principal Judge, Addl Family Court, Ranchi

*Remedy is to adopt **humanatarian** approach by the Courts, to provide adequate assistance to such parties at all levels and stages of proceeding. Court to take all steps for early disposal of their cases in fixed time frame with minimum number of dates and use tools of ADR at first instance so that matter not be dragged in trial. The "Act" (Family Court Act) by its provisions, S10(3), 13 and 14 etc. mandate to conduct the proceeding in simpler way than complexity as in trial of regular suits.*

*Further Courts have to implement the recommendation of **∝The Comittee of Empowerment of Women** like:*

(i) Information Centers to be setup for their assistance

(ii) Publication of pamphlets/proforma in regional languages mentioning the list of documents required to file in such cases in Courts.

(iii) Conducive and friendly atmosphere for the litigants.

(iv) Requirement of simplified drafting qua complex, cumbersome legal draft.

3. Adopting of best practices to diminish impediments:

*(a) **In camera proceeding or restricted entry norms** wherever it required. More particularly Where women are humiliated by obscene allegations.*

(b) Abolition of Court fees

*(c) **Adequate Infrastructural facilities** : Each court must have adequate waiting rooms, spacious court rooms, Children complexes, lady toilets, Stress management and*

child counseling services, cabins for conciliators, services of marriage counsellors, trained staff, readily assistance of NGOs of that field.

Q 2. *In what manner and to what extent the procedure in family courts can be evolved for speedy disposal of cases? Explain with reference to the relevant provisions of The Family Courts Act and Rules.*

Ans 2. **Relevant provisions :**

1. Section 10: *The Courts are provided with Special Powers under Section 10 of the Act, wherein the Judge can formulate his own ways and means within the scope of Law, to help the litigants to arrive at a settlement.*

Section 10(3): *Now again the Judge of the Family Court has ample powers under Section 10(3) of the Act to have a conciliation with the parties.*

2. Section 13: *The salient feature of the Act is that of, which declines the rights of the parties to be represented by a legal practitioner as a matter of right. The object of the legislators was not to take away the rights of the parties in total. Instead the provision to the above section empowers the Court to seek the assistance of a legal practitioner as **amicus curiae**.*

3. Section 6: Appointment of Counselors: *The Judge of a Family Court shall prepare a list of Counselors who are well versed in counseling and such list shall be submitted to the Honourable High Court. On receipt of the list, the Honourable High Court would approve the panel of counselors for the year. Such counselors shall be attached with the respective Family Courts. The number of Counselors shall be determined by the State Government in consultation with the High Court.*

4. **Section 23(2)(b)** : *The State Government in consultation with High Court to frame rules wrt the roles and responsibilities of a counselor are not defined under the Act.*

5. **Section 10 (1)**: *The provisions of section 10 (1) of the Act would indicate that the procedures laid down under the Code of Civil Procedure 1908 have to be followed.*

6. **Section 10 (1) r.w Section 10(3)**: *Provides power to Family Courts to take liberty from strict adherence of provisions of CPC in the intrest of Justice.*

7. **Section 14** : *The provisions consists that any piece of paper could be received in evidence, whether or not it is relevant or admissible under the Indian Evidence Act 1872. As regards to the marking of documents, the application of Evidence Act cannot be invoked.*

8. **Section 15 and 16** : *Consists the procedure for recording evidence. The chief examination of the petitioner is done by way of an **affidavit**. The evidence shall not be lengthy and shall contain the memorandum of substance alone. The evidence shall have to be in formal character. Even granting oppurtunity to Cross examine a witness is under controll of family court as the above provisions not*

lays down the right to cross examination of a witness. However the Court if thinks fit could be permitted it vide Order XVIII Rule 4 (2) CPC.

It helps to check the practice of lengthy and piece meal cross examination just to make an attempt to shatter the confidence of the witness or to cause delay of trial. The Court can invoke its power under section 13 of this Act if the Counsel cross examning of the witness violating the mandate of speedy disposal of cases pending in Family Courts. It also help Court to prevent Counsels from asking scandalous questions or humilating a women witness in dock.

Premlata Tripathi, Addl Principal Judge, Addl Family Court, Ranchi

In the nutshell the Act has provisions firstly to save institution of marriage and reunion of couples at its first object and with the same aim and object it has also provided laws for speedy disposal of the matter.

*It is apparent that the Act has provided discretion to Court to formulate its own way of proceeding to fulfill its goals and in course of the same it may take liberty not to adhere with the settled procedure of law in absolute terms. It is more apparent in the provisions related to **receiving or recording** of evidence. Processes has been simplified.*

It has provisions of appointing trained counsellors and psychologist and take aid of NGO working in the field for better solution of the dispute which also helps the Court in speedy disposal of the matter in compliance to the spirit of law.

The case laws by which the interpretation of laws has been settled are as follows:

*(i) **Leela Mahdeo Joshi v Mahadev S Joshi AIR1991 Bom 105**: Mentioned the Aim and Object of the Act is delivering Instant Justice and humanitarian and considerate approach towards the parties.*

*(ii) **Gurubchan Kaur v Preetm Singh** Judgment of Honble Allahabd High Court: Defined Speedy disposal is the aims and objects of the Act and has referred provisions therein for it.*

*(iii) **Komal Padukone v Principal Judge Family Court, Bangalore AIR1999Kar427**:*

*Humanitarian and considerate approach towards the parties. Permitted Agent or legal practitioner of parties for purposes of appearance and differentiate the stage of **Appearance of parties** in Court to that of **Representation in proceeding** as mentioned in **Act**.*

Q 3. In a matrimonial suit for divorce filed by the husband on the ground of cruelty and desertion the wife appears and admits desertion but makes counter allegation of cruelty. Can the divorce suit be decreed on the ground of desertion on admission? Will the situation be different if there is no allegation of cruelty by the husband? Whether the limitation of cooling off period apply in such cases.

Ans 3.

Principles of settle law laid down relevant to the issues in question:

1.Principles of settle law laid down relevant to the issues in question:1.The settled proposition of law in civil proceedings is that the principle of proof of a fact is established on a preponderance of possibility and the the person pleading cruelty is not required to prove his case beyond a reasonable doubt.

If the evidences on record points out to the existence of a particular fact, then the said fact can be accepted as having been proved.

The expression "cruelty" has not been defined under the HMA. Cruelty can be mental or physical. It is easy for a party to prove physical cruelty, but mental cruelty depends on various factors.The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational,family and cultural

Premlata Tripathi, Addl Principal Judge, Addl Family Court, Ranchi

background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

Any conduct of such a character as to cause in the mind of any person a reasonable apprehension that it will be harmful or injurious for him/her to live with his/her wife/husband comes under definition of cruelty .

To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life.

It is difficult to laid down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

Premlata Tripathi, Addl Principal Judge, Addl Family Court, Ranchi

*The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a **spouse's conduct** have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent.*

Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system.

Therefore, cruelty in matrimonial behaviour defies any definition.

Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula.

Cruelty in matrimonial cases can be of infinite variety--it may be subtle or even brutal

and may be by gestures and words.

Therefore, there is no mathematical formula to assess cruelty. If the consistent behaviour of a spouse is of such a nature as to causes pain, discomfort or it brings disrespect or disrepute to the other spouse, such behavior would constitute cruelty.

Evidence of contemporaneous nature plays an important role as it may reveal the thinking and attitude of the parties towards each other at the relevant time. Such evidence is usually found in the form of documents like letters written by the parties to each other or to their friends and relatives or recorded in any other document of contemporaneous nature.

False police complaints would result in mental cruelty.

Unfounded allegation of adultery is a serious allegation amounting to cruel conduct the position of law in this regard has come to be well settled and declared that disgusting levelling accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extramarital relationship is a grave assault on the character, honour, reputation, status as well as the health of the party. Such aspersions of perfidiousness attributed to a person more particularly a lady viewed in the context of an educated Indian wife and judged by Indian conditions and standards would amount to worst form of insult and cruelty, sufficient by itself to substantiate cruelty in law`

Unsubstantiated allegations if levelled, amounts to mental cruelty and is a ground for divorce under Section 13(1)(i-a) of the Act.

Failing to substantiate the accusation of this nature even on the yardstick of preponderance of evidence that would have lowered the image of the party in the eyes of his / her society and peers would certainly constitute cruelty.

Premlata Tripathi, Addl Principal Judge, Addl Family Court, Ranchi

Now on the first issue where the divorce filed by the husband on the ground of cruelty and desertion and the wife appears and admits desertion but makes counter allegation of cruelty the law requires that the parties has to prove the factum of their allegation of cruelty by adducing evidences in support of it and that be tested by the court on principle of preponderance of probability.

How that be proved is in nutshell discussed above. They have to prove it by producing contrapaneous documents like letters etc of the relevant time of cruelty. That be proved by the fact that unfounded bald allegations of adultery, extramarital relations, unchastity etc has been levelled against them and the same were found baseless, without having any substance, by Court of law or any legal authority.

Which of the party proved it, the Court will decide in his/her favour.

Thus in the present case if the husband wants decree in his favour he need to prove:

- (i) that his wife committed cruelty upon him*
- (ii) he also has to rebutt that no cruelty has ever been committed by him upon his wife*
- iii) Factum of separation;*
- iv) Animus deserendi;*
- v) that he is not responsible for creating any circumstances which lead to the respondent/wife to leave his company as he cannot be allowed to take advantage of his own wrongs; (Section 23 of Hindu Marriage Act)*
- vi) The concerted efforts made by the petitioner/husband to bring back his wife and on making such efforts, the wife has refused to return to matrimonial home*

without any just cause or lawful excuse.

(vii) that of no reason, she deserted her for a continuous period of not less than two years.

In the present case since the said desertion has all ready been admitted hence the husband doesnot required much to prove this fact. However to succeed, not only he has to prove the factum of cruelty committed upon him by his wife but also to rebutt the allegation levelled on him that he has committed cruelty upon his wife.

However in counter to it, it is sufficient for the wife to prove cruelty of such a nature in part of husband which left no option before her to continue with her husband and compelled her to desert him. If proved the admitted desertion not going to help the husband to find a decree of divorce in his favour and justify the act of desertion of wife.

What is Cruelty and in which form and manner it be called to be committed has already been dealt in in aforesaid pargraphs.

In the second situation:

(i) where there is no allegation against the husband of committing any cruelty against his wife

(ii) and the desertion as per statute is admitted by the wife without any lawful reason or excuse

(iii) and the husband has also proved cruelty committed upon him by her wife then in the aforesaid circumstances he deserves the Decree of divorce prayed for.

It is pertinent to mention here that the desertion admitted must be in confirmity to the statutory provision vide Section 13(1)(ib), otherwise the husband has also to prove that the said desertion by his wife is of an uninterrupted period of not less than two years.

Premlata Tripathi, Addl Principal Judge, Addl Family Court, Ranchi

As far as application of limitation of cooling off period is concerned in the first condition where the continuous separation for a period of two years before the filing of petition for dissolution of marriage vide Section 13(1)(ib) is admitted by the wife or in the later one where the same is proved by the husband, the limitation of cooling off period does not apply.

It is further to clarify that the husband is entitled to decree even on the sole ground of either desertion by his wife without any reason or lawful excuse or on the ground of cruelty committed upon him.

The important judgments relied upon are as follows:

- (1) Dr. N.G. Dastane vs. S. Dastane, AIR 1975 SC 1534*
 - (2) A. Jayachandra Vs. Aneel Kaur AIR 2005 SC 534*
 - (3) Samir Ghosh vs Jaya Ghosh (2007) 4 SCC 511*
 - (4) Ravi Kumar vs Julmidevi (2010)4SCC 476*
 - (5) Dev Narayan Haldhar vs Anushree Haldar (2003)11SCC 303*
 - (6) GVN Kameshwar Rao vs G. Jabilli (2002)2SCC296*
 - (7) R Balasubramanyam vs Vijaylakshmi Balasubramanyam (1999)7SCC311*
 - (8) (2003) 6 SCC 334*
-

Q 4. *Due to strained relations between the parents, a child who ideally needs the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective considerations to be kept in mind in awarding "Shared Parenting" orders. Discuss in the light of latest case laws on the point. SHARED PARENTING*

Ans 4.

Shared Parentage System in India:

There are two types of shared parenting models :

(1) The first is shared responsibility parenting :The non-custodial parent shares economic and decision-making responsibility and participates to a greater extent in the child's life.

Each parent retains the same powers, responsibilities and authority over the child, though the child lives with the custodial parent. the system allow for the parents to share the guardianship of the child.

(2) The second is shared access parenting:In the latter model, however, the non-custodial parent is granted physical access to the child. In this model, the child will live at alternative intervals with both parents. The responsibility for the child's welfare falls solely on the parent in custody at the prevalent time. The focus of this model is on sharing access' ie, the amount of time the child spends with each of the parents, and not sharing responsibility.

*There are **three** approaches to joint custody related to the two models of shared parenting discussed above.*

The first is joint legal custody, where both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child, even though the child's primary residence may only be with one parent.

The Second model is joint physical custody, where both parents share physical and custodial care of the child.

Finally, the third model is any combination of joint legal and joint physical custody, which the court deems to be in the best interest of the child.

Although joint custody is not specifically provided for in Indian law but Family Court Judges do use this concept at times to decide custody disputes.

At present, in general joint custody, arrangements are being made between the parents on weekly basis or the minor child was directed to be with the parents month wise or six months with one parent and six months with other every year.

Shared Parenting and Child Support

What is child support ?

Child support is not defined in any legal instrument, Act and laws in India in this context except reference may be found in HMA where provision of Childs maintenance exists. Till date in Indian context it is understood as the amount payable by non custodian parent to that of the parent having custody of the child for the Child's maintenance. However it is merely a monetary support.

In shared parenting the court may pass orders on child support if it deems such an order necessary. In shared parenting arrangements there no longer exists a binary between the parents, wherein one parent is the custodial parent and the other, the non-custodial parent, as both parents share the custody of the child. In such cases it be presumed that each of the parent will take care of the child in its part of custody and thus Courts generally not pass such orders of Child Support however this concept is not proper when appreciated in the interest of the child as there exists all possibility of difference in financial, earning capacity and real income of the parents and thus it effects the Childs maintenance during different phase of Custody hence it is mandated that the Court even in case of shared parenting pass necessary Child Support orders considering the welfare of the Child. In that case Court may, even in that phase in which a particular parent not having custody of the child(non custodial parent at that instance), direct such parent to pay a reasonable amount of money to the Child who is in custody of other parent(custodial parent at that particular time). Such issues arise because in India predominantly the father is the earning parent and the mother is non earning or having lesser earning, in that situation Court should pass child support orders.

One more aspect to be discussed here in shared parenting is related to Domestic violence and its effect on the Child. At this aspect the Court shall adopt Rebuttable Presumption Model, which is in general practice in foreign Countries and is in welfare of Child. In this model once it is proved by preponderance of probability that one of the parent is an offender the Court restrain itself to handover custody of the himself Child to such parent. The prima facie offender parent get custody of child only after he got exonerated from such charges. The Court even in such condition if in

exigency or otherwise it thinks fit to order to handover custody of such child to such parent the order must have specific reason for it.

Witnessing Domestic violence seriously harm the young child. It creates severe emotional and psychological problems. Learning disabilities and impaired intellectual may develop in such child. It traumatises him and causes shock, fear and guilt to him.

In conclusion the Courts must pass orders of Child Support in case of shared parenting and to review its implementation after certain period. It also amend and alter its order in course of such review in the interest and welfare of the child.

It be also better to adopt rebuttable presumption stand while passing orders of share parenting to safeguard the interest and welfare of the Child.

Apart from the aforesaid conditions the Court has also to consider following facts:

(I) Fulfillment of Emotional need of the child by the parents applying for child's custody.

(ii) Age, health and mental conditions of the child

(iii) Child's own preference. However while considering this fact Court must remain conscious that whether the preference of the child is voluntary, natural and free and not be biased because of poisoning of the mind of the child against the non custodial parent by the custodial parent.

(iv) Child welfare means material welfare like pleasant home, comfortable standard of living, adequate care to maintain good health both physically and mentally.

(v) the parent applying for child's custody could provide Stability and security to the child in all terms .

(vi) love, affection, care and guidance by the parent applying for child's custody

(vii) the warm and compassionate relationships etc.

Some of the Important Cases having guidelines with regard to shared parenting are:

(I) Smt Anjali Kapoor vs Rajiv Bajjal

(ii) Walker vs Walker & Harrison reported in 1981 NewZe Recent law 257

(iii) Law Commissions Reports

(iv) K M Vinaya vs B R Srinivas 2013 SCC Online Kar 8269

Q 5. What are the practical difficulties in execution of an order for grant of maintenance under section 125 Cr.P.C? Discuss the available options in law before a family judge for the realisation of the maintenance amount awarded under section 125 Cr.P.C. with special reference to the case laws.

ANS: 5

Practical difficulties in execution of an order for grant of maintenance under section 125 Cr.P.C:

*1. **Apathy and Collusion of police:** Notices and warrant issued from the family Court, as a practise followed from before the constitution of family Court by the Magistrate Court, be sent to the police for their execution but the same were not executed by the police on one or the other pretext on time even in some cases not return them at all. It happened as at one hand the applicants are poor and helpless whereas in the other hand the O.Ps are comparatively in better financial position and hence capable to influence the police in one way or other and in turn they either delay the process or even not execute them or not sent the execution report to the Court.*

*2. **Apathy of Revenue Official:** Since maintenance has to be recovered as sale of properties of defaulting O.P which has to be done through revenue officials particularly the Tehsildar The process of recovery in most of the cases either be delayed or not at all complied on one or other evading reasons in collusion to or under influence of financially better O.Ps. The revenue official at times even not bother to convey the reasons of non recovery and the case remain pending for years for the same on cost of suffering of poor applicants in hard need of maintenance amount.*

*3. **Apathy of Government official or official of private sector:** While executing orders of recovery of maintenance amount from the salary of their employee or attachment of salary. Much delay caused in the execution of the orders or if executed not in true spirit. Sometimes they try to facilitate them or started favouring them being their employee.*

3. *It is bitter to accept but practically true that either the police or the revenue officials not take the orders of the Family Court as seriously as that of Magistrate Court since they have to visit Magistrate Courts regularly in their ordinary course of business and in that regard the Family Court is toothless. To show its authority the Family Court **has to take coercive actions against them** which **multiply** the work load of the already overburdened Family Courts.*

*For proper execution the Family Court needs **exclusive workforce**, including police personnels as well as revenue officials, exclusively under its authority and administrative control. The provisions of execution be also made strict with better coverage and **stringent and deterrent punishment** to the defaulter. Its a serious issue to redress with immediate effect as due to this lapse the entire spirit of constitution of the family Courts become futile.*

It is the need of the hour to orient and sensitize the police personnel, the government officials and others involved in process of execution of Family Courts orders for its better implementation lest the entire purpose of its constitution become futile. Further the Government also launch welfare schemes in favour of the poor destitute applicant and to pay a minimum amount to them till the execution of Court orders so that they have some respite to live and attend Court proceeding.

Case Laws:

1. **1992 CrLJ 658 (P&H):** *Court cannot pass order for arrest without resorting to coercive measures under section 421 Crpc like attachment of property etc.*
2. **Rajendra vs Pramilla 1993 CrLJ 3813 (Ori) DB:** *Issuance of distress warrant is a condition precedent for exercise of the power to sentence conferred by that section even though this is not specifically mentioned in therein but the applicant to wait till measures u/s 421 be exhausted.*
3. **Ramesha vs Mallamma 2006 CrLJ 4811(Kant):** *Held issuance of arrest warrant by the executing Court for executing of the order of maintenance is in consonance with the procedure.*
4. **Non-payment of arrears.** - *Where the husband, who has admitted the non-payment of arrear, has neither paid nor made any representation in this behalf such person could*

be arrested and to sentenced to imprisonment. [P.Ataullah vs Memunisa Begum 1984CrLJ 1522 A.P]

5. Order of Attachment. *Once the Court has issued a writ of attachment of salary in default of payment of the arrears or current maintenance, without sufficient cause, the salary when becomes due or any part thereof shall be liable for attachment. If during any particular month, maintenance is paid, the writ of attachment shall remain dormant. In any case of default, until the salary becomes payable to the husband at the end of the month, the writ of attachment shall continue to remain dormant so as to revive at the end of the month.[1990(1) CRIMES 331]*

Only the property of the husband whether movable or immovable over which he has got exclusive domain can be attached for realizing the amount of maintenance. The property of any other person cannot be attached for realizing the said maintenance amount. U.P.Tiwary vs St. of U.P[2007(2)AllLJ508(511)]

6. Serving sentence does wipe out liability to pay: *Mere sentencing the defaulting party to jail, imprisonment does not wipe out the arrears which were outstanding. The defaulted arrears continued to be the liability of the defaulting petitioner.1991 CrLJ766(Bom)*

7. Notice in execution: *The Court should first issue a notice to the person against whom the order of payment is so made to show cause as to why he is not making the payment and after enquiry,the warrant of attachment should be issued. [1991 (3)Crimes 38(Raj.DB]*

Notice to the defaulter shall be issued before the issuance of warrant of arrest. K.Nityanandan vs Rajamani[1980 CrLJ 1191(Ker)]

Before issuing a warrant for levying the maintenance amount due as a fine, the husband should be given an opportunity to show cause against the order for issue of a warrant. [Pradeep Kumar vs Minu Bhowmic 1985 CrLJ 1802(Gau)]

8. Defence in execution: *Until the original order for maintenance is modified or cancelled or varied or vacated, its validity survives. It is enforceable and no plea that there has been co-habitation in the interregnum or that there has been a compromise between the parties, can hold good as a valid defence for non-payment. Bhupinder Singh vs Daljeet Kaur [1979CrLJ 198,199]*

A Magistrate who is required to execute the order of maintenance cannot cancel it.

[1990CrLJ2506(A.P)]

9. Applicability to both modes of recovery: The first proviso of s 125 CrPc would apply to both the limbs or to both the methods of recovery contemplated under sub-s. (3), and this view is in consonance with the harmonious construction of the proviso, as held by the Division Bench of the Calcutta High Court. [AIR 1967 Cal 136.]

Q6. *What are the principles for computation of maintenance in a case under section 125 Cr.P.C.? How will the quantum of maintenance vary in case the competent court has awarded maintenance under Domestic Violence Act and/or under section 24 of the Hindu Marriage Act.*

Ans 6.

Principles for computation of maintenance :

Relevant provision:

Section 125 CrPc: *Order for maintenance of wives, children and parents.*

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

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

1. Subs. by Act 45 of 1978, s. 12, for " Chief Judicial Magistrate" (w. e. f, 18- 12- 1978).

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) 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 his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time

Premlata Tripathi, Addl Principal Judge, Addl Family Court, Ranchi

direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means. Explanation.- For the purposes of this Chapter,-

(a) " minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b) " wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due: Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

(4) No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

Relevant considerations for computation of maintenance:

In catena of cases Honble Apex Court and different High Courts has laid down guidelines for the Courts in this regard and the same are as follows:

- (i) the social status,*
- (ii) the conduct of parties*
- (iii) the way of living of spouse*
- (iv) whether the wife is earning or not and if she is earning whether it be sufficient to maintain her in the same standard at par to her matrimonial home/ standard of living of her husband.*
- (v) Capacity of the spouse to pay maintenance.*
- (vi) the same is the parameters for other claimants apart from the wife.*

The relevant caselaws are as follows:

- (i) V. Aggarwal vs Sarla V Aggarwal (2012) 7 SCC 288: the Court has directed to consider the social status, the conduct of parties, the way of living of spouse and other ancillary aspects before passing orders while granting permanent alimony.*
- (ii) Chatarbhuj vs Sita Bai AIR 2008 SC 530: In this case the Honble Apex Court held that earning of wife is not a bar for her for applying for her maintenance. The **test** is whether the wife is in position to maintain her in the way she was used to in place of her husband.*
- (iii) the same is the ratio laid down in AIR 2015 SC 554, Sunita Kachwaha case.*
- (iv) Kalyan Dey Choudhary vs Rita Dey Choudhary, Civil Appeal 5369 of 2017: it is held that in case of salaried husband 25% of his salary be appropriate to be awarded as maintenance to her wife. It is further held that amount awarded be considered considering the Capacity of the spouse to pay maintenance. [However this direction is passed on an application filed u/s 25 HMA but]*

As far as enhancement of maintenance is concern the court may consider price rise, inflation, other financial status in general, affecting the parties, caused to them due to passage of time. Changed health status of the applicant or the O.P is also one of the ground. [CASE LAW: Bharat Singh vs State of U.P 2011(97) AIC 360 All.]

In the recent Judgments the Honble Apex Court and Honble High Courts in
(i) Sangeeta Kumari vs State of Jharkhand

(ii) *Manish Jain vs Ankansha Jain*, (Civil appeal-4615/2017 r.w SLP CIVIL NO.7670/2014)

(III) *Vikas vs State of U.P 2014 DMC 373 ALL*

(IV) *Juberia Abdul Mazid vs Atif Iqbal Mansoori 2014 (10)SCC736*

It is held that maintenance under D.V Act is different and in addition to order of maintenance under 125 of Crpc or any other law. A family court has power to adjust the amount of maintenance already awarded u/s 125 Crpc and D.V Act 2005.

In Sangeeta Kumari vs State of Jharkhand Honble Jharkhand High Court has held vide para 12 referring Judgment of Honble Apex Court in Sudeep Choudhary Vs. Radha Choudhary reported in (1997) 11 SCC 286 that --

- "the order of maintenance under Section 125 Cr.P.C is adjustable against the awarded amount of interim alimony in the matrimonial proceedings and is not to be given over and above the same."

vide para 16 of the same judgment it is held that --

" From perusal of the aforesaid judgments, it would emerge that although the provision for granting maintenance under Section 125 Cr.P.C and Section 24 of the Hindu Marriage Act are different, the husband is not obliged to pay maintenance twice rather he is only required to pay higher amount amongst the two. Thus, the argument of the petitioner that the amount of Rs.2000/- per month ordered to be paid by the respondent No.2 to the petitioner under Section 24 of the Hindu Marriage Act, 1955 in M.T.S No. 12/2011 is not adjustable against the award of maintenance granted under Section 125 Cr.P.C, is not tenable. The maintenance awarded under Section 24 of the Hindu Marriage Act is a maintenance pendente lite and after the conclusion of the matrimonial case, the same will have no effect, however, the maintenance granted under Section 125 Cr.P.C will continue till the same is altered on the changed circumstances as has been mentioned under section 127 of the Cr.P.C. Mere filing of a petition under Section 24 of the Hindu Marriage Act or grant of maintenance thereunder, does not preclude a person to file a petition under Section 125 Cr.P.C. However, when there are orders of maintenance both under Section 125 Cr.P.C and Section 24 of the Hindu Marriage Act, 1955, the claimant shall not be entitled to get maintenance simultaneously, rather, he/she would

be entitled to get only the higher amount of maintenance out of both the provisions. Section 24 of the Hindu Marriage Act, 1955 has been introduced with a laudable object of ensuring maintenance to a party to the proceeding so as to enable him/her to maintain during the pendency of such proceedings. Section 125 of the Cr.P.C has also been introduced to ensure maintenance to women, children as also old and infirm poor parents who are unable to maintain themselves. Thus, the object of both the sections are to provide maintenance. If the interim alimony under Section 24 of the Hindu Marriage Act, 1955 is allowed to be paid to the claimant by the other party over and above the amount being paid under Section 125 Cr.P.C, the purpose of granting maintenance would itself frustrate overburdening the person against whom the said order has been passed."

In the case of Mahuya Nanda Vs. Tapan Nanda & Anr. reported in 2008 SCC Online Cal 742, a Bench of the Calcutta High Court has held as under:

"However, the husband is not at all obliged to pay maintenance twice, once in terms of the order passed by the Civil Court and then in terms of the order passed in connection with a proceeding under section 125 of the Code of Criminal Procedure. He is only required to pay such amount of maintenance which is higher amongst the two, meaning thereby if the amount of maintenance granted in connection with matrimonial suit and the amount of maintenance granted in connection with proceeding under section 125 of the Code of Criminal Procedure are different, the husband is only obliged to pay the higher amount out of the same not to pay both in terms of the order passed by the Civil Court as well as the Criminal Court."

As far as the answer of the second part of this question is concerned according to the law laid down it is now well settled that:

*(i) the maintenance under one Act is different and in addition to order of maintenance under any other law and the Court Concerned has **power to adjust** the amount of maintenance already awarded u/s 125 Crpc and D.V Act 2005.*

(ii) provisions for granting maintenance under different Acts are different, the husband is not obliged to pay maintenance twice rather he is only required to pay higher amount amongst the two.

Q 7 *What is the difference in jurisdiction of the courts under the Courts and Wards Acts and Minority & Guardianship Acts in appointment of Guardians of a minor?*

Ans 7. *As far as guardianship of minor in India is concerned the two important Acts which govern the field are Guardians and Wards Act, 1890 and Hindu Minority and Guardianship Act, 1956 and the Relevant provisions of the said Acts are as follows :*

A) Applicability of the Act

Guardians and Wards Act, 1890(GWA): This Act is a secular law regulating questions of guardianship and custody for all children within the territory of India, irrespective of their religion

*Hindu Minority and Guardianship Act, 1956(HMGA): **Hindu** Minority and Guardianship Act provides various provisions concerning the matters of guardianship and custody of **only minor Hindu children.***

B) Distinction of Guardian under the Guardian and Wards Act and Hindu Minority & Guardianship Acts 1956-

*As per Section 4 (2) of Guardian and Wards Act- **"guardian"** means a person having the care of the person of a minor or of his property or of both his person and property*

*As per Section 4 (b) of Hindu Minority & Guardianship Acts 1956- **"guardian"** means a person having the care of the person of a minor or of his property or of both his person and property, and includes'*

(i) a natural guardian,

(ii) a guardian appointed by the will of the minor's father or mother,

(iii) a guardian appointed or declared by a court, and

(iv) a person empowered to act as such by or under any enactment relating to any Court of wards.

According to section 6 Hindu Minority and Guardianship act 1956

*The **natural guardians** of a Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are :*

*(a) in the case of a **boy or an unmarried girl** the **father, and after him, the mother:***

***provided that** the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;*

(b) in the case of an illegitimate boy or an illegitimate unmarried girl the mother, and after her, the father;

(c) in the case of a married girl the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section'

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.'In this section, the expressions "father" and "mother" do not include a step-father and Step mother

On perusal of the aforesaid provisions it appears that the word Guardian is defined in different manner in the former Act it is simply a person having a care of the person or the property of a minor.

Vide this definition any one who fits in the criteria be the guardian subject to section 7 & 8 of the said Act

whereas in the later Act there is a well defined and classified relatives primarily the natural guardian (defined vide S 6 of this Act) who can be the guardian of a particular child at first instance and thereafter the person mentioned to be the guardian in the Will of the father and mother of the minor. It is not open for all or

anybody to claim himself a guardian rather a restricted and well defined person can be a claimant

C) Point to be consider by the court while appointing the guardian under the Guardian and Wards Act and Hindu Minority & Guardianship Acts 1956:

Provision under section 17 of Guardians and Wards Acts-

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

*(3) If minor is old enough to form an intelligent preference, the Court may consider that preference. 1[***]*

Provision under section 13 of Hindu Minority & Guardianship Act -

(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

*Section 13 of the **Hindu Minority & Guardianship Acts** declares that in deciding the guardianship of a Hindu minor, the welfare of the minor shall be the paramount consideration' and that no person can be appointed as guardian of a Hindu minor if the court is of the opinion that it will not be for the welfare' of the minor. "The following can be concluded with respect to guardianship under the **Hindu Minority & Guardianship Acts** .*

The relevant and landmark Case Laws touching this topic which settle the laws in this field are as follows :

i) In *Surinder Kaur Sandhu v. Harbax Singh Sandhu*, (1984) 3 SCC 698 Honble court held that Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor.

ii) An order of custody of minor children either under the provisions of the Guardians and Wards Act, 1890 or the Hindu Minority and Guardianship Act, 1956 is required to be made by the court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the child are **some of the relevant factors** that have to be taken into account by the court while deciding the issue of custody of a minor, *Gaytri Bajaj v. Jiten Bhalla*, (2012) 12 SCC 471 .

iii) While taking a decision regarding custody or other issues pertaining to a child, "welfare of the child" is of paramount consideration, *Sheoli Hati v. Somnath Das*, (2019) 7 SCC 490.

iv) It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the court. It is the welfare of the minor and of the minor alone which is the paramount consideration, *Saraswatibai Shripad Vad vs Shripad Vasanji Vad*, 1940 SCC OnLine Bom 77.

v) Children are not mere chattels nor are they toys for their parents. **Absolute right of parents** over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so

that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them, Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42.

VI) Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy-duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration, Mausami Moitra Ganguli v. Jayant Ganguli, (2008) 7 SCC 673

*vi) In Gita Hariharan v. Reserve Bank of India the constitutional validity of Section 6(a) was challenged as violating the guarantee of equality of sexes under Article 14 of the Constitution of India. The Supreme Court considered the import of the word 'after' and examined whether, as per the scheme of the statute, the mother was disentitled from being a natural guardian during the lifetime of the father. The Court observed that the term 'after' must be interpreted in light of the principle that **the welfare of the minor is the paramount consideration** and the constitutional mandate of equality between men and women. The Court held the term 'after' in Section 6(a) should not be interpreted to mean 'after the lifetime of the father,' but rather that it should be taken to mean 'in the absence of the father.' The Court further specified that 'absence' could be understood as temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise. Therefore, in the above specific situations, the mother could be the natural guardian even during the lifetime of the father.*

*Section 13 of the HMGA declares that, in deciding the guardianship of a Hindu minor, the **welfare of the minor shall be the 'paramount consideration'** and*

*that no person can be appointed as guardian of a Hindu minor if the court is of the opinion that it will not be for the 'welfare' of the minor. Further it has been held that any other interpretation of the word will go against the the **constitutional guarantee of the Gender Justice.***

*However it is now well settle that in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court 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. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the child. Hence whatever be the criterias either preferential guardianship or natural guardianship or any other qualifications mentioned in the different laws related to child custody all these criterias and qualifications be ignored when the child welfare come to the fore before the Court and in that condition irrespective of any other thing the court shall consider and decide the custody of the child on the ground of one and only factor that is where and in whose custody the safety, security, welfare and interest of the child remain. **The welfare of the child is the paramount consideration above all and on this point all the landmark Judgments are in agreement.***

Q 8. *What are the major differences in procedure for adoption by Indian prospective adoptive parents living in India and inter country adoption? What are the eligibility criterion for prospective adoptive parents? Discuss with relevant provisions of law and latest case laws.*

Ans:8 The relevant provisions related to the issues:

*--> **The Juvenile Justice (care and protection) Act 2015 Chapter VIII** deals with adoption.*

Section 56 *sub-section (1) provides that adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of the Act, the rules made thereunder and the adoption regulations framed by the authority. Section 57 deals with eligibility of prospective adoptive parents, which is as follows:-*

Section 57: *Eligibility of prospective adoptive parents-*

(1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

(2) In case of a couple, the consent of both the spouses for the adoption shall be required.

(3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

(4) A single male is not eligible to adopt a girl child.

(5) Any other criteria that may be specified in the adoption regulations framed by the Authority

-- Section 58 deals with procedure for adoption by Indian prospective adoptive parents living in India, which is to the following effect:-

Section 58: *Procedure for adoption by **Indian prospective adoptive parents living in India.***

(1) Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a Specialised Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.

(2) The Specialised Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority.

(3) On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(4) On the receipt of a certified copy of the court order, the Specialised Adoption Agency shall send immediately the same to the prospective adoptive parents.

(5) The progress and well-being of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the Authority.

*The next provision, is Section 59, which provides for procedure for inter-country **adoption of an orphan or abandoned or surrendered child**, which is as follows:-*

Section 59: *Procedure for inter-country adoption of an orphan or abandoned or surrendered child.-*

(1) If an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parent despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption:

Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such

inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.

(2) An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children.

(3) A non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

(4) The authorised foreign adoption agency, or Central Authority, or a concerned Government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority.

(5) On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialised Adoption Agencies, where children legally free for adoption are available.

(6) The Specialised Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency.

(7) On receipt of the acceptance of the child from the prospective adoptive parents, the Specialised Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(8) On the receipt of a certified copy of the court order, the specialised adoption agency shall send immediately the same to Authority, State Agency and to the prospective adoptive parents, and obtain a passport for the child.

(9) The Authority shall intimate about the adoption to the immigration authorities

Premlata Tripathi, Addl Principal Judge, Addl Family Court, Ranchi

of India and the receiving country of the child.

(10) The prospective adoptive parents shall receive the child in person from the specialised adoption agency as soon as the passport and visa are issued to the child.

(11) The authorised foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption, in consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority.

(12) A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority.

*Thus section 58 and 59 provides for two different mechanisms for adoption. As per Section 59(1), if an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parents despite the joint effort of the Specialised Adoption Agency and State Agency within **sixty days** from the date, the child has been declared legally free for adoption, such child shall be free for inter-country adoption. Thus, **sixty days** period has to be elapsed from the date when the child has been declared legally **free for adoption** .*

Relevant case Laws:

(i) Union of India Vs. Ankur Gupta and another.:2019 SCC Online SC 262

(ii) Karina jane creed v union of india SLP No.13627/2019 : No objection certificate from the diplomatic mission of his country in India of their country is mandatory for a foreigner prospective adoptive parent or a prospective adoptive parent of Indian origin or an prospective adoptive parent who is an overseas citizen of India.

Answers Submitted By: Premlata Tripathi, Addl Principal Judge, Addl Family Court, Ranchi.

Q. No. 1- Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the Family Courts. Discuss the impediments and possible remedies.

Answer- The following tools and techniques for speedy disposal of matrimonial and other matters are as follows ;

Judges should obtain more information and resources to help them understand, evaluate, communicate, assess intervention, strategies and support resilience in response to trauma. They also wanted more training on how to communicate and listen to children and women; further more they wanted increased information about vicarious traumatization and compassion fatigue including personal and institutional prevention and intervention strategies.

The impediments are;

i. The police do not execute the processes on one pretext or the other and on most occasion they are not returned at all. Since the courts do not have their own police force, there is a scope for collusion between husband and the police, both at the time of serving the notice as well as during the execution proceedings.

ii. Maintenance has to be recovered from sale of properties of defaulting husbands, which has to be done through revenue officials, particularly the circle officer. If they can not recover the amount, they do not convey to the court, the reasons for non-recovery.

iii. Government departments do not cooperate in effecting the orders for salary attachments. In many cases, when salary warrants are sent to the drawing and disbursing authority for recovery of maintenance, they are either not given effect to or only small amounts are sent, which cause un-necessary delays and hardship to needy women.

iv. Many a times, the husband plead inability to comply with the order and welcome a prison stint as they can able to avail of free government hospitality during this period. And if the defendant/respondent is given a civil incarceration, then the plaintiff withdraws as they are unable to put the payment for civil incarceration.

The possible remedies are of deployment of independent police force for Family Courts and issue of suitable direction to different department particularly to police and revenue officials in case of attachment and sale of immovable agricultural lands.

Q.No. 2-In what manner and to what extent the procedure in Family Courts can be evolved for speedy disposal of cases? Explain with reference to the relevant provisions of the Family Courts Act and Rules.

Answer- The following manner and procedure can be evolved for speedy disposal of Family Courts cases are as under;

To pre-mediate each case after appearance of both the parties and try to solve the grievances of each parties at initial stage. In the process, some relatives of both the sides may be given the charge to solve the case outside the court. And even then any difference of opinion or bargain persists then refer it for mediation.

In the process the judge should, while disposing;

i. Strive to provide a fair and respectful environment inside and outside of their court room.

ii. listening carefully and consciously the views of the parties, letting them speak directly, when possible.

iii. Let them aware of the legal consequences individually in separate sessions and ask for solution in deciding peacefully after giving introspection time of one hour for the case to each party separately and asked for sharing of honest mutual appraisal and dialogue in two separate cool and fragrant room. In which for help a para legal woman volunteer matured in family cases should be employed as per their requirement.

iv. Ask for their final report individually.

v. The court should write their solutions upon the utterances of the parties. Call for joint sessions. Decide taking the legal consideration having flexibility in the proceeding immediately.

45% cases could be solved. For next 35% is to be given for mediation fixing another date for appearance before mediator and one another date for appearance in the court.

20% would be solved in mediation and for next 35% cases general recourse should be taken.

Special recourse should be taken u/s 10 of family Act for execution of the award.

Q.No. 3. In a matrimonial suit for divorce filed by the husband on the ground of Cruelty and desertion the wife appears and admits desertion but makes counter allegation of cruelty. Can the divorce suit be decreed on the ground of desertion on admission? Will the situation be different if there is no allegation of cruelty by the husband ? Whether the limitation of cooling off period apply in such cases ?

Answer - Here in this case , when the husband files suit for divorce on the ground of cruelty and desertion and the wife appears and admits desertion but makes counter allegation of cruelty, it is a case of **constructive desertion**. For decree of divorce on the ground of desertion the plaintiff have to proof that the respondent has withdrawn from his society without any reasonable cause.

The allegation of cruelty, by respondent here as alleged is the cause which is the circumstances and condition which has compelled respondent to leave the society of plaintiff the divorce suit can not be decreed. No allegation of cruelty by the husband, does not matter as the husband if not alleges it goes in favour of the wife.

No, in such cases limitation of cooling period does not apply as the suit has not been filed with common consent and she is not asking for decree of divorce.

Q. No. 4. Due to strained relations between the parents, a child who ideally needs the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective considerations to be kept in mind in awarding "shared parenting" orders. Discuss in the light of latest case laws on the point.

Answer- Hon'ble the Supreme Court in a decision on Oct.2019 said family Courts should grant visitation rights in such a manner that a child is not deprived of the love and care of either parent.

A Bench led by Justice Deepak Gupta said the interest of the child should be kept foremost in custody battles between separated parents. The order is based on a plea by a man for custody of his child who is with the wife.

The court further directed that the family court should also make suitable arrangements during vacations, keeping the interest of the child foremost.

The right of a child to love and to be loved is already recognized as a fundamental right and is to be protected. When custody is entrusted to one parent, the well-being of the child and the right to an enhanced quality of life during crucial years of personal development will be severely affected.

Recently in Yashita Sahu Vs the State of Rajasthan the Supreme Court has decided that

"While deciding matters of custody of a child Primary and paramount consideration is welfare of the child..... If welfare of the child so demands then technical objections can not come in the way. However while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child..... While deciding what is best in the interest of the child, no hard and fast rules can be laid down and each case has to be decided on its own merits, weighing all the pros and cons of both the respective parents who claim custody of the child... Even if parents separate, they may reach an arrangement where the child can live in an environment which is reasonably conducive to her/his development."

Q.No.5. What are the practical difficulties in execution of an order for grant of maintenance Under section 125 Cr.P.C. ? Discuss the available options in law before a family judge for the realisation of the maintenance and awarded under section 125 Cr.P.C. with special reference to be case laws.

Answer- The following practical difficulties comes in way of execution of grant of maintenance:

- i. There is only one month simple punishment for the inability to comply the order of the court by the husband, who welcomes a prison stint of one month as he can avail of free government hospitality during this period.
- ii. The police do not execute the process on one pretext or the other and on most occasion they are not returned at all. Since the courts do not have their own police force, there is a scope for collusion between husband and the police, both at the time of serving the notice as well as during the execution proceedings.
- iii. Maintenance has to be recovered from sale of properties of defaulting husbands, which has to be done through revenue officials, particularly the circle officer. If they can not recover the amount, they do not convey to the court, the reasons for non-recovery.
- iv. Government departments do not cooperate in effecting the orders for salary attachments. In many cases, when salary warrants are sent to the drawing and disbursing authority for recovery of maintenance, they are either not given effect to or only small amounts are sent, which cause un-necessary delays and hardship to needy women.

The available option in law before a family judge for realisation of maintenance amount awarded under section 125 Cr.P.C. has well be illustrated in Smt. Kuldip Kaur Vrs. Surinder Singh AIR 1989 SC 232 in which it is stated that There is no bar to commit a person U/S 125(3) Cr.P.C. to commit a person defaulting in payment of maintenance amount to imprisonment and also simultaneously to proceed against his properties be it movable or immovable for realisation of the maintenance amount.

Q.No.6.- What are the principles of computation of maintenance in a case U/S 125 Cr.P.C. & How will the quantum of maintenance vary in case the competent court has awarded maintenance under Domestic violence Act and/or U/S 24 of the Hindu marriage Act.

Answer- While deciding the latest case of Hon'ble Supreme Court, a bench of Justice R.Banumathi and M.M. Santanagoudar made the observation and said the very principle for computation of maintenance in a case U/s 125 Cr.P.C. is that the amount must be sufficient to ensure that a woman lived with dignity after separating from her husband.

This Principle would be same for all maintenance seekers.

The maintenance if has been awarded in under Domestic violence Act by a competent court then this court may vary in awarding the maintenance under section 125 Cr.P.C. if the court thinks that the maintenance awarded is not sufficient in fulfilling the basic needs and her dignified living then the court shall award such amount adding with the award amount under domestic violence act to secure the dignified living of the petitioner.

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.P.C. 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.P.C., 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.P.C 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.P.C.

Q. No.7- What is the difference in jurisdiction of the Courts under the Courts and wards Acts and minority & Guardianship Acts in appointment of Guardians of a minor ?

Answer- As per section 9 of the courts and wards Act 1890 application with respect to the guardianship of the person of minor can be filed to the District Court having jurisdiction in the place where the minor ordinarily resides. Further, the application with the respect to the guardianship of the property of the minor, the said

application can be made either to the district court having jurisdiction to the place where the minor ordinarily resides or to a district court having jurisdiction in a place where he has property.

Under the Hindu minority and Guardianship Act 1956 Section 8 clearly stipulates that the application can be made before city civil Court or a district court or a court empowered under section 4 A of the Guardianship Act 1890(8 of 1890) within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situated, where the immovable property is situated within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situated.

Q.No.8.- What are the major differences in the procedure for adoption by Indian prospective adoptive parents living in Indian and inter country adoption ? What are the eligibility criteria for prospective adoptive parents ? Discuss with relevant provisions of law and latest case laws.

Answer- As per section 58 and 59 of Juvenile Justice(Care and protection of children) at 2015 as well as the adoption regulations 2017, inter county adoption is allowed only after if an orphan or abandoned or surrendered child could not be placed with an indian or non-resident Indian prospective adoptive parents despite the joint efforts of specilized adoption agency and the state agency within 60 days from the date the child has been declared legally free for adoption but there is no such condition for Indian prospective adoptive parents. Further there is different list of seniority for Indian Prospective adoptive parents and for Inter-Country Adoption.

As per section 57 of the Act, following are the eligibility criteria for prospective adoptive parents:

- i. The prospective adoptive parents shall be physically fit , financial sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.
- ii. In case of a couple, the consent of both the spouses for the adoption shall be required.
- iii. A single or divorce person can not adopt subject to fulfillment of the criteria and in accordance with the provisions of adoption regulation framed by the authority.
- iv. A single male is not eligible to adopt a girl child.
- v. Any other criteria that may be specified in the adoption regulation framed by the authority.

Recently the Hon'ble Supreme Court in case of Union of India and Anrs. Vrs. Ankur Gupta and Others (Civil Apeal no. 2017-2020 of 2019) held that 60 days peirod has to be elapsed from the date when the child has been delcared legally free for Inter-country adoption.

Family Court

Question -1. Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the Family court. Discuss the impediments and possible remedies.

Ans:- The preamble of Family court Act itself states that the family court Act is to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.

Preamble:-The terms of the preamble to the Act cannot be, serviced to qualify or cut down the language of clause (g), the enacting provision of the Act, which gives out the meaning of that clause clearly and unambiguously, as referring to any Minor inasmuch as such must be the approach to be made by the Courts when aid of the preamble to an Act is sought to construe and enacting provision of such Act. Such situation since does not arise in relation to the understanding of the word 'minor' in clause (g), no question of application of the *ejusdem generis* rule can arise. When initiation of a proceeding of the kind for appointment of a guardian of a minor and for removal of such minor to a foreign country is taken under the G and W Act, the court which gets jurisdiction to entertain such proceeding after the establishment of the Family Court, would be that Court itself by reason of clause (g) of the explanation of sub-section (1) of Section 7 of the Act.”

Section 3 of the Act clearly stated that “Establishment of Family Courts-Quick disposal:- State Government is under an obligation to establish Family Court in the first instance in the Metropolitan cities having population of 1 Million and above. In order to achieve these aims and objects. Section 3 has provided in the first instance, establishment of Courts on the basis of population. Section 3 cannot be challenged as being discriminatory and violating of Article 14 of the Constitution.

Apart from this by use of ADR mechanism, the matters should be disposed off quickly. By conciliation proceeding will be also effective for the speedy disposal, but both must be monitored by the Judge himself and judicial control should starts at the beginning of first hearing and a pre- trial hearing system to reduce the complexity of case will also be a mechanism to dispose of the case speedy.

Implementation of the procedure is also very much necessary for the speedy disposal in to a strict manner.

Apart from this, the court management is also helpful for speedy disposal of the matrimonial cases and other matters pending before the Family Court.

Plea of limitation can be raised even when pleadings are not there specifically. If the facts duly proved or admitted, clearly show that the claim is barred by limitation, the court at any stage is entitled to consider the plea.

Apart from this, section 10 (4) reads as follows:- Family court and civil court-Expeditious jurisdiction-It should not turn into an ordinarily civil court and dispose of the matter as expeditiously as possible and adjournments should be restricted. The proceedings must be held in camera and the advantage of provisions of Family Courts Act be taken fully with respect to the association of social welfare agencies.

For the speedy disposal, the act itself mentioned the role of legal preamble in Section 6 of the Act for the settlement between the parties:-

Procedure Adopted:- Violation and Discrimination:- Order 32 A has been added in the Civil Procedure Code in the year 1976 to simplify the procedure and laying emphasis on conciliation in the matrimonial matters. Most of the provisions contained in Order 32 A of the CPC have been incorporated in the procedure prescribed under Section 10 and 14 of the Act and the Rules. Some of the provisions are in fact overlapping. It is no more in dispute that provisions of the Civil Procedure Code apply to the proceedings under the Act, do not suffer from vice of either arbitrariness or being fanciful.

By passing interlocutory order in maintenance case which creates the social-legal obligation on the parties will also helpful in quick disposal of the family disputes. Order 32 (A) of CPC is also helpful to the family Court dispute for quick disposal. All the matrimonial case which simplify the procedure and lying emphasis on conciliation.

The family court judge though situated in adversarial system is expected to adopt a problem solving approach. It is the need for family court to adopt a therapeutic approach to resolve the dispute as well as address the underline cause for the dispute. He should play a pro-active role to pointed out the problems and resolved it. The personal tact and skill of a judge play a vital role for quick disposal in the reconciliation and ADR methods and he has to made all endeavor for settlement and to adjourn the matter if there is reasonable possibility of settlement. Section 10 of the Family Court Act enable the family court to adopt innovative procedure and methods to facilitate the settlement and the section 14 enable the family court to adopt relaxed rules of evidence.

The matter before the family court could not taken as matter before regular Civil Court or Commercial Courts.

The video conferencing should be utilize in family court for examination of

witnesses. The Judge could invoke the section 12 to take help of counselors, if no counselor is attached with the court, it was advised that the judge should seek assistance of amicus to assist them u/s 13.

Visitation can also be supervised by the DLSA to avoid any contravention of the court orders.

Suggestion to various problems faced by the Family Court.

1. The family court should working homely environment not like a regular court.
2. Section 125 (3) of Cr.P.C does not provide for part payment of maintenance and part payment should not be considered as a ground of release of a person imprisoned u/s 125 (3) Cr.P.C.
3. In cases where not property is found to realization of the maintenance amount, the statute does not prohibit the court from taking and making an order of rigorous imprisonment and the payment received by the husband in jail can be used to provide maintenance to the wife.

The Hon'ble Apex Court has observed in several cases that the family court should be disposed off the matter before family court speedily.

In case of Minakshi Sundaram J. Bimla has clearly stated that “Apart from the provisions of Supreme Court Act under article 21 states that “ No person shall be deprived of his life or personal liberty except according to procedure established by law”

In another case **Santhini Vrs. Vijaya Venketash** Hon'ble Supreme Court in **T.P. Case no-1278/16** has discussed the role of family judge as well as the mechanism required by the family court while discussing the scope of section 9, 11, 12 of Family Court Act, section 22, 23, 26 of Hindu Marriage Act. The hon'ble Court has held that the principle trust of the law in family matter is to take and attempt for reconciliation before processing the dispute in the legal frame work. Reconciliation is not mediation neither it is conciliation. No doubt there is conciliation in reconciliation, but the concept is different.....However, reconciliation is not always the restoration of statue quo-ante, it can as well be a solution as acceptable to both the parties.

Law commission has also recommended that there should be full utilization of court working hour. The cases which are filed on similar points should be club together and decided accordingly. The judges must be delivered judgment in time. The day of vacation should be reduced. The lawyer should advice to conclude their arguments precisely with points. Judgment must be concise an it does not give weight to the further litigation.

In case of **Santhini Vrs. Vijaya Venketesah** dated October 2017, the Hon'ble Apex Court has observed that the Judges must take the privilege of technical development and can be used the Video Conferencing facility to examine the witnesses.

Serviced of summon, the advancement of technical ought to utilized for the service purposes or receiving from the parties. In this very case the availability of Video conferencing and availability of legal Aid services must utilized by the Family Court. In several cases the Hon'ble Apex Court has held that “ **State of Maharstra Vrs. Praful B. Desai, Kalyan Chandra Vrs. Rajesh Ranjan, Mathur Guddu Vrs. State of Karnataka** will also be helpful in speedy disposal.

Other various provisions of the Family court Act under Section 22, 23, 26 must be use in strict sense.

The matter should also be taken by reconciliation in case of **Bhuwan Mohan Vrs. Meena and others**, the Hon'ble Apex court clearly stated that in special cases u/s 125 Cr.P.C the adjournments must be avoided, it must be in routine manner.

Apart from this, section 6 provides the Counselors for dispute reduced in between the parties. Section 7 prescribed that Judgment of Family Court rendering assistance.

Section 11 reads as follows:- Personal Appearance with under-taking- Circumstantial permission.

Section 12 reads as follows:- Pragmatic Approach-Trite Law.

Section 22 reads as follows:- Maintenance Order- Step in Aid

Section 23 reads as follows:- Mutual consent-Both in presentation and Inquiry.

Section 26 reads as follows:- Opportunity of Hearing-Custody of child.

To conclude all the tools and technique you should serve the end goal of reaching the parties to an acceptable and amicable settlement as the earliest, so that unnecessary litigation is saved.

So, in my view by using all above, the Family Court can use for speedy disposal of cases.

Question No-2. In what manner and to what extent the procedure in family Courts can be evolved for speedy disposal of cases? Explain with reference to the relevant provisions of The Family Courts Act and Rules.

Ans:- The Family Court Act 1984 has been established for speedy settlement of family disputes. The preamble to an Act provide for the establishment of Family Courts

with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.

Settlement of objects and Reasons:- Several associations of women, other organizations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The law commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family court ought to adopt an approach radically different from that adopted in ordinary civil proceeding and that it should make reasonable efforts settlement before the commencement of the trial. The code of civil procedure, 1908 was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family.

The Bill inter alia, seeks to:-

(e) make it obligatory on the part of the Family court to endeavor, in the first instance to effect a reconciliation or a settlement between the parties to a family disputes. During this stage, the proceedings will be informal and the rigid rules of procedure shall not apply;

(f) provide for the association of social welfare agencies, counselors, etc, during conciliation stage and also to secure the services of medical and welfare experts.

(g) provide that the parties to a dispute before a family court shall not be entitled, as of right, to be represented by legal practitioner. However, the court may in the interest of justice, seek assistance of a legal expert as amicus curiae

(h) Simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute.

(I) provide for only one right of appeal which shall lie to the high Court.

Section 4 of the Family court Act 1984 deals with the appointment of the judges, section 5 of the Act provides for association for social welfare agencies etc. it engrafts that the State Government may, in consultation with the High Court, provide, by rules, for the association in such a manner and for such purposes and subject to such conditions as may be specified in the rules, with a family court of institution or organizations engaged in social welfare are the representatives there are, persons professionally engaged in promoting the welfare of the family, persons working in the social welfare and in any person whose association with a Family court would enable it, to exercise its jurisdiction more effectively in accordance with the purpose of 1984 Family Court Act. Section 6 of the Act provides for counselors, officers and other employees of Family Courts. Section 7 of the Act deals with the jurisdiction of the family Court. It confers power in a Family Court to exercise jurisdiction exercisably by any District court or any Sub ordinate Civil Court under any law relating to a suit or a proceeding between the parties to a marriage or a decree of a nulity of a marriage, declaring the marriage to be null and void or annulling the

marriage, as the case may be, or restitution of conjugal rights or judicial separation or dissolution of marriage. Thus, the power of Family Court is extensive as it has the authority to declare as to the validity of a marriage so as to annul the matrimonial status of any person and also the power to entertain a proceeding with respect to the properties of the parties to a marriage or either of them. The Family Court has a jurisdiction to pass an order of injunction in circumstances arising out of a marital relationship, declare legitimacy of any person and deal with proceeding for grant of maintenance, guardianship of the person or the custody of or the access to any minor. Apart from it, it has also been conferred the authority to deal with the applications for grant of maintenance for wife and children and parents as provided under 125 Cr.P.C.

Section 9 provides the duty of the Family Court to make effort for settlement by rendering assistance and persuading the parties for arriving settlement in respect of the subject matter of the suit or proceeding. If any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable opportunity of settlement between the parties, it may adjourn the proceeding for such period as it think fit to enable attempt to be made to effect such as settlement.

Section 10 of the Family Court Act provides regarding procedure generally of the Family Court. Although, Section of the Act makes the procedure laid down under the code of Civil Procedure 1908 applicable to Family Court proceedings, it is also laid down that the Family Court is free to evolve its own rules of procedure and once the Family Court lays down its own rule of procedure, they will over-ride the rules of procedure, they will over-ride the rules of procedure laid down in the Civil or criminal procedure. Thus, the Act itself contained some provision which indicates the formalities of procedure.

Section 11 of the Family Court Act 1984 provides for proceeding to be held in camera, if the family courts so desire and shall be so if either party so desires.

Section 12 of the Act stipulates for assistance of medical and welfare experts for assisting the Family Court in discharging the function imposed by the Act.

Section 13 of the Family Court Act provides that no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner. Thus, according to section 13 of the Act, it is the discretion of the Family Court to permit or not to permit representation by lawyer.

Section 14 of the Family Court Act provides that the Family Court may receive as evidence any report, statement, document, information or other matter that may assist in effectually resolving a dispute irrespective of the fact that same would be otherwise relevant or admissible under the Evidence Act. **In Md. Sgheryar Khan Vrs. Bhumera Khan, 1996 (3) Addl. 816 (A.P)**, it has been held by the Hon'ble High Court that Family Court is competent to receive document in view of section 14 of the Act which though marked were not proved by any witness.

Section 15 of the Family Court Act provides it is also not obligatory on the part of the Family Court to record the evidence of the witness at length. It would be enough if the judge records or causes it to be recorded, a memorandum of the substance of what witnesses have deposed. Such a memorandum is required to be signed by the judge and the witness and that is done, it will form part of the record of the case.

Section 16 of the Act says that where the evidence of a person is a formal character, it may be given by affidavit and it will constitute part of the evidence of the case. The same nonconformity is maintained about the judgment of the Family Court.

Section 17 of the Family Court says that a Judgment of the Family Court should contained a concise statement of the case. The point for determination and the decision thereon and the reason for such decision.

Section 18 of the Family Court provides that a decree or a order of Family Court may be executed by the same court or any other Family Court or by an ordinary Civil Court in accordance with the connivance of the party concerned.

Section 19 of he Family Court that no appeal shall lies against the interlocutory order, against the decree or order passed with the consent of the parties. As to other matter, an appeal lies to the High Court both in fact and law. All appeals to be heard by a bench consisting of two or more judges. No second appeal is provided but an appeal with the special leave can lie before the Supreme Court under Article 136.

Question No-3. In a matrimonial suit for divorce filed by the husband on the ground of cruelty and desertion the wife appears and admits desertion but makes counter allegation of cruelty. Can the divorce suit be decreed on the ground of desertion on admission? Will the situation be different if there is no allegation of cruelty by the husband? Whether the limitation of cooling off period apply in such cases.

Ans:- In the said problem, when the desertion is admitted by wife with a counter allegation of cruelly, the divorce must not be granted , because for the grant of divorce there must be willful not under compulsion. According to Indian Divorce Act, if there is a dispute for at least 2 years, the petitioner immediately preceding the presentation of the petition for divorce on the ground of desertion.

A petition for divorce is not like any other commercial suit. A divorce not only affects the parties, their children, if any, and their families, but the society also feels its reverberation. Stress also be on preserving the institution of marriage. That is the requirement of law.

According to **Section 13 (1) (ia)** of the Hindu Marriage Act, any marriage solemnized, whether before or after the commencement of this Act, may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party has, after the solemnization of the marriage, treated the

petitioner with cruelty.

According to **Section 13 (1)** of the Hindu Marriage Act, any marriage solemnized, whether before or after the commencement of this Act, may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

Desertion is not the withdrawal from a place, but from a state of things.

Halsbury's law of India defines desertion as a 'total repudiation of the obligation of marriage'. The word desert literally means to abandon or give up or forsake without any sufficient reason or intention to return. In a marriage, if one spouse leaves the matrimonial alliance without any sufficient cause he is said to be at 'fault'

Marriage is considered a sacrament and preserved as a social institution. In olden times, it was believed that this special contract could be put to an end only when one of the spouse was guilty of an act which undermined the importance of this institution. This was the foundation of the fault based theory of marriage. In a bid to preserve this holy union, the society reprimands the guilty spouse and provides no remedy of divorce for him, thereby restricting the right to file for divorce to the spouse with the clean hands. The ambiguity and complexities of the law have been interpreted by the judiciary which attempts to render justice to the innocent party. In spite of this attempt, there is a scope for abuse and misuse of the law by the guilty spouse.

Concept and elements of desertion

Section 13 (1) of the Hindu Marriage Act, 1955 deals with desertion as a ground for divorce and the explanation of the same reads:- "The expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent of or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly:. There are mainly four basic elements which are primarily to be satisfied to constitute desertion. The first two are to be present in the deserting spouse.

1. The fact of separation (factum deserendendi)
2. The intention to desert (animus deserendendi)

Desertion is a state which occurs only on the co-existence of both these elements. If either of these two ingredients is absent, the petition for divorce on desertion fails. The interesting phenomenon in desertion is that either of the

elements can precede the other however, desertion will result only when both coincide and form a union.

When a petition is filed, the first step is proving the fact of separation and the intention separately while the second step is to prove their union. It is fairly easy to prove the physical act of separation either from the conductor from the state of minds. The difficulty raised on proving the animus ;i.e the intention for desertion. This intention is required throughout the period of desertion. The petitioner is expected to prove intention through conducts a person's mind cannot be read. In this process, there are two ways in which the deserting spouse has n opportunity to misuse the position of law.

There exist cases where the separation was consensual (like when the husband is on a voyage) with no animus to desert. While separated, one of the spouse may develop the intention to bring an end to the cohabitation permanent on the expiry of the consensual period. With the separation and the consequent formation of intention, the act of desertion commences which the deserted spouses expected to prove. The exact duration of supervening intention is difficult to prove thereby giving an edge to the deserting spouse, and the deserted spouse is in a sores off position as she has consented to something she could not object (like a husband leaving for a business trip

The quality of permanence in intention to leave the matrimonial home is one of the essential sub-elements in desertion which differentiate it from willful separation. If there is just temporary separation without the intention to leave permanently, there is no desertion.

In this law, if a person decides to return just before the expiry of two years and claims to have no intention of permanent separation, the so deserted spouse will have no recourse in law

Apart from these elements in the deserting spouse, there are two other elements which have to be present in the deserted spouse.

1. Absence of consent
2. The absence of conduct which led to the other spouse leaving the matrimony

The deserted spouse filing the petition is the one who must sufficiently prove and provide evidence for his conduct showing unmistakably that the desertion was against his will. Courts have held that it is not enough for the petitioner to show that he was unwilling that the respondent stays out rather he must have expressly declared his wishes to the deserting spouse or make it clear that the absence was against his wish. With this burden on the deserted spouse, there arise times when

illiterate, and submissive women cannot expressly convey their consent or rather lack it. This creates problems in discharging their burden of proof providing for the deserting spouse to take advantage of . If there is no proof of lack of consent, the consensual separation is not a matrimonial offence using violent non fit injuria.

It is additionally important to note that for a matrimonial relief on the ground of desertion, it is necessary to show the passage of the statutory period of two years and the same must be continuous. Therefore, it can be illustrated that a deserting spouse has an opportunity to take advantage of the law right from the fulfillment of the basic elements of desertion.

Desertion as a continuing offence:

The petition for divorce on the grounds of desertion can be filed only after a period of two years from the commencement of the co-existence of animus an the factum. Desertion is known as continuing offence as the element of permanence necessarily requires that the factum and animus must continue during the entire statutory period preceding the presentation. If there spouse returns before the expiry of two years and then leave again, the waiting period of two years commences all over again from the time he left again. If such period is interrupted, the broken periods may not be added together so as to establish a summed period of two years. The legislature provided this buffer period as a sort of cooling off period so that couples can rethink and reconsider their decision before ending the holy matrimony.

Desertion is known as an inchoate offence as it continues from the day it commences to the day it is terminated by the conduct of the deserting spouse or by the presentation of the petition.

It becomes a complete fault based matrimonial offense only when the deserted spouse files for divorce.

Keeping the intent of the legislature in mind, providing a period of two years is also problematic in a few ways. There may be instances where the deserting spouse may return within two years on reconciliation of his decision, but the law provides for recommencement of the additional period of two years on his departure again providing him with an opportunity to abuse the leeway provided for reconciliation. The legislature overlooks the consequences on the deserted spouse who is left without any support or maintenance. The trauma of being deserted for a period just less than two years might lead to the attitude of non-acceptance of the renewal of the marriage by the deserted spouse. The legislature might have good intentions in protecting the marriages, but it seems to be working out the assumption that the deserted spouse would always want the cohabitation to resume

as soon as the deserting spouse return. This presumption by the legislature provides the deserting spouse a chance to abuse the law.

Termination of desertion:-

As seen above, desertion as a ground for relief differs from other such as adultery or cruelty as in that offense the cause of action of desertion is not complete until the petition seeking relief is filed. This means that through an act or conduct of the deserting spouse, the desertion can be put to an end. Desertion can come to an end in the following ways:-

1. Resumption of co-habitation
2. Resumption of marital intercourse
3. Supervening animus revertendi or offer of reconciliation

Resumption of cohabitation and marital intercourse should be with the intention of permanency. The deserting spouse may return just before the completion of the statutory period or engage in intercourse with the deserted spouse only to leave again. In both these cases, the offense of desertion is terminated although the deserter has no real intention to resume cohabitation but merely seeks to forestall or defeat impending judicial proceedings. When the offer of reconciliation is made, there lies and opportunity for misuse. Courts have said that unjustified refusal of the offer of reconciliation would not only terminate desertion but also reverse the process and put the boot on the other leg making the innocent spouse guilty of desertion now. This can be used by the deserting spouse for defense even when he has no intention of actual reconciliation.

Recognizing this loopholes, the courts have sought to restrict such abuse of this provision by laying down stipulation such as casual acts of intercourse are not be considered as proof of resumption of the marital relationship. Additionally, the offer of reconciliation must be genuine and in good faith. There may be instances where the deserting spouse cannot possibly be expected to subject herself to a risk of recurrence and should be allowed to refuse reconciliation. Under the Matrimonial Clauses Act 1973, if parties resume cohabitation during the period of desertion with a view to effect reconciliation, but the same does not come about, desertion will not be terminated but the period during which parties lived together will be deducted. This should also be accepted by the Indian courts. They must do so by taking into account the facts and circumstances both prior and subsequent to the desertion and also determine whether the deserting spouse can be reasonably said to be ready and willing to resume the marital relationship

Burden and problem of proof

The Court has held that the onus of proving desertion and all its elements rests on the petitioner as, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it. This principle accords with common-sense as it is “so much easier to prove a positive than a negative”. However, the Courts are often faced with a problem of conflicting evidence, and it is difficult to decide which of the conflicting factual version given by the two spouse is correct. This is especially so since such cases occur within the privacy of the four walls of the house and in the absence of witnesses to corroborate evidence, the circumstances are hostile to the discovery of the truth. This translates into an advantage for the deserting spouse. Following the English Court, the Supreme Court initially held that such proof must be beyond reasonable doubt. Eventually, the courts held that matrimonial offence may be proved on the preponderance of probabilities. However, there have been cases which have been decided on the beyond reasonable doubt standard thereby placing an immense burden on the innocent party to get relief and letting the deserter go scot free.

Due to the subjectivity and absence of any guidelines for the determination of desertion petitions, the discretion and prejudices play a huge role in the process. It is true that every case needs to be weighed according to the individual facts and background, however for consistency in dispensing justice, there is a need to introduce guidelines for the judges.

Conclusion:-

In recent times, to ensure that divorce is granted the petitioner combines the charges granted the petitioner combines the charges of adultery and desertion. However, courts have held that if adultery is not proved the petition under desertion falls too. There has been no room provided for spouses who genuinely believe that the other has been adulterous and leave the matrimonial homes. Desertion itself is not cruelty however it is difficult to draw a line between them, especially for constructive desertion. The contradictory pleas of cruelty and desertion always fail as there is a necessity to prove both of them separately.

Due to the patriarchal nature of Indian society, the courts have held that if a woman is working elsewhere, she is not fulfilling her marital obligations resulting in deserting. In addition the deserted woman has a right to maintenance but no right to a separate residence in today's day and age of perceived equality and social Justice, to force a woman to resign her job merely because she is living away from her husband would result in cutting of her source of Independence and subjecting her to

belief that continue to confine women to patriarchal ideals. There also is a need to duplicate the English stand of deserted woman equity which recognizes a deserted woman's right to reside in the matrimonial home because of her right to the consortium and the husband's reciprocal duty to maintain her.

In conclusion, it can be said that desertion might be considered a fault-based ground for divorce, but there are ways that the guilty spouse can maneuver around the law and deny justice to the deserted spouse. There are two probable solutions to this problem; either to adopt a new legislation which tackles these opportunities of misuse or move towards the concept of irretrievable breakdown of marriage to provide no necessity for the deserting spouse to abuse the legal provision of desertion.

So, the said provision is not willful neither fulfill the requirement of the divorce in ground of desertion. So, divorce cannot be granted on the ground of admission in this case, but there is no allegation of cruelty by husband, then it can be considered as admission of wife regarding desertion in this case. The husband has to prove allegations only such type of admission cannot be made ground for divorce.

Limitation of cooling period is not applicable in this case, because this cooling period can only used in divorce on ground of mutual consent, except the ground of mutual consent of cases, cooling period must be applicable.

Under the fact and circumstances of the present case, if the statutory requirement as prescribed Under Section 13 (1) (ib) of the Hindu Marriage Act is fulfilled, then the divorce suit can be decreed on the ground of desertion on admission of the respondent even if there is no allegation of cruelty by the husband because section 13 (1) (ib) of the Hindu Marriage Act provides that a suit can be decreed on the ground of desertion.

Limitation of cooling period:- The next part of the question is that whether the limitation of cooling off period apply under the facts of the aforesaid case. In this regard before adverting further, I would like to re-produce section 13 (B) of the Hindu Marriage Act which deals with a **divorce by mutual consent**.

*(I) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the **District Court/Civil Court** by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Law (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.*

(ii) On the motion of both the parties made not earlier than six months after the date of the

presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

The period of the 6 to 18 months provided in Section 13 B is a period of interregnum which is intended to give time and opportunity to the parties to reflect on their move. In this transitional period the parties or either of them may have second thoughts. But in the period of six months as provided u/s 13 B of the Hindu Marriage Act cannot be taken as mandatory because, if it is mandatory the very purpose of liberalized especially when the parties have lived separately and there is no chance of reunion.

“In Amardeep Singh Vs Harveen Kaur (Civil Appeal No.11158/2017), it was held by the Hon’ble Apex Court that where the court dealing with a matter is satisfied, that a case is made out to waive the statutory period under Section 13(B)(2), it can do so after considering :- (1) The statutory period of six months specified in Section 13(B)(2), in addition to the statutory period of one year under Section 13(B)(1) of separation of parties is already over before the first motion itself, (2) All efforts for Mediation/Conciliation have failed and there is no chance of their re-union, (3) The parties have genuinely settled their differences, (4) The awaiting period will only prolong their agony. If the above conditions are satisfied the waiver of awaiting period for second motion will be in discretion of the concerned court.

In the present case, the limitation of cooling off period will not apply because the said case is not filed by both the parties to a marriage together u/s 13 B of Hindu Marriage Act and both parties have not mutually agreed to dissolve their marriage.

Question no-4:- Due to strained relations between the parents, a child who ideally needs the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective considerations to be kept in mind in awarding “Shared Parenting” orders. Discuss in the light of latest case laws on the point.

Ans:- The law governing custody of children is closely linked with that of guardianship. Guardianship refers to a bundle of right and power that an adult has in relation to the person and property of a minor, while custody is a narrower concept relating to the upbringing and day to day care and control of the minor.

Principles in respect of custody of child:- An order of custody of minor children either under the provision of Hindu Minority and Guardianship Act 1956 or Guardian and Wards Act 1890 or any other law is required to be made by the court treating the welfare and interest of minor to be a paramount importance. The court while deciding

the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special status govern the right of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

In **Gourav Nagpal Vrs. Sumedha Nagpal 2009 (1) SCC 42**, the Hon'ble Apex Court pleased to observe that though the provision of special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases. The court further observed in para 32 of his judgment that the dominant matter for consideration of the court is the welfare of the child. But the welfare of the child is not measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the tie of affection be disregarded.

In **Rosy Jacob Vrs. Jabcob A Chakramakkai 1973(1) SCC 840**, the Hon'ble Apex Court pleased to observe that the principle on which the court should decide the fitness of the guardian mainly depends on two factors:- (1) the father fitness or otherwise to be guardian and (ii) the interest of the minor.

In para -15 of his Judgment, the Hon'ble Apex Court pleased to hold that "the children are not mere chattels: nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

In case of **Gayatri Bajaj Vrs. Jiten Bhalla 2012 (12) SCC 471**, the Hon'ble Apex Court has been pleased to observe that it is not the better right of either parents that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the child are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a minor.

In case of **Vivek Singh Vrs. Rumani Singh 2017 (3) SCC 231**, the Hon'ble Apex Court pleased to hold that the welfare principle is aimed at serving twin objectives. In the first instance, it is to be ensured that the child grows and develops in the best environment. The best interest of the child has been placed at the vanguard of the Family Court/custody disputes according to the optimal growth and development of the child and has primacy

over other consideration. This right of the child is also based on individual dignity. The second jurisdiction behind the welfare principle is the public interest that stands served with the optimal growth of the children. Child Centering Human Right Jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation.

In the matter of **Tejawashini Gour Vrs Shekhar Jagdish Prasad Tiwary 2019 (7) SCC 42**, the Hon'ble Apex Court observed that the welfare of the child shall include various factors like ethical upbringing, economic well being of the guardian, child's ordinary comfort, containment, health, education etc.

Shared Parenting:-The term shared parenting or joint custody means (I) joint legal custody where both parents retained joined responsibility for the care and control of the child and joint authority to make decision concerning the child even though the child's primary residence may be with only one parent (ii) Joint physical custody where both parents share physical and custodial of the child or (iii) any combination of joint legal and joint physical custody which courts deems to be in the best interest of the child.

Report no-257 in Guardianship and Custody Laws in India, the Law commission of India in order to emphasis the welfare of the child as the paramount consideration in adjudicating custody and guardianship matter, decided to study the issue of adopting a Shared Parenting System in India. The Commission in November 2014 issued a consultation paper on the subject and after several grounds of discussions and deliberation, the Commission reviews the current laws dealing with custody and guardianship, namely the Guardianship and Wards Act 1980 and the Hindu Minority and Guardianship Act 1956 and recommends legislative amendments to achieve the equal legal status of both parents with respect of awarding joint custody to both parents in certain circumstances conducive to the welfare of the child. Chapter -III of the Law Commission report is on the concept of Joint Custody and in Chapter -V, the Law Commission has mentioned and discussed the consideration for deciding child custody cases, .i.e factors to be considered for best interest and standard, determining the preference of the child, access to record of the child, grand parenting time, mediation, relocation, decision making parenting plan,visitation but the recommendation given by the Law Commission is not law and is not binding. In para 3.2.1 of the Law Commission report mentioned on the point of joint custody thus, shared and equal guardianship is recommended by the Law Commission.

In case of **Tushar Bishnu Ubale Vrs Mrs. Archana Tushar Ubale W.P no-5403/2015 @, DOC**, the Hon'ble Bombay High Court has been pleased to hold that in the custody matter, the child, mother and the father are the main stakeholders and the law repeatedly has emphasis as a settled position that the welfare of the child is th paramount consideration. However, one has to take note that today, the families are nuclear and the

couple restricts the family to one or two children. The Society is becoming complex and the parents have to struggle hard to run the household and give better future to the child. Under these circumstances, along with the welfare of the child, it is necessary for the courts to consider sympathetically the financial, physical, mental stress the parents carry and the emotional plight of the parents while awarding custody. If the parents are psychologically stable, positive and happy, then they can provide a healthy atmosphere to the child. Usually, the child is not a problem child but the problem lies in the parenting.

The Hon'ble Court further observed that a child wants to share his joys and sorrows, failure and success, with its parents simultaneously. Such simultaneous association is required for the healthy upbringing of the child. A father and a mother have different responses towards the child's sharing, which is also necessary. The child must get a sense of belonging and social security and he should not feel that he has a broken family and should not develop self pity. The child may become a center of either curiosity or comments, staring or sympathy from his friends, classmates and relatives. Peer pressure has negative impact on the tender and impressionable mind of the child. In the absence of simultaneous association with both the parents, the child misses completeness of his relationship. Therefore, shared custody may be an option open for the court to offer parents and make them aware of not only their child's needs but also the child's rights. As argued by the Id. Counsel for both the sides, the 257th report of the Law Commission is not only about shared parenting, but these are the recommendations on guardianship and custody laws in India, wherein under different chapters, the Law Commission has penned down its concept of joint custody, mediation in child custody cases and, also in chapter V, the considerations for deciding the child custody cases. Number of factors are to be taken into account in custody cases in the best interest of the child and parenting plan is one of these considerations.

Consent thereto cannot be imposed. The submission of the joint parenting plan or shared custody is required to be suggested by the Court and so also by the Counselors to the parents. It is necessary to give them time to prepare themselves emotionally for such shared custody, which is difficult for the parents to digest initially. It is a matter of an attitudinal change. The Law Commission has elaborated the parameters in respect of the child custody but has also expressed that considering the roles attributed to the parents as per our social norms and behavioral patterns, the idea of 50 % shared parenting may not be conducive in Indian society in all the cases. The law Commission has voiced that the seeds of the globally accepted concept of shared custody can be sown and the saplings can be planted in the minds of the parents so that the fruits of the company of both the parents can be enjoyed by a child of the warring parents. The Law Commission has commented on the crystallization of the roles and number of issues of the child in respect of the child's development. The Judges requires to be active and sensitive while deciding

issues of custody and access.

Thus, Parenting plan is a mutual arrangement of custody and access which is an outcome of matured parenting. The ideal situation is that joint parenting is a rule and single parenting is an exception. There may be a single mother or a single father left behind due to a blow of destiny, then the child has no option. However, when both the parents are available, the association with the child cannot be artificially denied only due to fights and hated and vindictive approach of the parents. Hence, though it is not mandatory that all the parents should adopt a parenting plan, it is advisable that the family court to invite a parenting plan in the cases found suitable upon the Law Commission which has taken formal cognisance of the legal right involved in joint parenting. This, of course, may be attuned to circumstances and must account for the special needs of the particular child.

Thus, in the light of aforesaid judgments and preposition of law, it can be said that before deciding as to whether the custody should be given to the mother or the father are partially to the other or in shared parenting, the court must take into account the wishes of the child concerned, assess the psychological impact of the child if any, the court while dealing with the custody cases neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. The court has to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favorable surrounding. But over and above physical comfort moral or ethical values cannot be ignored they are equally, or more important, essential and indispensable conditions.

Question No-5. What are the practical difficulties in execution of an order of grant of maintenance under section 125 Cr..P.C? Discuss the available options in law before a family Judge for the realisation of the maintenance amount awarded under Section 125 Cr.P.C with special reference to the case laws.

Ans:- The maintenance order passed u/s 125 Cr.P.C are enforced u/s 128 of Cr.P.C.

Section 128 Cr.P.C:- A copy of the order of (maintenance or interim maintenance and expenses of proceeding, as the case may be) shall be given without payment to the person in whose favour it is made or to his guardian, if any, or to the person to (whom the allowance for the maintenance for the allowance for the interim maintenance and expenses of proceeding, as the case may be) is to be paid: and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the (allowance, or as the case may be expenses, due)

Section 125 (3) Cr.P.C imposes an obligation on the applicant to bring to the knowledge of the court, the breach of the maintenance order by an application and when the applicant file any such petition, then it for the court to get its own order enforced and see that it for the complied with. The proceedings from that stage cannot be treated as one

between the analogical parties. Non appearance of party or its non prosecution does not entail in the dropping of the proceeding. The court has every power to inquire into the reasons for non compliance of the order and may failure on the part of the respondent to comply the order without sufficient cause can empower the court to issue a warrant for levy of the amount.

Warrant for levy of maintenance:- When an application is made u/s 125 (3) Cr.P.C for recovery of the amount, then it is the duty of the court to see the due compliance of the order. If, without sufficient cause, the respondent willfully avoided payment of maintenance, it has the power to issue a warrant for levy of the amount. The issue of warrant for levy of the amount due is in the manner provided for levying fines. Any further delay on the part of respondent without there being a justified cause may lead to his imprisonment.

Sentence in default of payment of maintenance:- If, the respondent willfully neglected to pay maintenance, order passed by the court even after constraint major taken by the court, then court can passed order of sentence, of imprisonment to compel the respondent to obey the order of the court. But arrest an imprisonment can be resorted to only after exhausting all such coercive measure of recovery, as attachment and sale of movable property of the respondent. This improves issuance of a warrant to the Collector, authorizing him realize the amount as arrears of land revenue as provided u/s 421 (7) of Cr.P.C.

In case of **Mehboob Basa Vrs. Nainima @ Hazra Bibi and Another. Reported in 2005 (1) Law weekly criminal 384**, the Hon'ble Madras high court after having considered, the Apex court judgment passed in the matter of **Sahada Khatoon & Ors Vrs. Amzad Ali & ors 1999 SCC cri. 129** has held in para 3 of his judgment

Para 3”- Under sub-section 3 of section 125 Cr.P.C it has been made clear that the power of the magistrate imposing imprisonment on the failure of the husband to pay maintenance has been restricted to only one month or until payment if sooner made. After the one month, for every breach or non compliance of the order of the Magistrate, wife can approach the Magistrate once again for similar relief”.

Thus, in the light of aforesaid authorities of the Hon'ble Apex Court and High Court, the principle emerges that whenever there is a failure of complying the order for payment of maintenance, then the person would be liable to sent jail for a period of one month. However, this restriction of one month under sub-section 3 of Section 125 Cr.p.C cannot stand on the way even after one month period, if he continues to neglect the payment of arrears, once again the same very provision of section 125 Cr.P.C can be invoked by the court concerned, provided if the law is set in motion by filing an appropriate petition by the wife or the effected party. However, the court cannot send a person to jail beyond the period of one month at stretch or in one stroke for his failure to pay the maintenance of

arrears.

Question no-6:- What are the principles for computation of maintenance in a case under section 125 Cr.P.C ? How will the quantum of maintenance vary in case the competent court has awarded maintenance under Domestic Voilenace Act and /or under Section 24 of the Hindu Marriage Act.

Ans :- Section 125 Cr.P.C. legislated as a tool for social justice, it provides an effective remedy for neglected persons to seek maintenance. A follower of any religion can apply for maintenance U/s 125 Cr.P.C. without restriction, the object of this provision is to provide a summary remedy to the dependent wife, children and parents from destitution and to serve a social purpose.

Section 125 Cr.P.C is a major of social justice and is specially enacted to protect women and children. In the case of **Remesh Chandra Kaushal Vrs. Mrs. Veena Kaushal and Ors., reported in AIR 1978 SC 1807**, the Hon'ble Apex Court has been pleased to observed that it is a meant to achieve a social purpose. The object is to prevent a vagrancy and destitution. It provides a special remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental right and natural duties of a man to maintain his wife, children and parent when they are unable to maintain themselves. Teh aforesaid position was highlighted in **Sabitaben Somabhai Bhatia Vrs. State of Gujrat and Ors. (2005) (2) Supreme 5003**.

The husband being an able bodied person is duty bound to maintain his wife, who is unable to maintain herself under the Personal Law arising out of the marital status and is not under contractual obligation.

Determination of quantum of maintena

In the matter of **Chitra Sengupta Vrs. Dhruba Jyoti Sengupta AIR 1988 Cal. 98**, the Hon'ble Apex Court please to held that the quantum of maintenance would depend upon various factors such as the ability of the respondent, need of the wife, the social status, age, education and other requirements. Teh court would have regard to the position and the status of the parties.

In case of **Jasbir Kaur Sehgal Vrs. District Judge, Dehradun 1997 (7) SCC 7**, the Hon'ble Apex Court observed that no set formula can be laid down for fixing the amount of maintenance. Some scope for leverage can also be there. Teh Court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but in voluntary payment or deduction. The amount of maintenance fixed for the wife should be such as she can be lived in reasonable comfort considering her status and the mode of life, she was used to when she lived with the husband.

The Hon'ble Apex Court has held in **Bhuvan Mohan sing Vrs. Meena, AIR 2014 SC 2875** that Section 125 of the Cr.P.C. was conceived to ameliorate the agony, anguish, financial suffering of a women who left her matrimonial home for the reasons provide in the provision so that some suitable arrangements can be made by the court and she can sustain herself and also her children if, they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an un person to be thrown away from grace and roam for her basis maintenance somewhere else. She is entitled in law of lead a life in the similar manner as she would have live in the house of her husband. That is where, the status and strata come into play, that where the obligation of the husband, in the case of a wife, become a prominent one. In proceeding of this nature, the husband cannot take subterfuges to deprived of her of benefit of living with dignity. Regard being had to the solemn pledge of the time of marriage and also in consonance with the statutory law that governed the field, it obligation of the husband to see that wife does not become a beggar, destitute. A situation is not to be maladroitly created where under she is compelled to resign to her fate and think of life "dust into dust". It is totally in permissible. In fact it is sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is able bodies, there is no escape unless there is an order from the court that the wife is not entitled for maintenance from the husband on any legally permissible ground.

The Hon'ble Supreme Court has laid down in case law reported in **208 (2) SCC 316 (Chaturbhuj versus Sita Bai)** that the object of the maintenance proceeding 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. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It fives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves.

In case of **Bhagwan Vrs. Kamla Devi AIR 1975 SC 83**, the Hon'ble Apex Court has observed that the wife should be in position to maintain standard of living which is neither luxurious nor penurious but what is consistent with the status of a family. The expression "unable to maintain herself" does nt mean that the wife must be absolutely destitute before she can apply for maintenance U/s 125 Cr.P.C.

In the case of **Kalyan Dey Chowdhury Vrs. Rita Dey Chowdhury Nee Nandy, AIR 2017 SC 2383**, the Hon'ble Apex Court has observed that 1/4th of the income should be granted as maintenance.

On the basis of above preposition of law, I am of view that no hard and fast

formula can be laid down for deciding the quantum of maintenance and it can be computed under the fact and circumstances of each case. The ability of the husband, the strata of the society to which the couple belongs, the standard of living that the wife was use to at her husband's residence, other financial obligation of the husband which he is obliged to discharged as per law or all factors which need to be considered while fixing the quantum of maintenance.

So far the question that how will the quantum of maintenance vary in case the competent court has awarded maintenance under D.V. Act and U/s 24 of H.M.Act ?

Before discussing the problem, I would like to go by the relevant sections.

Section 20 of D.V.Act deals with monetary relief:

I also deem it appropriate to reproduce herein below Section 20, 26 and 36 of the DV Act, which read thus, "20 Monetary reliefs. – (1) While disposing of an application under sub-section (1) of Section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but not limited to,-

- (a) The loss of earning;
- (b) The medical expenses;
- (c) The loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and
- (d) The maintenance for the aggrieved persona as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

Section 26 of the D.V. Act provides that upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the Court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

Section 26 of D.V. Act provides Relief in other suits and legal proceedings :-

1. Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceedings, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after respondent the commencement of this Act.
2. Any relief referred to in sub-section (1) may be sought for in addition to and

along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

3. In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

Section 20 (1) (d) of the D.V.Act makes it clear that the maintenance, which can be granted under the said Act, can be in addition to an order of maintenance under Section 125 of Cr.P.C. and or any other law for the time being in force. Whereas sub-section (3) of Section 26 of said Act enjoins the duty on the aggrieved person to inform the Magistrate, if she has obtained any relief available under sections 18,19,20,21 and 2 in any other legal proceeding filed by her before the Civil Court, Family Court or Criminal. It is discernible that the object behind incorporating the aforesaid specific provision is that while granting any of the reliefs sought under sections 18,19,20,21 and 22 of the D.V.Act, the Magistrate shall take into account and consider, if any similar relief is already obtained by the aggrieved person. The purpose underlying the said provision is explicit that the Magistrate must be in a position to take a reasonable decision while awarding the maintenance, if any under the provisions of the D.V.Act. It is thus evident that though the proceeding under the D.V. Act may be an independent proceeding, the Magistrate cannot ignore the maintenance awarded, if any, in any other legal proceeding before the civil court or criminal court and has to take into account the maintenance already awarded, if any, while taking a decision whether in addition to the maintenance already awarded any more amount is required to be awarded and if yes, to what extent ? and shall have to record reasons therefor.

Admittedly, there is no such provision, as aforesaid, under Sections 125 of the Cr.P.C But Section 125 of Cr.P.C. enjoins the duty upon the court to award fair and appropriate amount of maintenance, meaning thereby that it shall not be inadequate or insufficient and at the same time shall also not be excessive or unreasonable. In the circumstances though there may not be any express provision under Section 125 of Cr.P.C. it may not be impermissible to take into account the maintenance or interim maintenance, if any, already awarded to the aggrieved person under the provisions of the D.V. Act while finally determining the quantum of maintenance u/s 125 Cr.P.C and thus amount of interim maintenance awarded under D.V.Act shall liable to be adjusted in the amount of maintenance finally awarded u/s 125 Cr.P.C. so long the aggrieved person is receiving such amount.

Section 24 of the Hindu Marriage Act deals with Maintenance pendente lite and expenses of proceeding which is as follows:-

“Where in any proceeding under this Act it appears to the court that either the

wife or the husband, as the case may be, has not independent income sufficient for her or his support and the necessary expenses of the proceeding, it may on the application to pay to the petitioner the expenses of the proceeding, I and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, It may seem to the court to be reasonable.

The law is settled that the wife and children can claim maintenance U/s 125 Cr.P.C. U/s 20 r/w Section 23 of D.V. Act.. The wife additionally can claim interim alimony U/s 24 of Hindu Marriage Act and all these remedies are simultaneously pursued by the wife. However, while fixing the quantum of maintenance, the court can take into account the amount being paid to them in pursuance of an order passed under other enactments.

In case of **Vishal S/o Raja Saheb Gore Vrs. Spw Aparna, W/o Vishal Gore (Crl. Rev. No 203/2017)** the Hon'ble Bombay High Court has pleased to observe that wife and children can claim maintenance U/s 125 of the Cr.P.C. U/s 18 & 20 of the Hindu Adoption & Maintenance Act 1956 and also under 20 r/w 23 of D.V.Act, the wife additionally can claim interim alimony U/s 20 of the Hindu Marriage Act even if, all these remedies are simultaneously pursued by the wife and some or other order is passed in each of the said proceeding, it would not be permissible for the wife to claim the amount of maintenance awarded in each of the said proceedings independently. Firstly the propriety demands that if any similar relief is granted in the earlier proceeding, the person in whose favour such relief is granted has to disclose the said fact in the subsequent proceeding. For a moment even if it is presumed that no such disclosure was made or in a hypothetical situation, all the proceedings are simultaneously decided, the husband will definitely have a right to claim adjustment of the amount awarded in the said proceeding and cannot be subjected to independently pay the amount of maintenance awarded under each of the said petition.

In the matter of **Nagender Rappa Natikar Vrs Nilam AIR 2013 SC 1541**, the Hon'ble Apex Court has held that an order passed U/s 125 of Cr.P.C. would not preclude wife from making claim U/s 18 fo the 1956 Act similarly, in **Vikash Vrs. State of U.P. 2014 DMC 373 Allahabad**, the Hon'ble Court has held that hte Family Court has the power to adjust the amount of maintenance already by the Magistrate U/s 125 Cr.P.C. and the D.V.Act.

To sum up in the light of above preposition of law, it can be said that the wife can claim maintenance U/s 125 Cr.P.C. under provision of D.V. Act and Section 24 of Hindu Marriage Act simultaneously but it would not permissible for the wife to claim the amount of maintenance awarded in each of the said proceedings independently and the

amount so awarded is adjustable against the amount awarded in matrimonial proceedings or D.V. Act and the adjustment is permissible and the adjustment can be allowed of the lower amount against the higher amount.

Question No-7:- What is the difference in jurisdiction of the courts under the Courts and Wards Acts and Minority & Guardianship Acts in appointment of Guardians of a minor?

Ans:- Before discussion on this point, it is first to see the scope of both Acts which was as hereunder:-

Court of Wards Act as well as Guardians and Wards Act, 1890.

(i) Guardians and Wards Act, 1890

The Guardians and Wards Acts, 1890 is a secular law regulating questions of guardianship and custody for all children within the territory of India, irrespective of their religion. It authorizes the District Courts to appoint guardians of the person or property of a minor, when the natural guardian appointed under a Will fails to discharge his/her duties towards the minor. The Act is a complete code laying down the rights and obligations of the guardians, procedure for their removal and replacement, and remedies for misconduct by them. It is an umbrella legislation that supplements the personal laws governing guardianship issued under every religion. 'Even if the substantive law applied to a certain case is the personal law of the parties, the procedural law applicable is what is laid down in the Guardians and Wards Act, 1890. Section 7 authorizes the court to appoint a guardian for the person or property or both of a minor, if it is satisfied that it is necessary for the 'welfare of the minor'

Section 9 of the Guardians and Wards Act, 1890 makes a provision as regards the jurisdiction of the court to entertain a claim for grant of custody of a minor. While sub-section (1) of Section 9 identified the court competent to pass an order for the custody of the persons of the minor, sub-section (2) and (3) thereof deal with courts that can be approached for guardianship of the property owned by the minor. Section 9 (1) alone is, therefore, relevant for our purposes. It says.

"9 Court having jurisdiction to entertain application:- (1) if the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides;" It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court u/s 9 of the Act is the 'ordinary residence' of the minor. The expression used is "where the minor ordinarily resides" Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an inquiry into the factual aspects of the controversy.

In case of Mrs. Annie Besant Vrs. Narayaniah AIR 1914 PC 41 the Hon'ble Apex court has held that the jurisdiction of a court is confined to infant ordinarily residing.

In the case of Mst. Jagir Kaur and Anr. Vrs. Jaswant Sigh, the Hon'ble Apex court held that the residence reveals the sense where a person resides if he thoroughly chose makes it his abode permanently or even temporarily where a person has chosen to make a particular place his abode depends upon the facts of each case.

In case of Kuldeep Nayar & Ors Vrs. Union of India & Ors 2006 (7) SCC, 1, the Apex Court observed that the expression "ordinary residence" as used in the Representation of People Act, 1950 fell for interpretation.

So, the jurisdiction of the court is under the court of ward as well as the guardians and wards is where the minor ordinarily resided.

Section 17 lays down factors to be considered by the court when appointing guardians.

"Section 17 (1) stated that courts shall be guided by what the personal law of the minor provides and what, in the circumstances of the case, appears to be for the 'welfare of the minor'

Section 17 (2) clarified that in determining what is for the welfare of the minor, courts shall consider the age, sex and religion of the minor, the character and capacity of the proposed guardian and how closely related the proposed guardian is to the minor, the wishes, if any of the deceased parents, and any existing or previous relation of the proposed guardian with the person or property of the minor.

Section 17 (3) states that if the minor is old enough to form an intelligent opinion, the court 'may' consider his/her preference.

Section 19 of the Guardians and Wards Act, 1890 deals with case where the court may not appoint a guardian and Section 19 (b) states that a court is not authorized to appoint a guardian to the person of a minor whose father or mother is alive, and who, in the opinion of the court, is not unfit to be a guardian.

The earlier Section 19 (b) prevented the court from appointing a guardian in case of the father of the minor was alive. This clause was amended by the Personal Laws (Amendment) Act, 2010 and was made applicable to cases where even the mother was alive, thus removing the preferential position of the father.

Section 25 of GWA deals with authority of the guardian over the custody of the ward," Section 25 (1) states that if a ward leaves or is removed from the custody of the guardian, the court can issue an order for the ward's return, if it is of the opinion that it is for the 'welfare of the ward' to be returned to the custody of the guardian.

Reading the above provisions together, it can be concluded that, in appointing a guardian to the person or property of a minor under the Guardian and Wards Acts, 1890 courts are to be guided by concern for the welfare of the minor/ward. This is evident from

the language of section 7 and 17. At the same time, the implication of section 19 (b) is that, unless the court finds the father or mother to be particularly unfit to be a guardian, it cannot exercise its authority to appoint anyone else as the guardian. Thus, power of the court to act in furtherance of the welfare of the minor must defer. 'For instance, section 2 of the Hindu Minority and Guardian Act states that its provisions are 'supplemental' to and 'not in derogation' of the Guardian and Wards Act, 1890, which reads that in the case of minor, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property or both, which is valid by the law to which the minor is subject.

So far the property is concerned, it will govern by the Central Provinces **Court of Ward Act 1899** and in this Act the jurisdiction is the territories for time being administered by the LG of ref by the AO 1937 and Section 3 of the court of wards Act reveals that the subject to the provision of Section 9, the commissioner shall be the court of ward for the limit of his division.

Section 4 of the court of ward Act says that the superintendence by the court ward of property of disqualified land holders. The government assumed the superintendence of property of any land holder owing land within the local limit of his jurisdiction who is disqualified to manage his property.

Section 7 of the court of ward Act, 1899 states that temporary possession for custody of heirs and protection of property in certain cases is within the jurisdiction of District Commissioner.

Section 8 of the superintendence by the court of wards of person disqualified land holder where the court of ward assume that the superintendence of property of a minor or of a person who has been adjudged by a competent Civil Court to be of unsound mind incapable of managing his affairs it may with the government assumed the superintendence of the person also and court of ward has to assume the superintendence of a person of a female who is married to a man of full age and in his custody.

Section 9 is the superintendence of court of ward where disqualified land holder owns land in more than one division.

Section 10 of the court of ward Act 1899 assumption of superintendence to notified and to extend to whole of the government ward property.

Section 11 barring of the suit to contest authority to assume superintendence and no suit shall be brought in any civil court to contest the authority of court of wards in respect of the property or of the person and property of any person under this act. On the ground that such person was not or is not a land lord or minor.

(ii) Hindu Minority and Guardianship Act, 1956

Classical Hindu law does not contain principles dealing with guardianship and custody of children. In the Joint Hindu Family, the Karta was responsible for the overall

control of all depends and management of their property, and therefore specific rules dealing with guardianship and custody were not thought to be necessary. 'However, in modern statutory Hindu law, the Hindu Minority and Guardianship Act, 1956 (hereinafter, HMGA) the father is the natural guardian of a minor and after him, it is the mother. Section 6(a) of the HMGA provides that; in case of a minor boy or unmarried minor girl, the natural guardian is the father, and after him, the mother, and the custody of a minor who has not completed the age of five years shall "ordinarily" be with the mother. In *Gita Hariharan Vrs. Reserve Bank of India*, the constitution validity of Section 6 (a) was challenged as violating the guarantee of equality of sexes under Article 14 of the Constitution of India. The Hon'ble Supreme court considered the import of the word 'after' and examined whether, as per the scheme of the statute, the mother was disentitled from being a natural guardian during the lifetime of the father. The court observed that the term 'after' must be interpreted in light of the principle that the welfare of the minor is the paramount consideration and the constitutional mandate of equality between men and women. The court held the term 'after' in Section 6 (a) should not be interpreted to mean after the lifetime of the father, but rather that it should be taken to mean 'in the absence of the father'; The court further specified that 'absence' could be understood as temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise however it was held that in the above specific situations, the mother could be the natural guardian even during the lifetime of the father.

Section 13 of the HMGA declares that in deciding the guardianship of Hindu minor, the welfare of the minor shall be the paramount considerations, and that no person can be appointed as guardian of a Hindu minor if the court is of the opinion that it will not be for the welfare of the minor"; The following can be concluded with respect to guardianship under the HMGA. First, the father continues to have a preferential position when it comes to natural guardianship and the mother becomes a natural guardian only in exceptional circumstances, as the Supreme court explained in *Gita Hariharan*. Thus, even if a mother has custody of the minor, the father can, at any time, claim custody on the basis of his superior guardianship rights. *Gita Hariharan*, therefore, does not adequately address the original problem in section 6 (a) of the HMGA.

Second, all statutory guardianship arrangements are ultimately subject to the principle contained in section 13, that the welfare of the minor is the "paramount" consideration. In response to the stronger guardianship rights of the father, this is the only provision that a mother may use to argue for custody/guardianship in case of dispute.

Guardianship and Wards Act, 1890 Vrs. Hindu Minority and Guardianship Act, 1956.

The point of difference between the GWA and the HMGA lies in the emphasis placed on the welfare principle. Under the GWA, parental authority supersedes the welfare principle, while under the HMGA, the welfare principle is of paramount consideration in

determining guardianship. Thus, for deciding questions of guardianship for Hindu children, their welfare is of paramount interest, which will override parental authority. But for non-Hindu children, the court's authority to intervene in furtherance of the welfare principle is subordinate to that of the father, as the natural guardian.

In the case law reported in 2019 7 SCC 42 (Tejaswini Gaud Vrs. Shekhar Jagdish Prasad Tiwary) the Hon'ble Supreme Court while interpreting both Acts held that "In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act of the Guardians and Wards Act as the case may be. In cases arising out of the proceeding under the guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides with the area on which the court exercise such jurisdiction. It was further held that that the law relating to custody of a child is fairly well settled and in deciding a difficult and complex question as to the custody of minor, a court of law should keep in mind the relevant statutes and the right flowing therefrom. But such cases cannot be decide solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody of cases, is neither bound by statues 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. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favorable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor.

Thus, the paramount consideration before the court shall always be the welfare of the minor.

Question No-8. What are the major differences in procedure for adoption by Indian prospective adoptive parents living in India and inter country adoption? What are the eligibility criterion for prospective adoptive parents? Discuss with relevant provisions of law and latest case laws.

Ans. - The term 'Adoption' has been defined U/s 2 (2) of Juvenile Justice (C & P) Act 2015 which provide that "adoption" means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.

Differences in procedure for adoption by Indian PAP Living in India and inter country adoption:-

Section 58 of the Juvenile Justice (Care & Protection of Children) Act provides Procedure

for adoption by Indian prospective adoptive parents living in India which is run as follows :-

1. Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child may apply for the same to a specifically Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.
 2. The specialized Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority.
3. On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialized Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoptive regulations framed by the Authority.
4. On the receipt of a certified copy of the court order, the Specialized Adoption Agency shall send immediately the same to the prospective adoptive parents.
5. The progress and well being of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoptive regulations framed by the Authority.

Section 59 of the Juvenile Justice (Care & Protection of Children) Act, 2015

Provides procedure for inter-country adoption of an orphan or abandoned or surrendered child :-

- (1) If an orphan or abandoned or surrendered child could not be placed with an Indian or non resident Indian prospective adoptive parent despite the joint effort of the Specialized Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption;
 - Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.
2. An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children.
3. A non resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoption parents living abroad, irrespective of their

religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorized foreign adoption agency, or Central Authority of or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

4. The authorized foreign adoption agency, or Central Authority, or a concerned government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority.
5. On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialized Adoption Agencies, where children legally free for adoption are available.
6. The Specialized Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency.
7. On receipt of the acceptance of the child from the prospective adoptive parents the Specialized Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.
8. On the receipt of a certified copy of the court order, the specialized adoption agency shall send immediately the same to Authority, State Agency and to be prospective adoptive parents, and obtain a passport for the child.
9. The Authority shall intimate about the adoption to the immigration authorities of Indian and the receiving country for the child.
10. The prospective adoptive parents shall receive the child in person from the specialized adoption agency as soon as the passport and visa are issued to the child.
11. The authorized foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption in consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority.
12. A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic

mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority.

Regulation 14 of Adoption Regulation 2017 provided that non resident Indian to be treated at par with Indians living in India in terms of priority of adoption of Indian orphan, abandoned or surrendered children.

Regulation 15 of the Adoption Regulation 2017 envisaged registration and home study report for PAP for inter country adoption.

Regulation 12 of Adoption Regulation 2017 provides legal procedure for adoption of child. Clause 1 of section 12 provides that the Specialized Adoption Agency shall file an application in the court concerned, having jurisdiction over the place where the SAA is located, with relevant documents in original as specified in Schedule-IX within 10 working days from the date of matching of the child with the PAP and in case of inter country adoption, from the date of receiving No Objection Certificate from the authority, for obtaining the adoption from the court.

Regulation 17 (1) of Adoption Regulations 2017 provides the legal procedure as provided in Regulation 12 shall **mutais mutandis** be allowed in cases of inter country adoption.

(2) In case of the prospective adoptive parents habitual residing abroad and waiting the Specialized Adoption agency to represent on their behalf as well, the application shall also be accompanied by a Power of Attorney in favor of the social worker or adoption in charge of the Specialized Adoption Agency which is processing the case and such Power of Attorney shall authorize a social worker to handle the case on behalf of the prospective adoptive parents.

Section 57 of the Juvenile Justice (Care & Protection of Children) Act provides :-

Eligibility of prospective adoptive parents :-

1. The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.
2. In case of a couple, the consent of the the spouses for the adoption shall be required.
3. A single or divorced person can also adopt, subject to fulfillment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.
4. A single male is not eligible to adopt a girl child.
5. Any other criteria that may be sepcified in the adoption regulations framed by the Authority.

Regulation 5 of Adoption Regulation 2017 provides following eligibility criteria for PAP :-

1. The prospective adoptive parents shall be physically, mentally and emotionally stable, financially capable and shall not have any life threatening medical condition.
2. Any prospective adoptive parents, irrespective of his marital status and whether or not he has biological son or daughter, can adopt a child subject to following namely :-
 - (a) The consent of both the spouses for the adoption shall be required, in case of a married couple;
 - (b) A single female can adopt a child of any gender;
 - (c) A single male shall not be eligible to adopt a girl child;
3. No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship.
4. The age of prospective adoptive parents, as on the date of registration, shall be counted for deciding the eligibility and the eligibility of prospective adoptive parents to apply for children of different age groups shall be as under :-

Age of the child	Maximum composite age of prospective adoptive (couple)	Maximum age of single prospective adoptive parents
Up to 4 years	90 years	45 years
Above 4 and upto 8 years	100 years	50 years
Above 8 and upto 18 years	110 years	55 years

5. In case of couple, the composite age to the prospective adoptive parents shall be counted.
6. The minimum age differences between the child and either of the prospective adoptive parents shall not be less than twenty five years.
7. The age criteria for prospective adoptive parents shall not be applicable in case of relative adoptions and adoption by step-parents.
8. Couples with three or more children shall not be considered for adoption except in case of special need of children as defined in sub-regulation (21) of regulation 2, hard to place children as mentioned in regulation 50 and in case of relative adoption and adoption by step-parent.

Regulation 30 of Adoption Regulation 2017 deals with following fundamental principles of governing adoption.

- (a) The child's best interest shall be of paramount consideration, while processing

- any adoption placement;
- (b) Preference shall be given to place the child in adoption with Indian citizens and with due regards to the principle of placement of the child in his own socio-cultural environment, as far as possible;
- (c) All adoptions shall be registered on Child Adoption Resource Information and Guidance System and the confidentiality of the same shall be maintained by the Authority.

In case of **Sewa Bharty Matruchhaya, Drug through its Secretary Dilip Desmukh (Crl. Rev. No 97/2018)**, the Hon'ble High Court of Chhatisgarh, Bilaspur in Para-18 of the Judgment pleased to issue certain directions to the court concerned and the SAA, while dealing with an adoption case under J.J.Act 2015 shall henceforth positively comply with the following direction :-

1. While deciding an adoption application, the Court shall strictly adhere to the time limit of two months as provided by Section 61 (2) of the Juvenile Act, 2015 Rule 46 of the Model Rules, 2016 and Regulation 12 (6) of the Adoption Regulations, 2017.
2. If an adoption case is not disposed of within the aforesaid period of two months, the Court shall record a specific reason therefor.
3. The court shall conduct proceeding of an adoption case in camera.
4. The court shall not treat an adoption case as an adversarial litigation.
5. While deciding an adoption case, the Court shall strictly adhere to Rule 45 (2) of the Model Rules, 2016 with regard to applicability of the procedure laid down in the Juvenile Act 2015 and the Adoption Regulations, 2017.
6. Looking to Regulation 12 (7) of the Adoption Regulation, 2017, the adoptive parents shall not be asked to execute any bond or make any investment in the name of the child.
7. Since an adoption case is a non-adversarial litigation in nature, the Specialised Adoption Agency shall not make any opposite party or Respondent in the adoption application. Along with an application for adoption, names and details of PAPs shall be kept in a covered and sealed envelope.
8. Though as provided in Regulation 19 (1) of the Adoption Regulations, 2017 in a case of inter-country adoption, it is mandatory that the Authorized Foreign Adoption Agency or the Central Authority or Indian Diplomatic Mission or Government Department concerned, as the case may be, shall report progress of the adopted child for two years from the date of arrival of the adopted child in the receiving country, on a quarterly basis during the first year and on a six monthly basis in the second year. In my view that it appropriate to direct that in

addition to the above a welfare report and a detailed educational report of the adopted child shall also be obtained on a six monthly basis till the adopted child attains majority and such reports shall be monitored properly.

Submitted by

Kumari Ranjana Asthana
Principal Judge, Family Court, Giridih

Q.No.1. Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the Family Court. Discuss the impediments and possible remedies.

Ans: The speedy disposal of all sorts of cases before a family court is the prime intention behind the very creation of the family courts. In my opinion, the major impediments in resolving the family dispute by a family court judge is his own personality skills developed during his entire tenure of job as a judge working in an adversarial system with a problem solving approach. Hence first of all, the first step in achieving the goal of speedy disposal of family disputes before a family court is to shift himself from a problem solving approach to a therapeutic approach. First of all, he has to convert himself from an authoritative role as a judge to a conciliator with an empathetic approach to the problem before him. Appreciating the nature of disputes before a family court judge with a prime concern of its speedy resolution, the Family Courts Act has ousted the role of lawyers in such cases as essential under Section 13 of the Act. Considering the varied nature of family disputes, the said act has even provided scopes to take services of a legal expert as *amicus curiae* (Section 13), and assistance of medical welfare experts (Section 12). Further, the Sections 14, 15, 16 of the said act have rendered the family court judge to give a non- strict adherence to the evidence act. Section 10 (3) of the said act has even given an ample power to the family court judge to lay down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings or at the truth of facts alleged by one party and denied by the other.

The lawyers who generally work in an adversarial system, though permitted by the court itself, do not change their approach to their case generally, which in my opinion provide a great hurdle in resolving a dispute at hand speedily. Here, the family court judge has to make an effort to impress upon the lawyer to have a different approach in family court matters and if they cause any hurdle in resolving the matter the *vakalatnama* of the concerned lawyer can even be cancelled as held *Guruvachan Kaur vs Pritam Singh AIR 1998 ALL 140*.

In maintenance cases, the major problem before a family court judge is to firstly decide the quantum of maintenance amount and its subsequent payment to the petitioner as in the majority of cases in our locality come from

rural background with no salary income class to assess their monthly income. The same problem comes up during the time of recovery of maintenance amount from such people with no cooperation of police and administrative authorities.

The role of the Family Court was not to protect the institution of marriage at all costs but to adjudicate taking into account the best interest of parties in a marriage. The judges need to adjudicate keeping in mind the unequal relations and position in a marriage but should not be biased or unduly sympathetic to either party in a matrimonial dispute.

In matters of child custody the family court should develop a child-centric rather than a parental rights centric approach. The concept of first strike and closest contact in determining jurisdiction. Various factors which should be considered while ascertaining guardianship which includes age, gender and religion of minor, character and capacity of guardian, closeness of relationship, wishes of deceased parents keeping in view the concept of 'Best Interests of a Child'. Various factors which should be taken into account by the court to ascertain the best interest of the child. These include wishes of the child, mental and physical health of the parents home environment, age and gender of child, evidence of drug addiction or sexual abuse use of force by either parent, employment status of parents, ability and willingness of the parents to provide stability to the child negligence on part of parents, special needs of the child, previous living arrangements etc. The concept of "best interest of the child" is gender neutral and the welfare of the child is of paramount importance. The judges need to develop a mindset free of gender bias so that they are able to adjudicate neutrally.

Lastly as every case has its own individuality the family court judge empowered with section 10(3) of the Family courts act has to adopt a specific approach to that 1984 to resolve the dispute expeditiously. Here the judge can take a cue from the landmark judgement of Hon'ble Apex Court in Santhani vs Vijaya Venketesh reported in 2017 0 AIR (SC) 5745 wherein while discussing the discussing the scope of Section 9,11,12 of Family Courts Act, Section 22,23,26 of Hindu Marriage Act, the Hon'ble court has held "The principal thrust of the law in family matters is to make an attempt for reconciliation before processing the disputes in the legal framework. Reconciliation is not mediation. Neither is it conciliation. No doubt, there is conciliation in reconciliation. But the concepts are totally different. Similarly, there is

mediation in conciliation but there is no conciliation in mediation. In mediation, the role of the mediator is only to evolve solutions whereas in reconciliation, the duty-holders have to take a proactive role to assist the parties to reach an amicable solution. In conciliation, the conciliator persuades the parties to arrive at a solution as suggested by him in the course of the discussions. In reconciliation, as already noted above, the duty-holders remind the parties of the essential family values, the need to maintain a cordial relationship, both in the interest of the husband and wife or the children, as the case may be, and also make a persuasive effort to make the parties reconcile to the reality and restore the relationship, if possible. The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation. However, reconciliation is not always the restoration of status quo ante; it can as well be a solution as acceptable to both parties.”

Q. No. 2. In what manner and to what extent the procedure in family courts can be evolved for speedy disposal of cases? Explain with reference to the relevant provisions of The Family Courts Act and Rules.

Ans: With an ultimate object of the preservation of the family, the family courts came into being which are ought to adopt a human approach- an approach radically different from the adopted in ordinary civil proceedings and the very intention in legislating the family courts act is to provide a forum for speedy settlement of the disputes which are covered under the act. The act has some salient features to show that its proceedings are less formal in nature and more or less and in the nature of a conciliation proceeding. There are provisions for associating social welfare groups and counsellors in working out the purposes of the act vide sections 5 and 6. Section 12 enables the family court to secure the services of a medical expert of the services of persons who are engaged professionally in promoting the welfare of the family. Section 14 suitably modifies the rigours of Evidence Act in its application to family court proceedings relating to admissibility of evidence.

The sections 9 to 18 of the family courts act falling within chapter 4 dealing with procedure themselves provide different means for speedy disposal of cases before a family court. Elaborating further, section 9 of the act casts a duty upon the court to make an earnest endeavour to bring about a settlement between the parties. Uptil the stage of completion of that process undoubtedly the lawyers have no role to play. At this stage, the presiding officer, by using his good offices tries to bring about a conciliation, a settlement between the parties. Here, even the absence of one of the parties, the honourable court KS Padukone vs Principal Judge, Family Court, Bangalore City, AIR 1999 KANT 427 has held that the family court should permit representation through legal practitioner or authorized agent. In order to simplify the proceeding before the family court and to settle disputes expeditiously without there being strict rigour of procedural law and evidence act keeping an eye on conciliatory approach to achieve socially desirable result even the right to legal representation to the parties has been given go by vide section 13 of the act and only in the interest of justice, the family court can seek the assistance of a legal expert. In case of a representation by a lawyer is allowed and during such proceeding some obstruction is caused by non-availability of lawyers or

otherwise the family court can immediately cancel the *vakalatnama* for speedy disposal of the case (Guruvachan Kaur vs Pritam Singh AIR 1998 ALL 140).

In this way, by simply honestly adhering to the procedure enshrined in the chapter 4 of the family courts act, the cases before a family court can expeditiously be disposed off. The section 36 of the family courts (Jharkhand High Court) rules 2004 by giving a three months time in such cases provides another guideline in this context.

Q. No. 3. In a matrimonial suit for divorce filed by the husband on the grounds of cruelty and desertion the wife appears and admits desertion but matters counter allegation of cruelty. Can the divorce suit be decreed on the ground of desertion on admission? Will the situation be different if there is no allegation of cruelty by the husband? Whether the limitation of cooling off period apply in such cases.

As in the instant question, the religion of the husband and wife has not been given, I am taking the said problem applicable to the Hindus who are in majority here. Now, before giving my opinion towards the said problem, i'd like to have a look on the provisions applicable in this case i.e. Section 13 (i)-a and (i)-b of the Hindu Marriage Act 1955 which goes as under:

(1) Any marriage solemnized, whether before or after the commencement of the Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition;

Now, as in the given case the desertions has been admitted by the wife after her appearance in the case but with a counter allegation of cruelty. The expression desertion as contemplated in the Section 13 (i)-b of the Act is a withdrawal not from a place but from a state of things. The desertion here requires four important elements, viz., (i) factum of separation (ii) necessary intention to put an end to matrimonial consortium and cohabitation permanently, (iii) want of reasonable cause and (iv) want of consent or against the wish of the other spouse.

Again cruelty in a case may be inferred as from the whole facts and matrimonial relations of the parties and interactions in their daily lives disclosed by the evidence. In general, cruelty, in its character, a cumulative charge. Before granting relief on ground of cruelty and/or desertion, the court must be satisfied that the grounds are established by the petitioner by adducing substantive legal evidence to the satisfaction of the court. Respondent on the other hand bears the burden of establishing affirmative defenses set up by her/him in reply. Hence the divorce in the given problem

cannot be decreed on the ground of desertion of admission itself. If from perusal of materials on record, it is clear that wife willingly did not reside with her husband and still maintained the same position she was held to be guilty of wilful desertion as in *M Suresh vs Smt. M Anuradha* AIR 2011 (NOC) 213 AP. In that case the husband would be entitled for decree of divorce. But where cruelty on the part of husband was reasonable cause to make wife live apart therefore husband not entitled to divorce on ground of desertion by wife, as held in *Kuldip Singh vs Smt. Chand Rani* AIR 2010 HP14. It is well settled that both the plaintiff as well as the defendant must be held bound by the statement of facts in their respective pleadings. But under the proviso to Order VIII, Rule 6, the Court may, in its discretion require any fact admitted to be proved otherwise than by such admission. The proviso to section 58 of the Evidence Act is also to the same effect. In matrimonial proceedings, there can be no judgment by default or admission. Even in the case of *Pranjali Bingi* (supra), the learned Single Judge of this Court held in paragraph 10 that merely because both the parties have prayed for same reliefs of divorce, on the basis of different set of facts, the Court does not get jurisdiction to pass order under Order 12, Rule 6, Civil Procedure Code. It was also held that on a Petition for divorce, the Court has to record its satisfaction under section 23 of the Act, even if Petition is undefended. In other words, in the proceedings under the Act, the Court can arrive at the satisfaction contemplated by section 23 on the basis of legal evidence in accordance with the provisions of the Evidence Act and it is quite competent for the Court to arrive at the necessary satisfaction even on the basis of the admissions of the parties alone. Admissions are to be ignored on grounds of prudence.

The limitation of cooling off period does not apply in such cases as the petitioner has to prove the continuous separation for a period of two years before filing a petition for dissolution of marriage.

Q. No. 4. Due to strained relations between the parents, a child who ideally needs the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective considerations to be kept in mind in awarding "Shared Parenting" orders. Discuss in the light of latest case laws on the point.

Ans.- The children are the most important human resources whose development has a direct impact on the development of the nation, for the child of today with suitable health, sound education and constructive environment is the productive key member of the society. The present of the child links to the future of the nation, and while the children are the treasures of their parents, they are the assets who will be responsible for governing the nation.

In a broken family or in a family where parents are in an estranged relationship, the child of that family is the biggest sufferer. The child wants company from both parents but they are unable to provide the child a better atmosphere and such discord between the parents gives the natural effect which hinders the child's normal development. In such circumstances the court has to make a balance between welfare of child, his/her custody and safeguard of right of both the parents. This evolved the theory of Shared Parenting based on parental alienation syndrome.

The Hon'ble Supreme Court in Vivek Singh vs. Romani Singh, (2017) 3 SCC 231, has discussed the term "Parental Alienation Syndrome". In paragraph No.18 of the judgment, following was observed:-

"18..... Psychologists term it as "The Parental Alienation Syndrome". It has at least two psychological destructive effects:

(i) First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked to choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.

(ii) Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone who is devoid of any positive characteristics. Both of these assertions represent one parent's distortions of reality.

The Hon'ble Supreme Court in *Gaurav Nagpal vs. Sumedha Nagpal*, (2009) 1 SCC 42, had occasion to consider the parameters while determining the issues of child custody and visitation rights, entire law on the subject was reviewed. The Hon'ble Court referred to English Law, American Law, the statutory provisions of Guardian and Wards Act, 1890 and provisions of Hindu Minority and Guardianship Act, 1956, and laid down following in paragraph Nos. 43, 44, 45, 46 and 51:

"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.

"44..... The aforesaid statutory provisions came up for consideration before Courts in India in several cases. Let us deal with few decisions wherein the courts have applied the principles relating to grant of custody of minor children by taking into account their interest and well-being as paramount consideration.

"45..... In *Saraswathibai Shripad Ved v. Shripad Vasanti Ved*, ILR 1941 Bom 455 : AIR 1941 Bom 103; the High Court of Bombay stated;

“.....It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the Court. It is the welfare of the minor and of the minor alone which is the paramount consideration.....”

As held in **Gayatri Bajaj vs Jiten Bhalla (CA No.: 7232-7233 of 2012 dated 5/5/12)** “the law relating to custody of minors has received exhaustive consideration by the Hon’ble apex court in a series of pronouncements. In **Gaurav Nagpal vs Sumedha Nagpal**, the principles of english and american in this regard were considered by this court to hold that the legal position in India is not anyway different. Noticing the judgement of the Bombay High Court in **Saraswati Bai Shripad Vas vs Shripad Vasanji, Rosy Jacob vs Jacob A Chakramakkal and T. H. Dolikukka vs H. S. Dolikukka**, this court eventually concluded in para 50 and 51 that

50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look on the issue of legalistic basis in such matters human angles are relevant for deciding those issues.

The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of a minor. As observed recently in M M Ganguly’s case court has to give due weightage to the child’s ordinary contentment health, education, intellectual development and favourable surroundings and over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

51. The word welfare used in Section 13 of the act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents and the guardians maybe taken into consideration, there is nothing which can stand in the way of the court exercising its *parens patriae* jurisdiction arising in such cases.

The views expressed in para 19 and 20 of the report in **MM Ganguly vs Jayant Ganguly** would require special notice. In the said case it has been held that it is the welfare interest of the child and not the rights of the parents

which is a determining factor for deciding the question of custody.”

In the case of **Sheoli Hati Vs Somnath Das** reported in 2019 (6) Supreme 353; the Honorable court considering the scope of sharing parentage approved that the wards will live in boarding school for her grooming and she will visit her parents in annual vacation and both parents will have access to her. The parents cannot understand the ward as their own property. The interest of the child will be best served by removing her from the influence of home life and by directing that she should continue to remain in boarding school.

Apparently, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the court.

Q. No. 5. What are the practical difficulties in execution of an order for grant of maintenance under section 125 Cr.P.C? Discuss the available options in law before a family judge for the realisation of the maintenance amount awarded under section 125 Cr.P.C. with special reference to the case laws.

Ans.- In general, a maintenance order under Section 125 of Cr.P.C. can be passed without much hindrance either in the presence of the parties or in the absence of the OP. It is the execution part of it that poses the main challenge in such kind of cases and the problems encountered by a family court judge in this context can be enlisted as under

1. The maintenance amount ordered is in favour of the weak ; generally a destitute lady or helpless children with limited means to ensure enforcement in case of defaulters.
2. It is generally observed that the maintenance case is filed from the city / place of her maternal residence. The husband resides in another city either at her matrimonial residence or his place of work. Matters are worse when he is a labourer without any permanent abode. Thus neither the law enforcing agency nor she is aware of the current residential address of the husband. Warrant for realisation of maintenance amount due to incorrect address is thus generally not served.
3. In most of the cases, the wife has no idea of her husband's real income . For salaried persons , realisation of maintenance amount from salary is comparatively easy but it is very difficult in case of people in private jobs or daily wages earners. Defaulters in cases of daily wages earner is high as he has no money for payment of the maintenance amount. Parties often transfer property to avoid paying maintenance.
4. Often it is observed that there is a reluctance from the officer incharge of realisation warrant .In some cases there is even a lack of knowledge of procedures hence the maintenance orders are not executed.

5. It is practically seen that the intra district (within the same district) realisation service report or follow up action there but in cases of inter district realisation service report is either not available or is very poor.

However the court has been provided with means of execution such order through provisions of section 125(3) and 128 of Cr.P.C. which are as follows:

Sec125: "If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one month or until payment if sooner made."

Sec128: A copy of the order of 1[maintenance or interim maintenance and expenses of proceeding, as the case may be] shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to 2[whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be] is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the 3[allowance or as the case may be expenses, due.

The manner for levying fines is provided in Section 421, Criminal Procedure Code. Section 421 reads as follows :

"Warrant for levy of fine: (1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) The Hon'ble Supreme Court has abundantly made it clear that the provisions given in Chapter IX of the Code of Criminal Procedure comprising Sections 125 to 128 constitute a complete Code in itself. It further held that the

proceedings referred to in Chapter IX of the Code of Criminal Procedure are basically of civil nature, that they are certainly not punitive and that the rights of the parties have got to be determined with reference to the object, which the proceedings are expected to serve, as held in *Nandlal Misra v. Kanhaiyalal Misra*, , and *Mst. Jagir Kaur v. Jaswant Singh*, In Civil Law some of the sections provide for the procedure for attachment of intangible movable property, such as, debt, share, share in movables, salary or allowances of the Government servants or of Railway employees or of employees of the local Authority and of private employees. Similarly, the Criminal Court also has got powers to attach intangible movable assets for the purpose of recovery, out of the same, of certain amounts. Therefore, the necessary conclusion that can be arrived at from these provisions, is that the movable property, whether tangible or intangible or even a debt can be attached by a Criminal Court in accordance with the above said provisions of law.

Q. No. 6. What are the principles for computation of maintenance in a case under section 125 Cr.P.C. ? How will the quantum of maintenance vary in case the competent court has awarded maintenance under Domestic Violence Act and /or under section 24 of the Hindu Marriage Act.

Ans.- Before answering the question, one must have a look at the relevant provisions of Section 125 of Cr.P.C which reads as under

1) If any person having sufficient means neglects or refuses to maintain.- (a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) 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 his wife or such child, father or mother, at such monthly rate 1[***] as such a magistrate thinks fit, and to pay the same to such a person as the Magistrate may from time to time direct.

Apparently, no straight jacket formula for fixation of quantum of maintenance is given in the aforesaid provisions and so it is upon the court which has to decide the quantum maintenance on the basis of income and the earning capacity of the husband, his liabilities, the basic needs of the applicant, the status of the parties and other relevant circumstances, and also the income of the wife, if any (**Sushila Ben Mohanlan vs MC Hargovind 1991(2) crimes 736, Sabera Bibi vs Dr. S.H. Rehman 2003(3) crimes 424**). It has also been held in **G Mariah vs G Vijayalakshmi 1979 CrLJ 1226(AP)** that "*the quantum shall be such which lead her to live a luxurious life nor leave her in penurious state*". The Hon'ble Court in **Saheda Khatoon vs Ghulam Sarwar 2002,3 CHN 431** has held that "*the general reasonable rule is to charge 1/5th of the income of the husband for the purpose of awarding maintenance to the wife petitioner.*"

Maintenance awarded u/s 125 cr.p.c and other Acts

In the case of **Sudeep Chaudhary Vs Radha Chaudhary reported in AIR 1999 SC 536**, the Hon'ble court while considering the scope of maintenance amount awarded under Section 125 Cr.P.C. and under Section 24 of the Hindu Marriage Act held that the amount awarded under the Section 125 of Cr.P.C. for maintenance was adjustable against the amount awarded in the matrimonial proceeding and was not to be given over and above the same and the Hon'ble court comprehends both the amount awarded. The Hon'ble Jharkhand High Court in the case law reported in 2017 0 Supreme(Jhk) 1267 (**Sangeeta kumari Versus The State of Jharkhand & Anr.**) held that "when there are orders of maintenance both under Section 125, Cr PC and Section 24 of the Hindu Marriage Act, 1955, the claimant shall not be entitled to get maintenance simultaneously, rather, he/she would be entitled to get only the higher amount of maintenance out of both the provisions.

On the basis of the above ratio, it can be concluded that maintenance awarded in different proceedings between the same parties is adjustable and a party cannot be allowed to pay maintenance in each proceeding separately.

Q. No.7. What is the difference in jurisdiction of the courts under the Courts and Wards Acts and Minority & Guardianship Acts in appointment of Guardians of a minor?

Ans:- While answering this question, the relevant provisions of both the aforesaid acts are worth mention

1. Under the Guradians' and Wards Act 1890, section 7 authorizes the court to appoint a guardian for the person or property or both of a minor if it is satisfied that it is necessary for the welfare of the minor.

Further, Section 17 lays down factors to be considered by the court when appointing guardians.

"Section 17(1) states that courts shall be guided by what the personal law of the minor provides and what, in the circumstances of the case, appears to be for the' welfare of the minor'.

Section 17(2) clarifies that in determining what is for the welfare of the minor, courts shall consider the age, sex and religion of the minor; the character and capacity of the proposed guardian and how closely related the proposed guardian is to the minor; the wishes, if any of the deceased parents: and any existing or previous relation of the proposed guardian with the person or property of the minor.

Section 17(3) states that if the minor is old enough to form an intelligent opinion, the court 'may' consider his/her preference.

Section 19 of the Guardians and Wards Act, 1890 deals with cases where the court may not appoint a guardian. & Section 19(b) states that a court is not authorized to appoint a guardian to the person of a minor whose father or mother is alive, and who, in the opinion of the court, is not unfit to be a guardian.

The earlier Section 19(b) prevented the court from appointing a guardian in case the father of the minor was alive. This clause was amended by the Personal Laws (Amendment) Act, 2010 and was made applicable to cases where even the mother was alive, thus removing the preferential position of the father.

Section 25 of the GWA deals with the authority of the guardian over the custody of the ward." Section 25(1) states that if a ward leaves or is removed from the custody of the guardian, the court can issue an order for the ward's return, if it is of the opinion that it is for the 'welfare of the ward' to be returned to the custody of the guardian.

Apparently the aforesaid provisions suggest that in appointing to the person or property of a minor under the Guardians and Wards Act, 1890 courts are to be guided by concern for the welfare of the minor/ward.

The aforesaid Act is a secular law regulating questions of guardianship and custody for all children within the territory of India, irrespective of their religion. It authorizes the District Courts to appoint guardians of the person or property of a minor, when the natural guardian as per the minor's personal law or the testamentary guardian appointed under a Will fails to discharge his/her duties towards the minor. The Act is a complete code laying down the rights and obligations of the guardians, procedure for their removal and replacement, and remedies for misconduct by them. It is an umbrella legislation that supplements the personal laws governing guardianship issues under every religion. 'Even if the substantive law applied to a certain case is the personal law of the parties, the procedural law applicable is what is laid down in the Guardians and Wards Act, 1890. Section 7 authorizes the court to appoint a guardian for the person or property or both of a minor, if it is satisfied that it is necessary for the 'welfare of the minor'.

2. However under Hindu minority and guardianship act 1956, the father is the natural guardian of a minor and after him it is the mother. Section 6(a) of the said Act provides that HMGA provides that: a in case of a minor boy or unmarried minor girl, the natural guardian is the father, and after him, the mother; and the custody of a minor who has not completed the age of five years shall "ordinarily" be with the mother. In **Gita Hariharan v. Reserve Bank of India**, the constitutional validity of Section 6(a) was challenged as violating the guarantee of equality of sexes under Article 14 of the Constitution of India. The Hon'ble Supreme Court considered the import of the word 'after' and examined

whether,as per the scheme of the statute, the mother was disentitled from being a natural guardian during the lifetime of the father. The Court observed that the term 'after' must be interpreted in light of the principle that the welfare of the minor is the paramount consideration and the constitutional mandate of equality between men and women. The Court held the term "after' in Section 6(a) should not be interpreted to mean after the lifetime of the father, 'but rather that it should be taken to mean"in the absence of the father. "The Court further specified that 'absence' could be understood as temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise however it was held that in the above specific situations,the mother could be the natural guardian even during the lifetime of the father.

Further the section 13 of the said act declares that in deciding the guardianship of a Hindu minor, the welfare of the minor shall be the paramount consideration' and that no person can be appointed as guardian of a Hindu minor if the court is of the opinion that it will not be for the welfare' of the minor."

Thus a father having being given a stronger guardianship rights over a minor under section 6(a) of the Act can be disputed by the mother under the provisions of Section 13 of the said Act.

Guardians and Wards Act, 1890 Vs Hindu Minority and Guardianship Act, 1956

The point of difference between the GWA and the HMGA lies in the emphasis placed on the welfare principle. Under the GWA, parental authority supersedes the welfare principle,while under the HMGA, the welfare principle is of paramount consideration in determining guardianship. Thus, for deciding questions of guardianship for Hindu children,their welfare is of paramount interest,which will override parental authority. But for non-Hindu children,the court's authority to intervene in furtherance of the welfare principle is subordinated to that of the father,as the natural guardian.'

Recently the Apex Court in **Tejaswini Gaud vs Shekhar Jagdish Prasad Tiwary reported in 2019 7 SCC 42** as held that “In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. It was further held that the law relating to custody of a child is fairly well settled and in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting a proper guardian of a minor, the paramount consideration should be the welfare and well- being of the child. In selecting a guardian, the court is exercising *parens patriae* jurisdiction and is expected, nay bound, to give due weight to a child’s ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor”

Conclusively, the paramount consideration before the court shall always be the welfare of child.

8. What are the major differences in procedure for adoption by Indian prospective adoptive parents living in India and inter country adoption? What are the eligibility criterion for prospective adoptive parents? Discuss with relevant provisions of law and latest case laws.

Ans: The law of adoption in India is governed by the Juvenile Justice (Care and Protection) Act 2015. Section 56(1) provides that adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of the Act, the rules made thereunder and the adoption regulations framed by the authority.

Section 57.....Eligibility of prospective adoptive parents-

(1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

(2) In case of a couple, the consent of both the spouses for the adoption shall be required.

(3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

(4) A single male is not eligible to adopt a girl child.

(5) Any other criteria that may be specified in the adoption regulations framed by the Authority

Section 58. Procedure for adoption by Indian prospective adoptive parents living in India.-

(1) Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a Specialised Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.

(2) The Specialised Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study

report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority.

(3) On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(4) On the receipt of a certified copy of the court order, the Specialised Adoption Agency shall send immediately the same to the prospective adoptive parents.

(5) The progress and well-being of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the Authority.

Section 59: Procedure for inter-country adoption of an orphan or abandoned or surrendered child.-

(1) If an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parent despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption:

Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.

(2) An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children.

(3) A non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign

adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

(4) The authorised foreign adoption agency, or Central Authority, or a concerned Government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority.

(5) On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialised Adoption Agencies, where children legally free for adoption are available.

(6) The Specialised Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency.

(7) On receipt of the acceptance of the child from the prospective adoptive parents, the Specialised Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(8) On the receipt of a certified copy of the court order, the specialised adoption agency shall send immediately the same to Authority, State Agency and to the prospective adoptive parents, and obtain a passport for the child.

(9) The Authority shall intimate about the adoption to the immigration authorities of India and the receiving country of the child.

(10) The prospective adoptive parents shall receive the child in person from the specialised adoption agency as soon as the passport and visa are issued to the child.

(11) The authorised foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any

disruption, in consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority.

(12) A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority.

Putting at rest a recent controversy in an inter country adoption case of **Union of India vs Ankur Gupta and others (2019 SCC online SC 262)**, the Hon'ble Apex Court has held that *“Section 58 and 59 provides for two different mechanisms for adoption. As per Section 59(1), if an orphan or abandoned or surrendered child could not be placed with an Indian or Non-Resident Indian prospective adoptive parents despite the joint efforts of the Specialized Adoption Agency and State Agency, within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter country adoption. Thus the sixty days period has to be elapsed from the date when the child has been declared legally free for adoption.”*

Submitted by:

Ravindra Kumar

Principal Judge, Family Court

Lohardaga

Presented by:-

(Rizwan Ahmad)

Family Judge, West Singhbhum at Chaibasa

Answer to questions:-

Q.No.1.

Right to speedy trial is an intergral part of the principle of fair trial and is fundamental to the international human rights discourse. The purpose behind the establishment of family court was to provide a forum for speedy settlement of matrimonial and other matters. Family court's judges are armed with additional powers to mould and adopt procedure in the interest of justice, a power where the judge of civil courts and criminal courts do not have. In addition there are 2 points of departure from the practices adopted in the regular court. (1) Judges as a rule do not have the help of lawyers as in regular courts and (2) they are to be aided by none legal support system such as of conciliators and experts from other fields who may not have adequate knowledge of law.

The main impediments for speedy disposal of matrimonial matters pending in the family court are that the O.P/respondents always try to avoid the service of summons and after service of summons and appearance in the court, they seek unnecessary adjournments and file miscellaneous petition. Besides this, the parties also do not produce the witnesses in time with a view to delay the trial.

For the speedy disposal of matrimonial matters pending in family court,efforts should be made to decide miscellaneous petition at the admission stage after affording opportunity to the concerned parties. The Presiding Officer Family Court should have the complete control over the proceeding from the first hearing of the case. ADR mechanism should be enhanced. Court should not grant adjournment in casual manner and control cross-examination to prevent delay. There should be full utilisation of the court working hours. The advocates and judges should arrive on time and that there should not be unnecessary adjournments. The case that are filed on similar points should be clubbed together and decided accordingly. The judges must deliver judgments within reasonable time. The lawyers should not repeat their arguments and should be very precise within the points that make. Further the judges should also endeavour to right their judgments in such a way that he does not give away to further litigation on the same matter by way of appeal or revision of the same case. The lawyer, as officer of the court should not resort to strikes under any such circumstances. Written statement should be filed within time frame and the judge should inter act directly to the litigants instead of lawyer. Use of technology and the training of judges are also useful for the speedy disposal of matrimonial matters.

Q.No.2.

The main object of the family court Act 1984 was to provide the opportunities of conciliation to the litigants and to pave way for speedy disposal. The family courts are provided with special power u/s 10 of the Act where the judge can formulate his own ways and means within the scope of law to help the litigants to arrive at a settlement. **Sec.13** of the Act declines the right of the parties to be represented by a legal practitioner as a matter of right. The proviso to the above section empowers the court to seek the assistance of a legal practitioner as amicus curiae. As per **Sec. 6** of the Act when the respondents appear before the family court, the judge without insisting them to file a written statement would refer them to counselor for undergoing the process of counselling. The counselor shall send report indicating whether the settlement could be arrived or not. The mediation centre attached to the family courts are also constituted so as to conduct mediation in family dispute. Once reference is made, the mediation would go on for a maximum of 60 days which is extendable to 90 days. When the case is not settled at the mediation centre, the cases referred back to the court. Now, again the family court has ample powers **u/s 10 (3)** of the Act to have a conciliation with the parties. If the judge is not able to make the parties arrive at the settlement, then the adversarial procedure commences the judge then direct the respondent to file written statement within the time frame fixed by the court. The procedure laid down in C.P.C. 1908 have to be followed. After the pleading in either side is complete, the enquiry is commenced with the petitioner. The provision of section **15 & 16** of the Act lays down the procedure for recording evidence. Evidence shall not be lengthy and shall contain the memorandum of substance alone. Evidence of formal character on affidavit. **Sec.14** of the Act lays down that any piece of paper could be received in evidence whether or not it is relevant or admissible under the Indian Evidence Act. It means objection to the marking of documents cannot be raised while documents are being marked. The party can nullify the veracity or evidentiary value of the document during cross-examination only. As per **Sec.17** of the Act judgment of family court shall contain a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision. **Rule 20 to 23** of the Family Court (Jharkhand High Court) Rules 2004 also lays down procedure for speedy disposal of cases in family courts.

Q.No.3.

Desertion and cruelty are the grounds for divorce **u/s 13** of Hindu Marriage Act,1955. **Sec.13 (1)** of the Act reads as :- Any marriage solemnized, whether before or after the commencement of the Act may on a petition presented by either the husband or the wife be dissolved by a decree of divorce on the ground that the other party -

(ia) has after the solemnization of the marriage treated the petitioner with cruelty;

or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or--.

In the present problem, divorce suit cannot be decreed in both the situation. In the first situation, though the wife has admitted desertion but as per counter allegation her desertion was because of cruelty. When the wife has deserted the husband because

of cruelty, the husband is not entitled for divorce. The situation will not be different, if there is no allegation of cruelty by the husband because as per the counter allegation of the wife the desertion was not without any reasonable cause and for a continuous period of two years.

The limitation of cooling period does not apply in such cases.

Q.No.4.

An order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a minor. In Mousmi Moitra Gangulis case it has been held that it is the welfare and interest of the child and not the right of the parents which is the determining factor for deciding the question of custody of a child.

Shared parenting means joint parenting under which a child will be looked after by both the parents after divorce instead of giving custody to one of them. In 2013 the Karnataka High Court ruled in a case that both parents were entitled to get custody and brought into operation an appropriate parenting plan. In 2015 the law of commission of India sought an amendment in the Hindu minority and guardianship Act, 1956 spelling out the conditions that the court should consider before exercising the option of joint custody. The court needs to assess whether the parents are mature, responsible and willing to agree upon decisions that affects the child's welfare. Whether the parents will be able to jointly design and implement a day to day care plan that fosters stability. The Apex court has repeatedly held that where parties are not able to resolve their differences and stay together, then shared parenting is best formula to bring up a child. case law (**Jasmeet Kaur vs. State (NCT of Delhi) and Anr.**)

Q.No.5.

The practical difficulties in execution of an order for grant of maintenance u/s 125 Cr.P.C. are that the respondent who is not in service always try to avoid the payment of maintenance amount to the petitioner. Generally, the execution report of distress warrant is not received to the court. Some times, the execution report goes to show that the respondent was absconding or was not found at the address mentioned or the respondent had no property.

The option in law before a family judge for realisation of maintenance amount awarded under **sec 125 Cr.P.C.** is that If any person fails without any sufficient cause to comply with the order of maintenance or/interim maintenance, the only thing that can be done **u/s 125 (3) Cr.P.C.** is to issue warrants for levying the amount due in the manner provided for levying fine or for imprisonment as provided in **sub section 3 of**

section 125 Cr.P.C. The stage of issuing warrants cum only after sentencing and not before that.

In both the proceeding **u/s Domestic Violence Act and u/s 125 Cr.P.C.** the court has also power to strike off the defence in case of none payment of arrears of interim maintenance for the meeting of ends of justice. Case law (**Anita Vs. Mahavir Sancheti , Bani vs. Prakash Singh, Ashrif Ali vs. Manjurain & Ors and Govinda Sahid vs. Pratima**).

Q.No.6.

Sec.125 of Cr.P.C. gives effect to the natural and fundamental duty of a man to maintain his wife children and parents so long as they are unable to maintain themselves. It's provision apply and are enforceable what ever may be the personal law by which the persons concerned are governed. **Sec.125 Cr.P.C.** is applicable to all irrespective of their religion . It is also applicable to Muslim Woman. This sec. does not cease to operate when the relationship of marriage or paternity is denied. The personal law of the parties is relevant for deciding the validity of marriage or paternity of a child. This section provide only speedy remedy by a summary procedure to enforce liability in order to avoid vagrancy. The Supreme Court has repeatedly held that the right to maintenance of a wife was absolute and no exceptions could be made. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for the wife's right to receive maintenance u/s125 Cr.P.C. unless disqualified, is an absolute right. Sometimes, a plea is advanced by the husband that he does not have the means to pay for he does not have a job or his business his not doing well. These are only bald excuses and in fact they have no acceptability in law. **In Kulbhusan vs. Rajkumari and Anr.** It has been ruled that 25% of the husband net salary would be just and proper to be awarded as maintenance to the respondent wife.

U/s 24 of the Hindu Marriage Act, 1955, the wife may claim interim maintenance so as to enable the spouse to maintain herself and have sufficient funds to continue with the litigation. **Sec. 20 and 23 of Domestic Violence Act,2005** also lays down principle for the maintenance of aggrieved wife. Maintenance under Domestic Violence Act to be paid in addition to and not in substitution of maintenance awarded **u/s 125 of Cr.P.C.** In **Tara Laxmi (1938)40 Bom LR 1103.** It has been held that the mere existence of a decree of a Civil Court awarding maintenance to a wife does not oust the jurisdiction of a magistrate to make and order **u/s 125 Cr.P.C.** on the application of the wife. The magistrate however in such cases should make clear in his order that anything paid under the decree of Civil Court would be taken into account against anything which he may order to be passed. **In RD vs. BD 2019 SCC** online it has been held that if any order is passed by the Family Court **u/s 24 of the Hindu Marriage Act,** the same would not debar the court in the proceeding arising out of Domestic Violence Act are proceeding **under section 125 Cr.P.C.** instituted by the wife/aggrieved person claiming maintenance.

From the above it is clear that a person may sue for maintenance **u/s 125 of the Cr.P.C.** even if he has already obtained maintenance under Domestic Violence Act or under **section 24 of Hindu Marriage Act**. The court while fixing the amount of maintenance may take that into consideration while fixing the quantum of maintenance **u/s 125 Cr.P.C.**

Q.No.7.

Under the **Hindu Minority and Guardianship Act**, the appointment or declaration of any person as guardian of a Hindu Minor is made by a court, while appointing the guardian of a minor, the welfare of the minor shall be the paramount consideration.

Under the courts of Wards Acts when any land holder is minor or a person adjudged by a competent court to be of unsound mind and incapable of managing his affairs, the courts of wards may make order assuming the superintendence of his property or the person and property of such land holder. The court is not authorized to appoint or declare guardian of the property of a minor whose property is under the superintendence of a court of wards.

Q.No.8.

Eligibility Criteria.

Sec.57 of Jevenile Justice (Care and Protection of Children) Act, 2015 deals with eligibility of Prospective Adoptive Parents. As per the section the adoptive parents should be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him and both parents must consent for the adoption. A single or divorce person can also adopt in accordance with the provision of adoption regulations framed by the authority but a single male is not allowed to adopt a girl child.

Difference in procedure.

Procedure for a adoption by Indian Prospective Adoptive Parents living in India is laid down **u/s 58 of Jevenile Justice (Care and Protection of Children) Act, 2015** and procedure for inter country adoption of an orphan or abandoned or surrendered child India is laid down **u/s 59 of Jevenile Justice (Care and Protection of Children) Act, 2015**.

Indian Prospective Adoptive Parents living in India may apply for adoption to a Specialized Adoptive Agency. The Specialized Adoptive Agency shall prepare the home study report of the prospective Adoptive Parents and upon finding them eligible will refer a child declared legally free for adoption to them alongwith the child study report and medical report of the child. On receipt of the acceptance of the child from prospective adoptive parents alongwith the child study report and medical report of the child signed by such parents, the specialized adoptive agency shall give the child in pre adoption foster care and file an application in the court for obtaining the adoption order. On receipt of certified copy of the court order the Specialized Adoptive Agency shall send immediately the same to the prospective Adoptive Parents. The progress

and well being of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoptive regulations framed by the authority.

The Prospective Adoptive Parents living abroad may apply for the adoption to an authorized foreigner adoptive agency who shall prepare the home study report of such prospective Adoptive Parents and upon finding them eligible will resopner their application to authority for adoption of a child from India, who shall examine and if it finds the applicants suitable, then it will refere the application to one of the Specialized Adoptive Agencies. The specialized Adoptive Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such person, who in turn may accept the child and return the child study report and medical report signed by them to the said agency. On receipt of the acceptance of the child from Prospective Adoptive Parents,

the specialized adoptive agency shall file an application to the court for obtaining the adoption order. On receipt of a certified copy of the court order, the specialized adoptive agency shall sent immediately the same to authority state agency and to the prospective Adoptive Parents and obtain a passport for the child. The authority shall intimate about the adoption to the immigration authority of India and the receiving country of the child. The Prospective Adoptive Parents shall receive the child in person from specialized adoptive agencies as soon as the passport and viza is issued to the child. The authorized foreign adoption agency shall ensure in submission of progress report about the child in the adoptive family and will be responsible for making alternative arrangment in the case of any disruption.

A foreignor who has habitual resident in India, if interested for adoption of a child from India may apply to authority for the same alongwith no objection certificate from the deplomatic mission of his country in India.

Case law **Lakshmi Kant Pandey vs. Union of India 1984 SLR (2) 795 and (Union of India and Anr. etc. vs. Ankur Gupta & Ors.) (SC)**

Sandeep Srivastava
Principal Judge
Family Court, Chatra

Answer to the questionnaire for the Family Court Judge directed vide letter no. 3216/JAJ dated 03.05.2020

Ans to Q1: The Family Courts Act 1984 which is exclusively meant for determination of family disputes in the nature of marriages, restitution of conjugal rights, guardianship, succession, divorce between the spouses, divorce by mutual consent, custody of child, paternity suits, maintenance u/s 125 of Cr.P.C and awarding of maintenance pendente lite including litigation cost and other forms of family disputes, is a special enactment which provides special teeth to the presiding officer of the Family Court to deal and tackle with the problems emanating in the household and brought before the Family Court for redressal. The Family Court essentially, harps on speedy and expeditious disposal of matters at the very inception through the effective technique of finding an amicable solution to the problems through the tools of mediation, conciliation and counseling of the parties so that unnecessary litigation may be discouraged. Thereafter, in case of the failure of the tools of amicable solution and the parties resorting to adversarial litigation then upon the direction of the presiding Judge, the contesting party is directed to file its written statement on a sworn affidavit and after submission of the same in case of civil disputes, in the nature of suits for divorce, restitution of conjugal rights, custody of child, adoption of child etc., the agitating petitioner is given the chance to produce his oral and documentary evidence as expeditiously as possible and similar privilege is granted to the respondent party. The matter is then put up for arguments and the judgment can be pronounced at the earliest possible convenience of the court. In the matter relating to maintenance u/s 125 Cr.P.C, after admission of the case and issuance of notice to the opposite party, the matter is posted for appearance and possible reconciliation between the litigating parties. In case of denial to provide maintenance to the aggrieved wife, the opposite party is granted some time to file his response and if he fails to do so despite repeated instructions, then court can proceed to award an interim maintenance.

Some of the tools and techniques for speedy disposal of matrimonial and other matters pending in the family court are reconciliation, mediation, counseling, awarding of interim maintenance or any other relief to the agitating party so as to make the opposite party serious towards the cause and avoid adopting dilatory methods for prolonging the litigation. 'Compromise' is the basic spirit and tool of application in a Family Court. The impediments crop up in the shape of delayed filing of notice, delayed filing of response by the opposite party and other methods of evading of appearance before the court and different alibi's taken by the opposite party for cooperating in the litigation. The possible remedies lie in awarding interim relief to the agitating party debarring the opposite party from filing his response, if unnecessary or unreasonable delay is caused in participating in the litigation and even taking coercive steps by the court for non-implementation of the direction of the court.

Ans to Q2: As already discussed in the answer to the previous question, apart from applying the tools and techniques of finding amicable solution through resolving it with the tools and procedure of mediation, conciliation, counseling and awarding of interim maintenance, an expeditious disposal of cases can be achieved. However, apart therefrom, it would be pertinent to point out that under relevant section of 8 of Family Courts Act, 1984, the Family Court assumes greater powers than even a District Court or any sub-ordinate Civil Court. Under Section 9 of the Family Courts Act, where procedures are laid out, Sub Clause 1, 2 & 3 clearly lay out that in every suit or proceedings, endeavor shall be made by the Family Court and shall be the duty of Family Court to make efforts for amicable settlement. Further, Section 10 of the Family Courts Act lays down the various procedure for resolving the family dispute. Notably, Section 10 (3) provides extraordinary powers and claws to the Family Judge from laying down its own procedures with a view to arrive at a settlement in respect to the subject matter of the suit or proceeding or at the truth of the facts alleged by the one party and denied by the other. Moreover, Family Courts Act, being a special Act has precedence over the other Acts. Besides, Section 5 of the Family Courts Act provides for

association of Social Welfare Agencies and Section 12 of the Act provides for assistance of Medical and Welfare experts for promoting the welfare of the family. Another relevant aspect that can be applied in a Family Court for evolving speedy disposal of the cases is the least involvement of lawyers in a family court proceedings as is clearly enshrined under the provisions of Section 13 of Family Courts Act, where although there is no strict bar in participation of lawyers in a case, but there is definitely an embargo on mandatory and active participation of lawyers in a proceeding before a Family Court. Since, the personal ego or grudge between the participating lawyers may also affect in speedy disposal of a case.

Ans to Q3: In a situation where matrimonial suit for divorce is filed by the husband on the ground of cruelty and desertion, and the wife appears and admits desertion but makes counter allegation of cruelty, in my humble view the decree for divorce can be granted on the ground of desertion on admission because as per provisions of Section 13 (1)(ib) desertion of the petitioner by the respondent for continuous period of not less than two years immediately preceding the presentation of the petition and the petitioner is able to demonstrate that the other spouse has withdrawn from the society of the other without any reasonable excuse. The court can proceed to award the decree in favour of husband as it is a valid and sufficient ground for granting divorce. In my view divorce suit can be decreed on the ground of desertion on admission because wife here has herself acknowledged her guilt of living separately from her husband beyond the stipulated period which gives rise to the right of a husband to petition the court seeking divorce on the ground of desertion. The willful abandonment of the spouse (wife) without any reasonable or excuse is writ-large on the face of the facts and it is a premier ground for obtaining divorce.

There would be no difference to the result if there is no allegation of cruelty by the husband because desertion itself is a complete grievance for obtaining relief of divorce. No, the limitation of cooling off period does not apply to such cases as this remedy has been provided through the wisdom of legislature only under the provisions for grant of relief in a case pertaining to divorce between the parties by mutual consent as provided u/s 13 of the Hindu Marriage Act.

Adverting to the query with regards to the issue of a wife appearing in a divorce case, admitting the desertion but makes counter allegation of cruelty inflicted by the husband, then in my humble opinion, the counter allegations of cruelty by the wife needs to be thoroughly proved by the wife as raised in her W.S. since the grounds and the element of cruelty as laid out under section 13 (1) (ia) of the Hindu Marriage Act 1955 also the specific ground for obtaining divorce. The elements of cruelty have two facets viz. a) mental cruelty and b) physical cruelty, and these need to be proved through substantial evidence. The basic spirit of matrimonial alliance is companionship and certain marital obligations which a wife cannot deny to her husband acting whimsically.

Ans to Q4: Procreation of a progeny is one of the basic purpose of marriage. The child born out of the wedlock of a couple is universally treated as a bond between them. However, there are occasions when marriages between the spouse fails and the child is often treated as a bondage. It is no longer looked upon as a bridge gulfing the parents. It often becomes a shuttle cock being tossed from one end to the other and the child who is considered as a treasure to the parents whose important duty cast upon is to make it a worthy citizen of tomorrow is thrown to the winds. The child then loses its own self esteem, confidence, identity and is then shrouded with self doubts. The hostile atmosphere at home and the constant conflict between the warring parents makes negative and adverse indelible impacts on the young soft mind of a child. Indeed, due to the stained relations between the parents, a child who ideally needs company of both the parents feels tormented and then it indeed becomes the onerous task upon the court to decide as to whom the custody should be given. At the time of discussing the grant of custody of child under 26 of the Hindu Marriage Act, 1955, and under section 7, 8 & 9 of Guardians and Wards Act 1890 and the provisions of Minority & Guardianship Acts in appointment of guardian of a minor, the court has to actively bear in mind the concept of the welfare of the child. The welfare of child includes in itself the physical, psychological, mental, biological, sociological, educational and all kinds of welfare needs incorporated for bringing up a child in a healthy environment and atmosphere, where the child grows in a normal fashion without being adversely affected by any negative thoughts or ingredients which could physically or morally harm his personality. While determining all these issues, the court

has to bear in mind that the child custody is normally given to a parent who is more competent to shoulder the responsibility and shape the future of the child. The competence of the custodian shall be evaluated on the basis of the income, the resources, the attitude and behavior towards the child and the confidence a custodian generates inspiring the court to decide the grant of custody depending upon the best interest and welfare of the child. It has to be borne in mind that it is not mandatory that a custody has to be given only to a mother or to a father alone. Normally, the courts for a child under seven years of age grants custody to the biological /natural mother of the child and thereafter depending upon the circumstances, the custody of the child is handed over to the deserving parent. Earlier, the concept was conservative in which usually the custody of the child was given to the mother, but now, the welfare of child surmounts all the other factors. Considering the impact on a soft mind of a child the courts discouraged the practice of custody being awarded to a single parent because that would deprive the child of love and affection of both father and mother. It has now tilted its balance in the concept of shared parenting. In this regard, pages 69-70 of Law Commission's Report provides objectives regarding amendment to guardianship and custody laws and accordingly in the Principal Act, after chapter II the following Chapter IIA has been inserted namely 'Custody, Child Support and Visitation Arrangements'. The concept of parenting plan in child custody / interim custody / child visitation decisions is relatively new in India. The emphasis now lies that the father or the mother or other non-custodial parents can at best some visitation right of few hours in a months to show love and affection is now being encouraged. This concept is slowly percolating through courts. The concept of shared parenting is focused and encouraged to ensure that the welfare of the minor is met by

19A. Objectives of the Chapter.

The objectives of this Chapter are to ensure that the welfare of a minor is met by:-

- (a) Ensuring that the child has the benefit of both parents having a meaningful involvement in his life, to the maximum extent consistent with the welfare of the child;
- (b) ensuring that the child receives adequate and proper parenting to help achieve his full potential;
- (c) ensuring that the parents fulfill their duties, and meet their responsibilities concerning the care, welfare and development of the child;

- (d) giving due consideration to the changing emotional, intellectual and physical needs of the child;
- (e) encouraging both the parents to maintain a close and continuing relationship with the child, and to cooperate in and resolve disputes regarding matters affecting the child;
- (f) recognizing that the child has the right to know and be cared for by both the parents, regardless of whether the parents are married, separated, or unmarried; and
- (g) protecting the child from physical or psychological harm or from being subjected to, or exposed to, any abuse, neglect or family violence.

19A. Objectives of the Chapter. The objectives of this Chapter are to ensure that the welfare of a minor is met by:-

- (a) ensuring that the child has the benefit of both parents having a meaningful involvement in his life, to the maximum extent consistent with the welfare of the child;
- (b) ensuring that the child receives adequate and proper parenting to help achieve his full potential;
- (c) ensuring that the parents fulfil their duties, and meet their responsibilities concerning the care, welfare and development of the child;

- (d) giving due consideration to the changing emotional, intellectual and physical needs of the child;
- (e) encouraging both the parents to maintain a close and continuing relationship with the child, and to cooperate in and resolve disputes regarding matters affecting the child;
- (f) recognising that the child has the right to know and be cared for by both the parents, regardless of whether the parents are married, separated, or unmarried; and
- (g) protecting the child from physical or psychological harm or from being subjected to, or exposed to, any abuse, neglect or family violence.

19A. Objectives of the Chapter. The objectives of this Chapter are to ensure that the welfare of a minor is met by:-

- (a) ensuring that the child has the benefit of both parents having a meaningful involvement in his life, to the maximum extent consistent with the welfare of the child;
- (b) ensuring that the child receives adequate and proper parenting to help achieve his full potential;
- (c) ensuring that the parents fulfil their duties, and meet their responsibilities concerning the care, welfare and development of the child;

- (d) giving due consideration to the changing emotional, intellectual and physical needs of the child;
- (e) encouraging both the parents to maintain a close and continuing relationship with the child, and to cooperate in and resolve disputes regarding matters affecting the child;
- (f) recognizing that the child has the right to know and be cared for by both the parents, regardless of whether the parents are married, separated, or unmarried; and
- (g) protecting the child from physical or psychological harm or from being subjected to, or exposed to, any abuse, neglect or family violence.

Report 257 of the Law Commission at page 78-80 chalks out information about parenting plan

(1)The objectives of a parenting plan are to–

- (a) minimize the child’s exposure to harmful parental conflict; and
- (b)encourage parents to mutually agree on the division of responsibilities of the child’s upbringing through agreements in the parenting plan, rather than by relying on court intervention.

(2)In designing a parenting plan, the parents must ensure that it is for the welfare of the child, and that–

- a. the day-to-day needs of the child are met;
- b. any special needs that the child may have are met;
- c. the child gets to spend sufficient time with each parent so as to get to know each parent, as far as possible;
- d. there is minimal disruption to the child’s education, daily routine and association with family and friends; and
- e. transitions from one parental home to another are carried out safely and, effectively.

(3)A parenting plan may deal with one or more of the following, namely:–

- a. the parent or parents with whom the child is to live;
- b. the time the child is to spend with the other parent;
- c. the allocation of parental responsibility for the child;
- d. the manner in which the parents are to consult with each other about decisions relating to parental responsibility;
- e. the communication the child is to have with other persons;
- f. maintenance of the child;
- g. the process to be used for resolving disputes about the terms or operation of the plan;
- h. the process to be used for changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan;
- i. any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for the child.

(4)The parenting plan must be voluntarily and knowingly arrived at by each parent.

(5)The court shall not ordinarily interfere with the division of responsibilities between parents reflected in the parenting plan, unless they are ex facie inequitable.

(6)If the initial parenting plan does not cover certain issues, the parents may approach the court to modify the terms of the plan to address new subjects of decision-making.

The above elements introduced in the form of shared parenting have to a large extent resulted in reduction of acrimony and bitterness between the couples pertaining to child custody and access matters. The shared parenting and the plans thrashed out have immensely assisted in bringing out an ease between the couples who are undergoing separation.

The noted case law on the concept of shared parenting has been pronounced Hon’ble Mr. Justice Deepak Gupta in the case of Yashita Sahu Versus State of Rajasthan and Others.

Ans to Q5: The practical difficulties encountered by the Family Courts in execution of an order for grant of maintenance u/s 125 Cr.P.C are as follows:

- a) The usual pleading of a respondent of denying access to the verdict of the court.
- b) The plea of economic hardship being suffered by the respondent himself and hence being unable to discharge the liability of providing maintenance to the aggrieved party.
- c) The plea of wife leading an adulterous life and thus being disqualified to receive the maintenance as provided u/s 125 (4) of Cr. P.C.

- d) The wife is already gainfully employed and is able to meet her expenses.
- e) It is often pleaded that the respondent owns landed property and hence maintenance could be awarded from the same. In such a matter it often becomes difficult for the court to realize the maintenance since unless the land is sold which should be free from any kind of encumbrances. The sale deed is not expeditiously executed and thus realization of money through sale of land is a difficult proposition.

However, despite all these oddities, the powers of the court are not curtailed or affected for realization of the maintenance amount awarded u/s 125 of Cr.P.C such as issuance of distress warrant under Form 19 laid down in Schedule II of Cr.P.C. (Warrant to enforce the payment of maintenance by attachment and sale) for realization and also issuance of reminders for its execution through Superintendent of Police as well as the concerned police station of the district. In case of failure to discharge the liability of paying maintenance amount, the Family Judge can also proceed to issue the warrant for imprisonment as laid out in Form 18 of Section 125, Schedule II (Warrant of imprisonment on failure to pay maintenance). The noted case in this regard is R. Rajesh Versus Kalaiyarasi (Madras High Court) pronounced by Hon'ble Mr. Justice R. Suresh Kumar.

Ans to Q6: The basic principles to be borne in mind by a Family Court while computation and awarding of maintenance in a case u/s 125 Cr. P.C. shall be based on the following:-

- i) The social and living status of the petitioner.
- ii) The economic hardships and the needs of the petitioner.
- iii) The change in status of the petitioner after separating from the spouse.
- iv) There should not be any undermining of the standard of living or the status of the petitioner.
- v) The earning capacity and living standard of the answering respondent is to be determined before computing the quantum of maintenance. The court has also to bear in mind the impact on the earning partner viz the answering respondent after deduction of the maintenance amount awarded.
- vi) Under no circumstances the petitioner can be permitted to make a windfall or a bounty through the maintenance awarded. The amount awarded should only be sufficient for sustenance and decent living.

In the cases where the competent court has awarded maintenance under Domestic Violence Act and / or u/s 24 of the Hindu Marriage Act, the quantum of maintenance would thereafter vary to the extent of the amount under provisions of the other laws. The maintenance amount so awarded shall be **set-off** accordingly in ratio and proportion to the amount of maintenance already awarded under Domestic Violence Act and / or u/s 24 of the Hindu Marriage Act.

Ans to Q7: As far as the jurisdiction of court under the Courts and Guardians & Wards Act and Minority and Guardianship Acts in appointment of guardian of a minor is concerned, then under the Guardians & Wards Act, 1890, Chapter II of the Act deals with appointment and declaration of Guardians. Section 6, 7 & 8 of the Act lays down the provisions and powers of the Court to make orders as to the guardianship of a minor (his person or property or both). Regarding the custody of a minor, the paramount consideration before the court is the natural guardian of the minor child under normal circumstance is the biological father of the child. Since, the welfare of the minor and not the legal right of a particular party is the paramount consideration. Section 6 of the Hindu Minority & Guardianship Act 1956 constitutes 'father as the natural guardian of a minor son or daughter' but that provision also cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. Custody of a minor child is a sensitive issue and therefore the court has to be very vigilant and alert while examining the application of custody of minor and the appointment of guardian. Section 7 (1) of the Family Court Act lays down various subjects to which the jurisdiction of a Family Court lies and Section 7 (1) (g) deals with the suit of proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

Section 9 (1) of the Guardians and Wards Act, 1890 specifically provides and lays down the territorial jurisdiction of the court while dealing with the matter pertaining to the guardianship of a person of the minor. It provides that 'if the application is with respect to the guardianship of the person of a minor, it shall be made to the district court having jurisdiction in the place where the minor ordinarily resides.

Section 9 (2) provides that 'if the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides, or to a District Court having jurisdiction in a place where he has property'.

Section 9 (3) further provides that ' if an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction'.

It is further specifically provided that as far as jurisdiction of court under Minority and Guardianship Act is concerned then the said Act is applicable and the court can take cognizance only to the persons of a Hindu faith and the other categories as mentioned u/s 3 & 4 of the Act. Whereas, the jurisdiction of the court under the Guardianship and Wards Act 1890 is applicable to person of any faith viz. Muslims, Christians, Parsis etc.

Ans to Q8: The major difference in procedure of adoption by Indian prospective, adoptive parents living in India and inter-country adoption are enumerated as follows:

- a) For any valid adoption, unless the person adopting has the capacity and also the right to take in adoption, the person giving in adoption has the capacity to do so, the person adopted is capable of being taken in adoption and the adoption is made in compliance with other per-requisites such as the person making adoption should be an adult as per the law. He or she should be of sound mind, there has to be a consent between the person adopting and the guardians of the minor being adopted through legal consent.
- b) If the minor is a male child and the person adopting is a woman then she must at least 21 years elder to the minor male child. Similarly, if the minor is girl child then the adopting father must at least be 21 years elder to that of the minor girl child.
- c) No person except the father or mother or the guardian of the child shall have the capacity to give the child in adoption.
- d) Before granting permission to a guardian, the court shall be satisfied that the adoption will be for the welfare of the child.
- e) The child adopted, he or she should not already have been adopted.

As regard inter-country adoption, the scrutinizing agency should not be asked to make any inquiries before the child is offered in adoption to a foreigner or a petition for appointment of a foreigner as guardian is filed in the court. The primary responsibility for ensuring that the child is legally free for adoption must be that of social or child welfare agency processing the application of the foreigner for guardianship of the child. Whatever inquiries are necessary for the purpose of satisfying itself that the child has been voluntarily relinquished by its biological parents after understanding all the implications of adoption as envisaged in the sufficient safeguard in this connection regarding the responsibility of the social or child welfare agency processing the application for guardianship. The protection of minor's interests and its welfare and the socio-economical competency of the adoptive parents, their keenness and inclination in the child and their deposition before the court making an undertaking of providing the best possible care and protection to the adoptive child are some of the pivotal safeguards laid out as reflected from para 18 of the landmark judgment of **Laxmikant Pandey Versus Union of India, AIR 1986 SC pg. 272**. Another aspect to be taken care of by the court's while determining child adoption procedure is to evaluate whether such child would get proper education and future opportunities of having better life social status. This important aspect has been considered by the Hon'ble Bombay High Court in the case of **Javid Ghorashian Versus State of Maharashtra, AIR 2002 Bom 1**.

Ans. No.1:-

Justice delayed is justice denied. Long delay in the disposal of cases has resulted in huge arrears and a heavy backlog of pending file in courts. The delay in the disposal of the case understandably causes dismay to and creates disillusionment in, all those who knock at the doors of the court. If the number of cases in the disposal of which there is delay is very large, the dismay and disillusionment would necessarily become widespread. Long delay has also effect of defeating in justice of some cases. As a result of such delay, the possibility cannot ruled out of loss of important evidence because of the lading of memory or death of witnesses. The quince thus would be that a party with even a strong case, may lose it not because of any fault of its own but because of the tardy judicial process entailing disappearance of material evidence. But while laying stress, on the necessity elimination of delay in the caution using disposal of cases, the court must guard against undue speed or haste in matter of disposal. Because this would be substituting one evil or another evil. Any stress on speedy disposal of cases at the cost of substantial justice. Would impair the faith and confidence of the people in the judicial system perhaps in a much better degree than would be the case if, there is disposal in the cases. It has to be borne in mind that in the disposal of the cases certain procedural require.. Without complying with such procedure, a trial in a court of law can hardly be said to satisfy the minimum requirements of a judicial trial, it would be wholly wrong to bring about speed in the disposal of court cases at the cost of

substantial justice. The object of the court, therefore, should be to ensure that consistently with the demands of fair play and substantial justice, ways and means might be found to eliminate delays in the disposal of cases.

The Hon'ble Supreme Court in its landmark judgment of *All India Judges Association Vrs. Union of India, AIR 1992 SC 165* pleased to observe that the Trial Judge is the king pin in the hierarchical system of administration of justice. He directly comes in contact with the litigant during the proceeding in court. On him lies the responsibilities of building up of the case appropriately and on his understanding of the matter, the cause of justice is first answered. The personality knowledge, judicial restraint, capacity to maintain dignity are the additional aspects which go into making court functioning successful.

The Family Court Act 1984 envisages an active role for the Family Court to faster settlements. Under the provisions Section 11 of the Family Court Act, the Family Court has to endeavour to assist and persuade parties to arrive at a settlement. Section 9 clearly recognizes a discretion in the Family Court to determine how to structure the process and it makes mandatory duty to the Family Court to make efforts for settlement. Section 10(3) enables the Family Court to lay down its own procedure. The Family Court is entitled to take the benefit of counselors, medical experts and persons professionally engaged in promoting the welfare of the family.

In *Bhuvan Mohan Singh Vrs. Meena & Ors. CrI. Appeal No.1331/2014*, the three Judges bench of Hon'ble Apex

Court while dealing with the duty and responsibility of Family Court or a Family Court Judge refer to the decision in **K.A. Abdul Jalil Vrs. T.A Sahida** and laid stress on securing speedy settlement of disputes relating to marriage and family affairs and pleased to hold that the Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto.

The Hon'ble Apex Court further observed that "*When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only given rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow.*"

In **Santhani Vrs. Bijay Venkatesh Transfer Petition (Civil) No.1278/2016**, the Hon'ble Apex Court has been pleased to hold that while dealing with the duty of Family Court that *A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold*

refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow."

Tools and techniques for speedy disposal of matrimonial and other matters pending in the Family Court.

(1) **Use of A.D.R Mechanism** :- Section 9 of the Family Court Act 1984 makes a mandatory duty of the Family Court to make effort for settlement by rendering assistance and persuading the parties for arriving at a settlement in respect of subject matter of the suit or proceeding. A.D.R mechanism should be used at the very first instance of the hearing. However, if it appears to the court in any suit or proceeding at any stage that there is a reasonable possibility of settlement between the parties, the court may adjourned the proceeding for such period as it think fit to enable attempt to be made to effect such a settlement.

Order -XXXIIA Rule-3 of the C.P.C also cast duty on the court to make every effort for settlement in family matters.

Use of reconciliation Proceeding :-

The reconciliation proceeding will help the speedy disposal of family matters as the role of Counselor in Family Court is basically to find out what is the area of incompatibility between the spouses, whether the parties are under the influence of any body. The Counselor can also

assist the parties to resume free communication.

The Counselor can also assist the child in custody matters if he/she is of such age to accept the reality of incompatibility between the parents and yet make the child understand that the child is of both parents and the child a right to get the love and affection of both the parents and also has a duty to love and respect both the parents. The Counselor assists the parents to shed their ego and take a decision in the best interest of the child. The Family Court must efforts for reconciliation, but the time is spent in the said process has to have its own limitation.

(2) **Implementation of provisions of Family Court Act :-** The objective of establishing of Family Courts in India is preservation of the institution of marriage and settlement of family disputes, with emphasis on conciliation and on achieving socially desirable goals. Towards the end, the Act has simplified rules of procedure and evidence. The Family Court shall take endeavour to decide the matters as expeditiously as possible keeping in view the object and reason of the Act and by implementing the provisions of Family Court Act in true sense in deciding the matter before it.

(3) **Court Management** :- The Family Court must prepare case plan for each case to dispose the same within time frame. At the beginning of each quarter, the court should draw a plan for disposal of old cases and cases chronologically. The court should make concentrated efforts to reduce the arrears in all categories of cases preferably old cases as soon as possible.

The court should adopt such means which may minimize the duration of disposal of cases. Too many cases should not be fixed in a days Cause List to avoid harassment to the litigants coming from distant places.

In Samina Faruqui Vrs. Saheed Khan, the Hon'ble Apex Court pleased to hold that *"it is the duty of the court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stand still on some unknown bank of the river. It cannot allow it to sing the song of brook...."*

(4) **Assistance of medical and welfare experts** :-

Section 12 of Family Court Act provides that in every suit or proceeding, it shall be open to a Family Court to secure the service of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purpose of assisting the Family Court in discharging the functions imposed by the Act.

(5) **Check in frequent adjournment** :- The court should not give frequent adjournment as a matter of routine and should be an exception rather than the rule in an old case, ready for hearing, if, an adjournment becomes unavoidable, it should not be unduly long and it should be granted with a specific direction that no further adjournment will be granted on the next date fixed. The court should make every endeavor to dispose of cases within time frame.

(6) **Interlocutory matters and maintenance cases** :- Special attention should be given to dispose of Interlocutory petition and maintenance petition expeditiously.

(7) **Punctuality** :- The Family Judge must be punctual and he/she should be observed strict court timing. Non observance of punctuality results in lower out turn of judicial work. Unless the P.O sits in court in punctually in sitting hour, it would not be possible to obtain maximum turn over in the matter of disposal. The punctuality in observing the courts hour would save the wastage of time which otherwise could be devoted for judicial work.

(8) **Use of technology** :- The advancement of technology ought to be utilized in proceeding of Family Court for speedy disposal of cases. Proceeding of Family Court may be conducted on Video Conferencing on the request of both the parties, obviating the needs of the party to appear in person.

In ***Santhani Vrs. Vijay Venkatesh, Transfer Petition (Civil) No.422/2017***, the Hon'ble Apex Court has pleased to hold that the advancement of technology ought to be utilized also for service on parties or receiving communication from the parties. Every District Court must have at least one e-mail ID. Administrative instructions for directions can be issued to permit the litigants to access the court, especially when litigant is located outside the local jurisdiction of the Court. A designated officer/manager of a District Court may suitably respond to such e-mail in the manner permitted as per the administrative instructions. Similarly, a manager/information officer in every District Court may be accessible on a notified telephone during

notified hours as per the instructions. These steps may, to some extent, take care of the problems of the litigants.

The Hon'ble Apex Court also issued directions in **Santhani Case** (Supra) which may provide alternative to seeking transfer of proceedings on account of inability of a party to contest proceedings at a place away from their ordinary residence which will eventually result in denial of justice. The safeguards laid down in the said judgment are :-

- (i) Availability of videoconferencing facility.
- (ii) Availability of Legal Aid Service.
- (iii) Deposit of cost for travel, lodging and boarding in terms of Order 25 C.P.C.
- (iv) E-mail address/phone number, if any, at which litigant from outstation may communicate.

Apart from it, **the Law Commission of India in its 230th report on reforms** in the judiciary has given some suggestions for speedy disposal of the cases like :-

(i) Utilization of full court working hour by the judges and lawyer must not be asking for adjournments unless it is absolutely unnecessary, grant of adjournments must be guided strictly by the provision under Order-XVII C.P.C.

(ii) Use of technology.

(iii) Delivery of judgment by the judges within a reasonable time and in that matter, the guidelines given by the Hon'ble Apex Court in the case of **Anil Rai Vrs. State of Bihar 2001 (7) SCC 318** must be scrupulously observed both in civil and criminal cases.

(iv) Lawyer must curtail prolix and repetitive arguments and should supplement it by written note.

(vi) Judgment must be clear and decision and free

from ambiguity and should not generate further litigation etc.

Ans. No.2 :-

The Family Court Act 1984 has been established for speedy settlement of family disputes. The preamble to an Act provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.

Statement of Objects and Reasons – Several associations of women, other organizations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th Report (1974) had also stressed that in dealing with disputes concerning the family the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts settlement before the commencement of the trial. The Code of Civil procedure, 1908 was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family.

The Bill inter alia, seeks to :-

(e) make it obligatory on the part of the Family Court to endeavor, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and the

rigid rules of procedure shall not apply;

(f) provide for the association of social welfare agencies, counselors, etc., during conciliation stage and also to secure the services of medical and welfare experts;

(g) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioner. However, the Court may, in the interest of justice, seek assistance of a legal expert as amicus curiae;

(h) Simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute;

(i) provide for only one right of appeal which shall lie to the High Court.

The Family Court Act was enacted to provide for the establishment of Family Court with a view to adopt and facilitate the conciliation procedure and to deal with family disputes in a speedy and expeditious manner. In ***K.A. Abdul Jalil Vrs. T.A. S ahida*** Appeal(civil)3322of2003 the three judges bench of the Hon'ble Apex Court while highlighting on the purpose of bringing in the Family Court Act by the legislature opined thus, "The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith." The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being alive to the objects and reasons of the Act and the spirit of the provisions under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family

Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc.

In *Santhani Vrs. Vijay Venkatesh Transfer Petion (Civil) No.422/2017*, the Hon'ble Apex Court has pleased to

observed that the legislative intent, the schematic purpose and the role attributed to the Family Court have to be perceived with a sense of sanctity. The Family Court Judge should neither be a slave to the concept of speedy settlement nor should be a serf to the proclivity of hurried disposal abandoning the inherent purity of justice dispensation system. The balanced perception is the warrant and that is how the scheme of the 1984 Act has to be understood and appreciated.

Now I would like to analyze the fundamental intent of the scheme of the Family Court Act 1984.

Section 4 of the Family Court Act 1984 deals with the appointment of the Judges. Section 5 of the Act provides for association for social welfare agencies etc. It engrafts that the State Government may, in consultation with the High Court, provide, by rules, for the association in such a manner and for such purposes and subject to such conditions as may be specified in the rules, with a Family Court of institution or organizations engaged in social welfare are the representatives there are, persons professionally engaged in promoting the welfare of the family, persons working in the social welfare and in any person whose association with a Family Court would enable it, to exercise its jurisdiction more effectively in accordance with the purpose of 1984 Family Court Act. Section 6 of the Act provides for counselors, officers and other employees of Family Courts. Section 7 of the Act deals with the jurisdiction of the Family Court. It confers power in a Family Court to exercise jurisdiction exercisably by any District Court or any Sub Ordinate Civil Court under any law

relating to a suit or a proceeding between the parties to a marriage or a decree of a nullity of a marriage, declaring the marriage to be null and void or annulling the marriage, as the case may be, or restitution of conjugal rights or judicial separation or dissolution of marriage. Thus, the power of Family Court is extensive as it has the authority to declare as to the validity of a marriage so as to annul the matrimonial status of any person and also the power to entertain a proceeding with respect to the properties of the parties to a marriage or either of them. The Family Court has a jurisdiction to pass an order of injunction in circumstances arising out of a marital relationship, declare legitimacy of any person and deal with proceeding for grant of maintenance, guardianship of the person or the custody of or the access to any minor. Apart from it, it has also been conferred the authority to deal with the applications for grant of maintenance for wife and children and parents as provided under 125 Cr.P.C.

Section 9 provides the duty of the Family Court to make effort for settlement by rendering assistance and persuading the parties for arriving a settlement in respect of the subject matter of the suit of proceeding. If any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable opportunity of settlement between the parties, it may adjourned the proceeding for such period as it think fit to enable attempt to be made to effect such a settlement.

Section 10 of the Family Court Act provides regarding procedure generally of the Family Court. Although, Section of the Act makes the procedure laid down under the

Code of Civil Procedure 1908 applicable to Family Court proceedings, it is also laid down that the Family Court is free to evolve its own rules of procedure and once the Family Court lays down its own rule of procedure, they will override the rules of procedure laid down in the Civil or Criminal procedure. Thus, the Act itself contained some provision which indicates the formalities of procedure.

Section 11 of the Family Court Act 1984 provides for proceedings to be held in camera, if the Family Courts so desire and shall be shown if either party so desires.

Section 12 of the Family Court Act stipulates for assistance of medical and welfare experts for assisting the Family Court in discharging the function imposed by the Act.

Section 13 of the Family Court Act provides that no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner. Thus, according to Section 13 of the Act, it is the discretion of the Family Court to permit or not to permit representation by lawyer.

Section 14 of the Family Court Act provides that the Family Court may receive as evidence any report, statement, document, information or other matter that may assist in, effectually resolving a dispute, irrespective of the fact that same would be otherwise relevant or admissible under the Evidence Act. *In Md. Shaheryar Khan Vrs. Bhumera Khan, 1996 (3) Alld. 816 (A.P)*, it has been held by the Hon'ble High Court that Family Court is competent to receive document in view of Section 14 of Act which though marked were not proved by any witness.

Section 15 of the Family Court Act r/w rule 23

of **Family Court Rules 2004** provides that it is also not obligatory on the part of the Family Court to record the evidence of the witness at length. It would be enough if the judge records or causes it to be recorded, a memorandum of the substance of what witnesses have deposed. Such a memorandum is required to be signed by the Judge and the witness and that is done, it will form part of the record of the case.

Section 16 of the Family Court Act says that where the evidence of a person is a formal character, it may be given by affidavit and it will constitute part of the evidence of the case. The same nonconformity is maintained about the judgment of the Family Court.

Section 17 of the Family Court Act read with Rule-23 of Family Court Rules provides that a Judgment of the Family Court should contained a concise statement of the case. The point for determination and the decision thereon and the reason for such decision.

Section 18 of the Family Court Act provides that a decree or a order of Family Court may be executed by the same court or any other Family Court or by an ordinary Civil Court in accordance with the connivance of the party concerned.

Section 19 of the Family Court Act provides that no appeal shall lies against the interlocutory order, against the decree or order passed with the consent of the parties. As to other matter, an appeal lies to the High Court both in fact and law. All appeals to be heard by a bench consisting of two or more judges. No second appeal is provided but an appeal with the special leave can lie before the Supreme

Court under Article 136.

Rules 11 of the Family Court Rules 2004 provides mode of service of notice Summon that the notices Summon shall be served in the manner prescribed in the C.P.C save and except in proceeding under Chapter-IX of the Cr.P.C where the provisions of the code will apply. Rule -11(B) provides that in addition to the normal process of the service by the court, the applicant will be at liberty to serve upon the respondent, the notices, Summons of the court along with the copy of the petition and exhibits either through person or through other recognizable mode of service including registered post and shall file affidavit of service upon the respondent. Rule-12 of the Family Court Rules provides proof of service of Summons that it has to be shown by affidavit of applicant or other evidence that the notices, Summons were served upon the respondents. Rule-13 provides regarding substituted service that is through pasting publication in the news paper etc., and applicant should file affidavit stating as to the mode adopted for service of Summons. Rule-18 of the Family Court Rule deals with role of counselor. Rule-19 says about confidentiality of information of counselor. Rule-22 of the Family Court Rules provides that the petition so fixed shall not be adjourned by the court unless there are circumstances justifying such adjournment and to meet the ends of justice. The court shall record its reasons for adjourned the matter. Rule-23 provides that the court shall record only the substance of what the witnesses disposes and prepare a memorandum accordingly. It also provide that the evidence taken on the affidavit, if any, shall also form part of the record of the court.

In *M. Minakshi Sundaram Chettiyar Vrs. J. Vimla in OSA No.186 & 187 of 2011*, the Hon'ble Madras High Court has been pleased to hold that apart from the provisions of the Family Courts Act, under Article 21 of the Constitution of India, no person can be deprived of the life or liberty, except in accordance with the procedure established by law and if the procedure is to be fair and reasonable, the Family Court should ensure speedy disposal.

Ans No.3:

A petition for divorce is not like any other commercial suit. A divorce not only affects the parties, their children, if any, and their families but the society also feels its reverberations. Stress also be on preserving the institution of marriage. That is the requirement of law.

According to **Section 13 (1)(ia)** of the Hindu Marriage Act, any marriage solemnized, whether before or after the commencement of this Act, may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party has, after the solemnization of the marriage, treated the petitioner with cruelty.

According to **Section 13(1)(ib)** of the Hindu Marriage Act, any marriage solemnized, whether before or after the commencement of this Act, may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition;

In the case in hand, the petitioner has been seeking divorce on the ground of cruelty and desertion. The respondent appeared and admitted desertion but she made counter allegation of cruelty against the petitioner. Now the question arise that whether, divorce can be granted on the basis of admission of respondent ?

Order-XII, Rule-6 of C.P.C provides judgment on admission.

(1) Where admission of fact have been made either in the pleading or otherwise whether orally or in writing, the court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

On bare perusal of Order-XII Rule-6 C.P.C, it appears that only where the admissions of fact have been made either in any pleading or otherwise whether in orally or in writing, the court may at any stage either on an application of any party or of its own motion make any order or give such judgment as it may think fit, having regard to the admission. In the said fact, the petitioner has made allegation of cruelty and desertion as against the respondent on the basis of which, the divorce has been sought, the respondent though admitted desertion but made counter allegation of cruelty against the petitioner. It is well settled principle of law that where admissions of fact have been made, the decree on admission can be passed however, the said admissions has to be unambiguous, certain and incapable of any confusion.

Law is settled that a decree on admission is not a matter of right, but rather a discretion of court, which discretion must be exercised in accordance with known judicial canons. In the Case of *Vijay Gupta Vrs. Ashok Kumar Gupta, reported in AIR 2007 Delhi 166*, the Delhi High Court has observed that it is also a settled principle of jurisprudence that judgment on admission is not a matter of right and rather is a matter of discretion of a Court. Where the defendant has raised objection which will go to the very root of the case, it would not be appropriate to exercise this discretion. The use of the words 'May' and 'make such orders' or 'give such judgment' spells out that power under these rules are discretionary and use of discretion would have to be controlled in accordance with the known judicial canons. The cases which involves questions to be decided upon regular trial and the alleged admissions are not clear and specific, it may not be appropriate to take recourse to these provisions.

In the case of *Pariwar Sewa Sansthan Vrs. Dr. (Mrs.) Veena Karla AIR 2000, Delhi 349* the Hon'ble Court examined at length the provisions and the need for an admission to be unequivocal and positive. The admission would obviously have the consequences of arriving at that conclusion without determination of any question and evidence."

Section 23 (1) (a) of the Hindu Marriage Act 1955 lay down in mandatory term that before a court can grant a decree under the said Act it must be satisfied that one or other of the statutory ground granting relief exists in the case before it. It is only on the court be so satisfied that

it gets the jurisdiction to grant a decree under the said Act and it cannot pass a decree otherwise.

Thus, before granting decree on admission, the court has to satisfy that whether essential requirements U/s 13(1)(ib) of Hindu Marriage Act is satisfied or not which requires that respondent ***has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.***

The essence of desertion is forsaking and abandonment of one spouse by other without reasonable cause and without consent or against wish of other spouse. It may at times be impossible to draw line between the two that is desertion and cruelty, because very often facts are mixed so that it is impossible to extricate one from other. It is a firmly established rule that the ground for the relief in a matrimonial cause should be strictly proved. The standard of proof in case of all proceedings under Act that Court must be satisfied on preponderance of probability and The Court requires evidence of spouse who charges other spouse with matrimonial offence should be corroborated.

In ***Rajiv Mangal Vrs. Ritu Mangal reported in CDJ 2017 MHC 4989***, the Hon'ble Court has been pleased to hold that in a case when the respondent / husband does not make out necessary ingredients stipulated for making out a case for divorce on the ground of desertion, the Family Court ought not to have granted divorce

The Hon'ble Apex Court and the High Court in plethora of Judgments has held that for establishing the claim of desertion, so far as the deserting spouse is concerned, ***two essential conditions must be there viz., (i)***

the factum of separation; and (ii) the intention to bring cohabitation permanently to an end (animus deserendi).

Similarly, two elements are essential so far as the deserted spouse is concerned: (i) the absence of consent; and (ii) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. Thus, under Section 13(1) (ib) of the Hindu Marriage Act, the petitioner who seeks for divorce has to prove (i) that there was desertion for a continuous period of two years immediately preceding the presentation of the petition; (ii) the desertion was without reasonable cause and without the consent or against the wish of the petitioner. Further, heavy burden is cast upon the petitioner who seeks relief of divorce on the ground of desertion to prove four essential conditions viz., (i) factum of separation; (ii) animus deserendi; (iii) absence of any or her consent; and (iv) absence of his or her conduct giving reasonable cause to desert the spouse to leave the matrimonial home. It is necessary for the petitioner to establish that during all the period that there has been a desertion, petitioner must affirm that he/she was ready and willing to resume the married life. Offence of desertion must be proved beyond any reasonable doubt and as a rule of prudence.

Under the fact and circumstances of the present case, if the statutory requirement as prescribed Under Section 13(1)(ib) of the Hindu Marriage Act is fulfilled, then the divorce suit can be decreed on the ground of desertion on admission of the respondent even if there is no allegation of cruelty by the husband because section 13(1) (ib) of the Hindu Marriage Act provides that a suit can be

decreed on the ground of desertion.

Limitation of cooling of period:- The next part of the question is that whether the limitation of cooling off period apply under the facts of the aforesaid case. In this regard before adverting further, I would like to re-produce Section 13(B) of the Hindu Marriage Act which deals with a **divorce by mutual consent**.

*(i) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the **District Court/ Civil Court** by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.*

(ii) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied ,after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

The period of 6 to 18 months provided in Section 13B is a period of interregnum which is intended to give time and opportunity to the parties to reflect on their

move. In this transitional period the parties or either of them may have second thoughts. But in the period of six months as provided U/s 13B(2) of the Hindu Marriage Act cannot be taken as mandatory because, if it is mandatory the very purpose of liberalized concept of divorce by mutual consent will be frustrated, especially when the parties have live separately and there is no chance of reunion.

“In Amardeep Singh Vs Harveen Kaur (Civil Appeal No.11158/2017), it was held by the Hon’ble Apex Court that where the court dealing with a matter is satisfied, that a case is made out to waive the statutory period under Section 13(B)(2), it can do so after considering :- (1) The statutory period of six months specified in Section 13(B)(2), in addition to the statutory period of one year under Section 13(B)(1) of separation of parties is already over before the first motion itself, (2) All efforts for Mediation/Conciliation have failed and there is no chances of their re-union, (3) The parties have genuinely settled their differences, (4) The awaiting period will only prolong their agony. If, the above conditions are satisfied the waiver of awaiting period for second motion will be in discretion of the concerned court.

In the present case, the limitation of cooling of period will not apply because the said case is not filed by both the parties to a marriage together U/s 13(B) of Hindu Marriage Act and both parties have not mutually agreed to dissolve their marriage.

Ans. No. 4 :-

The law governing custody of children is closely linked with that of guardianship. Guardianship refers to a bundle of right and power that an adult has in relation to the person and property of a minor, while custody is a narrower concept relating to the upbringing and day to day care and control of the minor.

Statutory Law regarding custody :-

1. **Guardian and wards Act 1890** :- This Act is a secular law relating questions of guardianship and custody for all children within the territory of India irrespective of their religion.

2. **Hindu Law on Custody :-**

(a) **Hindu Minority and Guardianship Act 1956** :- This law is applicable to any person who is Hindu, Buddhist, Jain or Sikh by religion. This act provides various provisions concerning the matter of guardianship and custody of minor Hindu children.

(b) **Hindu Marriage Act 1955** :- Section 26 of the Hindu Marriage Act authorizes court to pass interim orders in any proceeding under the Act, with respect to custody, maintenance and education of minor children, in consonance with their wishes.

(c) **Islamic Law** :- In Islamic Law, the father is the natural guardian but custody vests with the mother until the son reached the age of 7 and the daughter reached puberty. The concept of Hiznat provides that, of all persons the mother is the most suited to have the custody of her children up to a certain age, both during the marriage and after its dissolution. A mother cannot be deprived of this

right unless she is disqualified because of apostasy or misconduct and her custody is found to be unfavorable to the welfare of the child.

(d) **Parsi and Christian Law** :- U/s 49 of the Parsi Marriage and Divorce Act 1936 and Section 41 of the Divorce Act 1869 Courts are authorized to issue interim order for custody, maintenance and education of minor children in any proceeding under these Acts.

3. **Special Marriage Act 1954** :- Section 38 of the Act empowers the District Court to pass interim orders during pendency of proceeding and make such provision in the decree as it may seem to it to be just and proper with respect to the custody, maintenance and education of the minor children.

Principles in respect of custody of child :- An order of custody of minor children either under the provision of Hindu Minority and Guardianship Act 1956 or Guardian and Wards Act 1890 or any other law is required to be made by the court treating the welfare and interest of minor to be a paramount importance. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special status govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

In ***Kamla Devi Vrs. State of H.P AIR 1987 HP 34***, the Hon'ble Apex Court has been pleased to hold that the court while deciding child custody cases, in its inherent and general jurisdiction is not bound by the mere legal right of

the parent or guardian. Though the provision of the special statutes which govern the right of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its *parens patriae* jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other.

In ***Gourav Nagpal Vrs. Sumedha Nagpal 2009 (1) SCC 42***, the Hon'ble Apex Court pleased to observe that though the provision of special statutes which governs the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its *parens patriae* jurisdiction arising in such cases. The court further observed in Para-32 of his Judgment that the dominant matter for consideration of the court is the welfare of the child. But the welfare of the child is not measured by money only nor merely physical comfort. The word 'welfare' must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the tie of affection be disregarded.

In ***Rosy Jacob Vrs. Jacob A Chakramakkai 1973 (1) SCC 840***, the Hon'ble Apex Court pleased to observe that the principle on which the court should decide the fitness of the guardian mainly depends on two factors; (i) the father

fitness or otherwise to be the guardian and (ii) the interest of the minor.

In Para-15 of his Judgment, the Hon'ble Apex Court pleased to hold that "the children are not mere chattels: nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

In ***Gayatri Bajaj Vrs. Jiten Bhalla 2012 (12) SCC 471*** the Hon'ble Apex Court has been pleased to observe that it is not the better right of either parents that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the child are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a minor.

In ***Mousumi Mitra Gangulay Vrs. Jayant Ganguly 2008 (7) SCC 673***, the Hon'ble Apex Court observed that better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the court to

exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.

In *Surendra Kaur Sandhu Vrs. Harbaksh Singh Sandhu 1984 (3) SCC 698*, it has been observed by the Hon'ble Apex Court that Section 6 of the Hindu Minority and Guardianship Act 1956 constitutes the father as the natural guardian of a minor son but that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor.

In *Vivek Singh Vrs. Rumani Singh 2017 (3) SCC 231*, the Hon'ble Apex Court pleased to hold that the welfare principle is aimed at serving twin objectives. In the first instance, it is to be ensured that the child grows and develops in the best environment. The best interest of the child has been placed at the vanguard of the family/custody disputes according to the optimal growth and development of the child and has primacy over other considerations. This right of the child is also based on individual dignity. The second justification behind the welfare principle is the public interest that stands served with the optimal growth of the children. Child Centering Human Rights Jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation.

In *Tejawshini Gour Vrs. Shekhar Jagdish Prasad Tiwary 2019 (7) SCC 42*, the Hon'ble Apex Court observed that the welfare of the child shall include various factors like ethical upbringing, economic well-being of the guardian,

child's ordinary comfort, containment, health, education etc.

In *Lahri Sakhmuri Vrs. Sobhan Kodaly 2019 (7) SCC 311*, the Hon'ble Apex Court observed that the crucial factor which have to be kept in the mind of the courts for gauging the welfare of the children and equally for the parents can be, inter alia, delineated, such as maturity and judgment, mental stability, ability to provide access to school, moral character, ability to provide continuing involvement in the community, financial sufficiency and last but not the list the factors involving relationship with the child, as opposed to characteristics of the parent as an individual.

Shared Parenting :- The term shared parenting or joint custody means (i) joint legal custody where both parents retained joined responsibility for the care and control of the child and joint authority to make decision concerning the child even though the child's primary residence may be with only one parent. (ii) Joint physical custody where both parents share physical and custodial of the child or (iii) any combination of joint legal and joint physical custody which courts deems to be in the best interest of the child.

Report No.257 on Reforms in Guardianship and Custody Laws in India, the Law Commission of India in order to emphasis the welfare of the child as the paramount consideration in adjudicating custody and guardianship matter, decided to study the issue of adopting a Shared Parenting System in India. The Commission in November 2014 issued a consultation paper on the subject and after several grounds of discussions and deliberation, the Commission reviews the current laws dealing with custody and

guardianship, namely the Guardianship and Wards Act 1980 and the Hindu Minority and Guardianship Act 1956 and recommends legislative amendments to achieve the equal legal status of both parents with respect to guardianship and custody and to provide for the option of awarding joint custody to both parents in certain circumstances conducive to the welfare of the child. Chapter-III of the Law Commission report is on the concept of Joint Custody and in Chapter-V, the Law Commission has mentioned and discussed the consideration for deciding child custody cases i.e., factors to be considered for best interest and standard, determining the preference of the child, access to record of the child, grand parenting time, mediation, relocation, decision making, parenting plan, visitation but the recommendation given by the Law Commission is not law and is not binding. In Para-3.2.1 of the Law Commission report mentioned on the point of joint custody thus, shared and equal guardianship is recommended by the Law Commission.

In ***Tushar Bishnu Ubale Vrs. Mrs. Archana Tushar Ubale W.P No.5403/2015 (R).DOC***, the Hon'ble Bombay High Court has pleased to hold that in the custody matter, the child, mother and the father are the main stakeholders and the law repeatedly has emphasised as a settled position that the welfare of the child is the paramount consideration. However, one has to take note that today, the families are nuclear and the couple restricts the family to one or two children. The society is becoming complex and the parents have to struggle hard to run the household and give better future to the child. Under these circumstances, alongwith the welfare of the child, it is necessary for the Courts to

consider sympathetically the financial, physical, mental stress the parents carry and the emotional plight of the parents while awarding custody. If the parents are psychologically stable, positive and happy, then, they can provide a healthy atmosphere to the child. Usually, the child is not a problem child but the problem lies in the parenting.

The Hon'ble Court further observed in Para-15, 16 & 19 of his judgment:

(15) "that for spouses, who are staying away from each other and fighting for the child, the word 'custody' connotes inherent crisis of sharing. To get company, love and affection of both the parents means a shared custody.

A child wants to share his joys and sorrows, failures and success, with its parents simultaneously. Such simultaneous association is required for the healthy upbringing of the child. A father and a mother have different responses towards the child's sharing, which is also necessary. The child must get a sense of belonging and social security and he should not feel that he has a broken family and should not develop self pity. The child may become a centre of either curiosity or comments, staring or sympathy from his friends, classmates and relatives. Peer pressure has negative impact on the tender and impressionable mind of the child. In the absence of simultaneous association with both the parents, the child misses completeness of his relationship. Therefore, shared custody may be an option open for the court to offer parents and make them aware of not only their child's needs but also the child's rights. As argued by the learned Counsel for both the sides, the 257th

report of the law commission is not only about shared parenting, but these are the recommendations on guardianship and custody laws in India, wherein under different chapters, the Law Commission has penned down its concept of joint custody, mediation in child custody cases and, also in chapter V, the considerations for deciding the child custody cases. Number of factors are to be taken into account in custody cases in the best interest of the child and parenting plan is one of these considerations. "

(16) Consent thereto cannot be imposed. The submission of the joint parenting plan or shared custody is required to be suggested by the Court and so also by the Counsellors to the parents. It is necessary to give them time to prepare themselves emotionally for such shared custody, which is difficult for the parents to digest initially. It is a matter of an attitudinal change. The Law Commission has elaborated the parameters in respect of the child custody but has also expressed that considering the roles attributed to the parents as per our social norms and behavioural patterns, the idea of 50% shared parenting may not be conducive in Indian society in all the cases. The Law Commission has voiced that the seeds of the globally accepted concept of shared custody can be sown and the saplings can be planted in the minds of the parents so that the fruits of the company of both the parents can be enjoyed by a child of the warring parents. The Law Commission has commented on the crystallisation of the roles and number of issues of the child in respect of the child's development. The Judges require to be active and sensitive while deciding issues of custody and access.

(19) Thus, Parenting Plan is a mutual arrangement of custody and access which is an outcome of matured parenting. The ideal situation is that joint parenting is a rule and single parenting is an exception. There may be a single mother or a single father left behind due to a blow of destiny, then, the child has no option. However, when both the parents are available, their association with the child cannot be artificially denied only due to fights and hatred and vindictive approach of the parents. Hence, though it is not mandatory that all the parents should adopt a Parenting Plan, it is advisable that the family Court to invite a Parenting Plan in the cases found suitable upon the Law Commission which has taken formal cognisance of the legal right involved in joint parenting. This, of course, may be attuned to circumstances and must account for the special needs of the particular child.

Thus, in the light of aforesaid judgments and preposition of law, it can be said that before deciding as to whether the custody should be given to the mother or the father are partially to the other or in shared parenting, the court must take into account the wishes of the child concerned, assess the psychological impact of the child if any, the court while dealing with the custody cases neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. The court has to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favorable surroundings. But over and above physical comfort moral or ethical values cannot be ignored they are equally, or more important, essential and indispensable conditions.

Ans. No. 5:-

The maintenance order passed U/s 125 Cr.P.C are enforced U/s 128 Cr.P.C.

Section 128 Cr.P.C :- A copy of the order of [maintenance or interim maintenance and expenses of proceeding, as the case may be] shall be given without payment to the person in whose favour it is made or to his guardian, if any, or to the person to [whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be] is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the [allowance, or as the case may be, expenses, due.]

Practical difficulties in Execution of Order of Maintenance granted U/s 125 Cr.P.C :-

The following are the some of the practical difficulties in execution of order of maintenance passed U/s 125 Cr.P.C. -

(1) Frequent change of address of respondent especially in outside county.

(2) Assessment of income of respondent if, he is non government employee or non salaried person because in most of the cases, respondent used to take plea that he has no means or income to give maintenance to petitioner.

(3) Non execution of Distress Warrant and in several cases, service report of Warrant or Distress Warrant as the case may be has not been received inspite of issuance of reminder.

(4) In case, the property is not in the sole name of respondent then, it creates difficulty in attachment of property because the other co-sharer can claim over the property.

(5) In some of the cases, respondent adamant to not give maintenance to applicant and ready to go to jail.

Section 125(3) Cr.P.C imposes an obligation on the applicant to bring to the knowledge of the court, the breach of the maintenance order by an application and when the applicant file any such petition, then it for the court to get its own order enforced and see that it is complied with. The proceedings from that stage cannot be treated as one between the analogical parties. Non appearance of party or its non prosecution does not entail in the dropping of the proceeding. The court has every power to inquire into the reasons for non compliance of the order and may failure on the part of the respondent to comply the order without sufficient cause can empower the court to issue a warrant for levy of the amount.

Warrant for levy of maintenance :- When an application is made U/2 125(3) Cr.P.C for recovery of the amount, then it is the duty of the court to see the due compliance of the order. If, without sufficient cause, the respondent willfully avoided payment of maintenance, it has the power to issue a Warrant for levy of the amount. The issue of warrant for levy of the amount due is in the manner provided for levying fines. Any further delay on the part of respondent without there being a justified cause may lead to his imprisonment.

Sentence in default of payment of

maintenance:- If, the respondent willfully neglected to pay maintenance, order passed by the court even after constraint major taken by the court, then court can passed order of sentence of imprisonment to compel the respondent to obey the order of the court. But arrest an imprisonment can be resorted to only after exhausting all such coercive measure of recovery, as attachment and sale of movable property of the respondent. This improves issuance of a warrant to the Collector, authorizing him realize the amount as arrears of land revenue as provided U/s 421(7) of Cr.P.C of fine.

In *Kuldeep Kaur Vrs. Surender Singh & Ors.*, **AIR 1989 SC 232**, the Hon'ble Apex Court pleased to hold that a person who without cause refuses to comply with the order of the court to maintain his wife or child would not be absorbed of his liability merely because he prefers to go to jail. Sentencing a person to jail is only a 'mode of enforcement' and not a 'mode of satisfaction'. The liability can be satisfied only by making actual payment of the arrears. Keeping the defaulting responding in jail is only an alternative for ensuring/facilitating regular recovery of the maintenance amount. The imprisonment that is ordered is not a punishment but a merely a measure to make him pay the unpaid portion of maintenance. The imprisonment is to be concerned as a coercive method to effect recovery rather than a punishment for failure to make payment.

In *Mehboob Basa Vrs. Nainima @ Hazra Bibi and Anr. Reported in 2005 (1) Law Weekly Criminal 384*, the Hon'ble Madras High Court after having considered the Apex Court Judgment passed in *Sahada Khatoon & Ors. Vrs. Amzad Ali & Ors. 1999 SCC CrL. 129* has held in Para-3 of his judgment -

“Para-3 :- Under Sub Section 3 of Section 125 Cr.P.C, it has been made clear that the power of the magistrate imposing imprisonment on the failure of the husband to pay maintenance has been restricted to only one month or until payment if sooner made. After the one month, for every breach or non compliance of the order of the Magistrate, wife can approach the Magistrate once again for similar relief.”

Thus, in the light of aforesaid authorities of the Hon'ble Apex Court and High Court, the principle emerge that whenever there is a failure of complying the order for payment of maintenance, then the person would be liable to sent jail for a period of one month. However, this restriction of one month under Sub Section 3 of Section 125 Cr.P.C cannot stand on the way even after one month period, if he continues to neglect the payment of arrears, once again the same very provision of Section 125 (3) Cr.P.C can be invoked by the court concerned, provided if the law is set in motion by filing an appropriate petition by the wife or the effected party. However, the court cannot send a person to jail beyond the period of one month at stretch or in one stroke for his failure to pay the maintenance of arrears.

Ans No.6 :-

Section 125 Cr.P.C legislated as a tool for social justice it, provides an effective remedy for neglected persons to seek maintenance. A follower of any religion can apply for maintenance U/s 125 Cr.P.C without restriction. The object of this provision is to provide a summary remedy to the dependent wife, children and parents from destitution and

to serve a social purpose.

Basis of the claim:- An application U/s 125 Cr.P.C, be it be by a wife, child or parent will be entertained only on proof that the respondent has sufficient means and that he/she neglected or refused to maintain him/her. In addition he or she has to prove her inability to maintain himself or herself.

Section 125 Cr.P.C is a major of social justice and is specially enacted to protect women and children. In *Caption Remesh Chander Kaushal Vrs. Mrs. Veena Kaushal and Ors., reported in AIR 1978 SC 1807*, the Hon'ble Apex Court has been pleased to observed that it is a meant to achieve a social purpose. The object is to prevent a vagrancy and destitution. It provides a special remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental right and natural duties of a man to maintain his wife, children and parent when they are unable to maintain themselves. The aforesaid position was highlighted in *Sabitaben Somabhai Bhatia Vrs. State of Gujarat and Ors. (2005 (2) Supreme 5003*.

In *Chandraprakash Bodh Raj Vrs. Shila Rani Chandraprakash reported in 1968 SCC onLine Del.52*, the Hon'ble High Court has opined that an able bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able bodies person to show to the court cogent ground for holding that he is unable, to reasons beyond his control, to earn enough to discharge his

legal obligation of maintaining his wife and child. When the husband does not disclose the exact amount of his income, the presumption will be easily permissible against him.

The husband being an able bodied person is duty bound to maintain his wife, who is unable to maintain herself under the Personal Law arising out of the marital status and is not under contractual obligation.

In ***Reema Salkhan Vrs. Somer Singh Salkhan 2012 SCC***, the Hon'ble Apex Court while computing the quantum of maintenance amount observed that the living standard of the respondent and his family, his past conduct must be considered in disposal of maintenance petition.

In ***Gopala Vrs. Parwati AIR 1929 MAD 47***, the Hon'ble Court observed that in determining the maintenance, the court usually takes into consideration; the reasonable wants of the woman, her position in life, her husband's means and income, as well as the mode of the former life of herself and her husband, and the fact that she has property of her own, though a relevant consideration in determining the quantum of maintenance, does not preclude her from claiming her right to be maintained.

In ***Appybai Vrs. Kimji AIR 1936 Bom. 138***, the Hon'ble High Court observed that a wife deserves her husband in order to live an adultery, or on the ground of her remarriage, or his trivial quarrel, or his unkindness not amounting to cruelty, she will not be claimed to separate maintenance.

In case of ***Chitra Sengupta Vrs. Dhurba Joyti Sengupta AIR 1988 Cal. 98***, the Hon'ble Apex Court please to held that the quantum of maintenance would depend upon

various factors such as the ability of the respondent, needs of the wife, the social status, age, education and other requirements. The court would have regard to the position and the status of the parties.

In *Jasbir Kaur Sehegal Vrs. District Judge, Dehradun 1997(7) SCC 7*, the Hon'ble Apex Court observed that no set formula can be laid down for fixing the amount of maintenance. Some scope for leverage can also be there. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but in voluntary payment or deduction. The amount of maintenance fixed for the wife should be such as she can be lived in reasonable comfort considering her status and the mode of life, she was used to when she lived with her husband.

The Hon'ble Apex Court reiterated the above principles in the case of *U Sree Vrs. U. Sree Nawas 2013 (2) SCC 114* and observed that it is the duty of the court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but at the same time, she should not be left to live in this comfort. The court has to act with pragmatic sensibility to such an issue so that the wife does not meet with any kind of man made misfortune.

The Hon'ble Apex Court in *Bhuvan Mohan Singh Vrs. Meena, AIR 2014 SC 2875* observed that Section 125 of the Cr.P.C was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that some

suitable arrangements can be made by the court and she can sustain herself and also her children if, they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basis maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have live in the house of her husband. That is where, the status and strata come into play, that where the obligation of the husband, in the case of a wife, become a prominent one. In proceeding of this nature, the husband cannot take subterfuges to deprived of her of benefit of living with dignity. Regard being had to the solemn pledge of the time of marriage and also in consonance with the statutory law that governed the field, it obligation of the husband to see that wife does not become a beggar, destitute. A situation is not to be maladroitly created whereunder she is compelled to resign to her fate and think of life "dust into dust". It is totally in permissible. In fact it is sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is able bodies, there is no escape unless there is an order from the court that the wife is not entitled for maintenance from the husband on any legally permissible ground.

The Hon'ble Supreme Court has laid down in case law reported in **2008(2) SCC 316 (Chaturbuj versus Sita Bai)** that the object of the 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. The object is to prevent vagrancy and destitution.

It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves.

In *Bhagwan Vrs. Kamla Devi AIR 1975 SC 83*, it was observed by the Hon'ble Apex Court that the wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with the status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance U/s 125 Cr.P.C.

In *Kalyan Dey Chowdhury Vrs. Rita Dey Chowdhury Nee Nandy, AIR 2017 SC 2383*, the Hon'ble Apex Court has opined that 1/4th of the income should be granted as maintenance.

To sum up in the light of above preposition of law, it can be said that no hard and fast formula can be laid down for deciding the quantum of maintenance and it can be computed under the fact and circumstances of each case. The ability of the husband, the strata of the society to which the couple belongs, the standard of living that the wife was used to at her husband's residence, other financial obligation of the husband which he is obliged to discharged as per law or all factors which need to be considered while fixing the quantum of maintenance.

Now I am coming to the next part of the question that how will the quantum of maintenance vary in case the competent court has awarded maintenance under D.V

Act and U/s 24 of H.M Act ?

Before advertng further, I would like to reproduce relevant sections.

Section 20 of D.V Act deals with monetary relief:

I also deem it appropriate to reproduce herein below Section 20, 26 and 36 of the DV Act, which read thus, "20. Monetary reliefs. (1) While disposing of an application under sub-section (1) of Section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but not limited to, -

- (a) the loss of earnings;
- (b) the medical expenses;
- (c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

(6) Section 20 (6) of the D.V Act provides that upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the

respondent, to directly pay to the aggrieved person or to deposit with the Court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

Section 26 of D.V Act provides Relief in other suits and legal proceedings: -

(1) Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceedings, before a civil Court, family Court or a criminal Court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal Court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

Section 20(1)(d) of the D.V Act makes it clear that the maintenance, which can be granted under the said Act, can be in addition to an order of maintenance under Section 125 of Cr.P.C. and or any other law for the time being in force. Whereas sub-section(3) of Section 26 of said Act enjoins the duty on the aggrieved person to inform the

Magistrate, if she has obtained any relief available under sections 18, 19, 20, 21 and 22 in any other legal proceeding filed by her before the Civil Court, Family Court or criminal. It is discernible that the object behind incorporating the aforesaid specific provision is that while granting any of the reliefs sought under sections 18, 19, 20, 21 and 22 of the D.V Act, the Magistrate shall take into account and consider, if any similar relief is already obtained by the aggrieved person. The purpose underlying the said provision is explicit that the Magistrate must be in a position to take a reasonable decision while awarding the maintenance, if any under the provisions of the D.V Act. It is thus evident that though the proceeding under the D.V Act may be an independent proceeding, the Magistrate cannot ignore the maintenance awarded, if any, in any other legal proceeding before the civil court or criminal court and has to take into account the maintenance already awarded, if any, while taking a decision whether in addition to the maintenance already awarded any more amount is required to be awarded and if yes, to what extent ? and shall have to record reasons therefor.

Admittedly, there is no such provision, as aforesaid, under Sections 125 of Cr.P.C. But Section 125 of Cr.P.C enjoins the duty upon the court to award fair and appropriate amount of maintenance, meaning thereby that it shall not be inadequate or insufficient and at the same time shall also not be excessive or unreasonable. In the circumstances, though there may not be any express provision under Section 125 of Cr.P.C., it may not be impermissible to take into account the maintenance or interim maintenance, if

any, already awarded to the aggrieved person under the provisions of the D.V Act while finally determining the quantum of maintenance u/s 125 Cr.P.C and thus the amount of interim maintenance awarded under D.V Act shall liable to be adjusted in the amount of maintenance finally awarded u/s 125 Cr.P.C., so long the aggrieved person is receiving such amount.

Section 24 of the Hindu Marriage Act deals with Maintenance pendente lite and expenses of Proceeding which is as follows :-

“Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has not independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner’s own income and the income of the respondent, it may seem to the court to be reasonable.

The law is settled that the wife and children can claim maintenance U/s 125 Cr.P.C U/s 20 r/w Section 23 of D.V Act. The wife additionally can claim interim alimony U/s 24 of Hindu Marriage Act and all these remedies are simultaneously pursued by the wife. However, while fixing the quantum of maintenance, the court can take into account the amount being paid to them in pursuance of an order passed under other enactments.

In case of ***Vishal S/o Raja Saheb Gore Vrs. Sow Aparna, W/o Vishal Gore (Crl. Rev. No.203/2017)*** the Hon'ble Bombay High Court has pleased to observe that wife and children can claim maintenance U/s 125 of the Cr.P.C, U/s 18 & 20 of Hindu Adoption & Maintenance Act 1956 and also under 20 r/w 23 of D.V Act, the wife additionally can claim interim alimony U/s 20 of the Hindu Marriage Act even if, all these remedies are simultaneously pursued by the wife and some or other order is passed in each of the said proceeding, it would not be permissible for the wife to claim the amount of maintenance awarded in each of the said proceedings independently. Firstly the propriety demands that if any similar relief is granted in the earlier proceeding, the person in whose favour such relief is granted has to disclose the said fact in the subsequent proceeding. For a moment even if it is presumed that no such disclosure was made or in a hypothetical situation, all the proceedings are simultaneously decided, the husband will definitely have a right to claim adjustment of the amount awarded in the said proceeding and cannot be subjected to independently pay the amount of maintenance awarded under each of the said proceedings.

In case of ***Sudeep Choudhary Vrs. Radha Choudhary AIR 1999 SC 536***, the Hon'ble Apex Court has laid down a law that the amount awarded U/s 125 Cr.P.C is adjustable against the amount awarded in the matrimonial proceedings U/s 24 of the H.M. Act as alimony to wife.

In ***Vishal S/o Rajesh***, the Hon'ble Bombay High Court has pleased to observed in Para-20 of his judgment that

no narrow meaning can be given by the law laid down by the Hon'ble Apex Court in the case of Sudeep Choudhary by interpreting the same to mean that the amount awarded by the criminal court can be adjusted against the amount awarded by the Civil Court in the proceeding before it. The Judgment read and interpreted in proper sprite lays down a law that the lower amount is to be adjusted against the higher amount.

In ***Nagender Rappa Natikar Vrs. Nilama AIR 2013 SC 1541***, the Hon'ble Apex Court has held that an order passed U/s 125 Cr.P.C would not preclude wife from making claim U/s 18 of the 1956 Act similarly, in ***Vikash Vrs. State of U.P 2014 DMC 373 Allahabad***, the Hon'ble Court has held that the Family Court has the power to adjust the amount of maintenance already awarded by the Magistrate U/s 125 Cr.P.C and the D.V Act.

In ***Sangeeta Kumari Vrs. State of Jharkhand (W.P.C No.5491 of 2014)*** the Hon'ble Jharkhand High Court held that although the provision for granting maintenance U/s 125 Cr.P.C and Section 24 of Hindu Marriage Act are different, the husband does not oblige to pay maintenance twice rather he is only require to pay higher amount amongst the two However when there are order of maintenance both U/s 125 Cr.P.C and 24 of H.M Act the claimant shall not be entitled to get maintenance simultaneously, rather he/she would be entitled to get only the higher amount of maintenance out of both the provisions.

To sum up in the light of above preposition of law, it can be said that the wife can claim maintenance U/s 125 Cr.P.C under provision of D.V Act and Section 24 of Hindu

Marriage Act simultaneously but it would not be permissible for the wife to claim the amount of maintenance awarded in each of the said proceedings independently and the amount so awarded is adjustable against the amount awarded in matrimonial proceedings or D.V Act and the adjustment is permissible and the adjustment can be allowed of the lower amount against the higher amount.

Ans. No.7 :-

The Hindu Minority and Guardianship Act was established to empower the Guardian and Ward Act, 1890 and provide better right and protection to children instead of acting as a replacement of already prevalent Act. Under the Hindu Minority and Guardianship Act, a person who is minor i.e., below the age of 18 years is incapable of taking care of himself or of handling his affairs and thus, requires a guardian. In such a situation, a guardian has been appointed for care of his body and his property. Prior to the Guardian and Ward Act 1890, there was no Act dealing with the guardianship of the minor. The statutory law before 1890 on the subject of guardianship (apart from legislation relating to Court of Wards) consisted of acts separately enforced in three presidencies but the general law of guardianship however remained unaffected. The guardianship envisaged by the act is a concept integrally linked with the legal concept of the minority. In Indian law, mainly, three periods of guardianship of a minor with reference to the age of the minor have to be considered, in the first case, a minor is a person under the specified age in regard to matters falling within personal law. This age varies but in the case of Hindus

at present is 18 years and according to Muslim Law minority extends up to 15 years.

During the British regime, the law of guardianship was developed by the court. Guardian and Ward Act and its object is to provide a law of guardian and Ward Act as far as possible to all classes. Subsequently, Hindu Minority & Guardianship Act 1956 has been brought in order to amend and qualify law relation to minority and guardianship among Hindus. This another installment of the Hindu Court and deals with the law relating to minority and guardianship. Under the Indian Majority act 1875, a person attains majority on his completing the age of 18 years but it before the completing that age, he has a guardian appointed by the court, he attains majority on completing the age of 18 years. That Act applies to all person including Hindus but an exception is made with respect to the capacity of any person to Act in the matter of marriage, dower, divorce and adoption. The present Act does not qualify the entire law of guardianship applicable to Hindu but amend and qualify only certain parts of law relating to minority and guardianship among Hindus. The provisions are supplemental to Guardian and Wards Act. In this Act, guardian may be divided in three classes. Natural Guardian, Testamentary Guardian, Guardian appointed or declared by the court. Other than the type mentioned, the other types of guardians existing under Hindu Law or De-facto Guardian and Guardian by Affinity. Mother is now considered as natural guardian in the present Act. Section 3 of the Hindu Minority and Guardianship Act 1956 and Section 3 of Guardian and Ward Act 1890 save the jurisdiction safes the jurisdiction of the court of ward and chartered High

Court.

Difference between jurisdiction of appointment of guardian under Court of Ward Act and Hindu Minority and Guardianship Act 2006:-

(1) The Hindu minority and Guardianship Act extends to whole of India and applies also to Hindus domiciled to the territories to which this Act extends who are outside the said territories.

Court of Wards Act 1879 extends to the State of West Bengal, Bihar and Assam and that part of the state Orissa which on the 30th day of July 1879 on the subject to the Lieutenant Governor of Bengal.

(2) Section 4(a) of Hindu Minority and Guardianship Act provides that minor means a person who has not completed the age of 18 years. Section 4(b) of the Act provides that guardian means a person having the care of the person of a minor or his property or of both his person and property and includes - (i) a natural guardian, (ii) a guardian appointed by the will of the minor's father or mother (iii) a guardian appointed or declared by the court and (iv) a person empowered to act as such by or under any enactment relating to any court of ward. Section 4(c) of the Act provides that natural guardian means any of the guardian mentioned in Section 6. Section 6 of H.M & G Act provides that natural guardian of a Hindu minor in respect of minor persons as well as in respect of the minor's property (excluding his/her undivided interest in joint family property) are in case of a boy or an unmarried girl- the father and after him, the mother; provided that custody of minor who has not completed the age of 5 years shall

ordinarily be with the mother. (b) in the case of an illegitimate boy or illegitimate girl- the mother and after her the mother. (c) In the case married girl- the husband. Provided that no person shall be entitled to act as the natural guardian of a minor under this Act, if he has ceased to be a Hindu or if he has completely and finally renounced the world by becoming a hermit and escetice. It further provides that expression of father or mother do not include step father or step mother.

(3) Section 3 of Court of Wards Act says that minor means a person who had not completed the age of 21 years and ward means any person who is under the charge of the court of wards or whose property is under such charge, or a trustee or any joint trustees, the property in the charge of whom as trusties, has been taken by the court of wards under the provision of this Act.

(4) Hindu Minority and Guardianship Act applied to Hindu Minor's person who has not completed the age of 18 years as well as in respect of minor's property (excluding his or her undivided interest in joint family property).

Section 5 Code of Ward Act 1879 says that it deals with every person and every property of which, it may take or retain charge under this Act or which may be placed under its charge by order of a competent court, in accordance with the provision of this Act. Section 6 of the Act deals with power of the court to take charge of property of female proprietors declared by the court in competent to manage their own property, (b) proprietors declared by the court to be minor, (c) proprietor adjudged by a competent Civil Court and capable of managing their affairs and (d) proprietors who

apply to the court to have all the immovable property and such part of their movable property as they may specify placed under the management of the court etc.

(5) Section 13 of Hindu Minority and Guardianship Act provides that welfare of minor to be a paramount consideration in appointment and declaration of any person as guardian of a Hindu minor by a court. Section 13(2) of the Act provides that no person shall be entitled to the guardianship by the virtue of this Act or of any relating to the guardianship amongst Hindus. If the court is of opinion that if he or her guardianship will not be for the welfare for the minor. The Hon'ble Apex Court in ***Gourav Nagpal Vrs. Sunedha Nagpal 2009 (1) SCC 42*** had occasioned to consider the parameters while determining the issue of custody of child and visitation right, entire law on the subject was reviewed. The Hon'ble Apex Court pleased to hold that it is not the welfare of the father, nor the welfare of the mother that is the paramount consideration for the court. It is the welfare of the minor and of the minor alone which is the paramount consideration.

Section 20 of the Court of Ward Act deals with appointment of manager and guardian :- The court may appoint one or more managers for property of any ward and one or more guardians for the case of the person of any ward under the charge of the court and may control and remove any manager or guardian so appointed. Provided that when any person other than a proprietor of whose property, the court has taken charge under U/s 6(1)(D) or a trusty of whose trust property, the court has taken charge under Clause-E of the said sub section becomes award, the court may as its discretion,

confirm or refused to recognize any appointment of a person to be the guardian of such ward which may have been made by a will.

(6) Section 8 of the Hindu Minority and Guardianship Act deals with power of natural guardian and Section 9 of the Act deals with power of testamentary guardian. Section 11 of the Act provides that no person shall be entitled to dispose of, or deal with the property of a Hindu minor merely on the ground of he or her being de-facto guardian of the minor. Section 12 of the Act also provides that where a minor has an undivided interest in joint property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest.

Section 19 of Guardian and Ward Act provides that that the court shall not be authorized or to declare a guardian of the property of minor whose property is under the superintendence of court of ward.

U/s 47 of the Court of Ward Act, court may order guardian and manager to make over property, to deliver of his accounts or any property which may be in his possession within such time as may be fixed by the court. Section 52 of the Court of Ward Act deals with power of court of ward to nominate another person to be next friend or guardian for suit and upon receiving copy of any such order of substitution, the Civil Court in which such suit is pending shall substitute the name of the next friend or guardian for the suit so appointed for the name of the manager or collector.

Ans. No.8 :-

The term 'Adoption' has been defined U/s 2(2) of Juvenile Justice (C & T) Act 2015 which provides that adoption that "adoption" means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.

Section 56(1) of the Juvenile Justice (Care & Protection of Children) Act provides "Adoption" shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of this Act, the rules made thereunder and the adoption regulations framed by the Authority.

Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956.

All inter-country adoptions shall be done only as per the provisions of the Act and the adoption regulations framed by the Authority.

Any person; who takes or sends a child to a foreign country or takes part in any arrangement for transferring the care and custody of a child to another person in a foreign country without a valid order from the Court, shall be punishable as per the provisions of Section 80 of the Act.

Differences in procedure for adoption by Indian Prospective Adoptive Parents (PAP) living in India and inter country adoption:-

Procedure for Indian Prospective Adoptive Parents

(PAP):- Section 58 of the Juvenile Justice (Care & Protection of Children) Act provides Procedure for adoption by Indian prospective adoptive parents living in India which is run as follows :-

1. Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child may apply for the same to a Specialized Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.

2. The Specialized Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority.

3. On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

4. On the receipt of a certified copy of the court order, the Specialized Adoption Agency shall send immediately the same to the prospective adoptive parents.

5. The progress and well being of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the Authority.

Section 59 of the Juvenile Justice (Care & Protection of Children) Act, 2015 provides procedure for inter-country adoption of an orphan or abandoned or surrendered child :-

(1) If an orphan or abandoned or surrendered child could not be placed with an Indian or non resident Indian prospective adoptive parent despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption;

Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.

2. An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children.

3. A non resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

(4) The authorized foreign adoption agency, or Central

Authority, or a concerned government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority.

(5) On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialized Adoption Agencies, where children legally free for adoption are available.

(6) The Specialized Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency.

(7) On receipt of the acceptance of the child from the prospective adoptive parents the Specialized Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(8) On the receipt of a certified copy of the court order, the specialized adoption agency shall send immediately the same to Authority, State Agency and to the prospective adoptive parents, and obtain a passport for the child.

(9) The Authority shall intimate about the adoption to the immigration authorities of India and the receiving country of the child.

(10) The prospective adoptive parents shall receive the child in person from the specialized adoption agency as soon

as the passport and visa are issued to the child.

(11) The authorised foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption in consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority.

(12) A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority.

Regulation 14 of Adoption Regulation 2017 provides that non resident Indian to be treated at par with Indians living in India in terms of priority of adoption of Indian orphan, abandoned or surrendered children.

Regulation 15 of Adoption Regulation 2017 envisaged registration and home study report for PAP for inter country adoption.

Regulation 12 of Adoption Regulation 2017 provides **legal procedure for adoption of child**. Clause 1 of Section 12 provides that the Specialized Adoption Agency shall file an application in the court concerned, having jurisdiction over the place where the SAA is located, with relevant documents in original as specified in Schedule-IX within 10 working days from the date of matching of the child with the PAP and

in case of inter country adoption, from the date of receiving No Objection Certificate from the authority, for obtaining the adoption from the court.

Regulation 17 (1) of Adoption Regulation 2017 provides the legal procedure as provided in Regulation 12 shall **mutatis mutandis** be followed in cases of inter country adoption.

(2) In cases of the prospective adoptive parents habitually residing abroad and wanting the Specialized Adoption agency to represent on their behalf as well, the application shall also be accompanied by a Power of Attorney in favour of the social worker or adoption in charge of the Specialized Adoption Agency which is processing the case and such Power of Attorney shall authorise a social worker to handle the case on behalf of the prospective adoptive parents.

Regulation 13 of Adoption Regulation 2017 provides follow-up of progress of adopted child in country adoption and **Clause 1 of Regulation 13 provides** that the SAA which has prepared the Home Study Report shall prepared the post adoption follow-up report on 6th monthly basis for two years from the date of pre-adoption foster placement with the PAP, in the format as provided in Schedule-XII and upload the same and CARA and guidance system alongwith the photograph of the child. **Clause-4 of the Adoption Regulation provides** that SAA or the DCPU as the case may be, shall arrange for counseling the adoptive parents and adoptee by social worker or link them to the counseling centre setup at the authority or state agency, whenever required. **Clause-5 of Regulation Adoption 2017 provides** that in case the child is having adjustment

problem with the adoptive parents, the SAA shall arrange the required counseling centre set up at the authority or state agency wherever required. **Regulation 13(7) of Adoption Regulation** provides that in case of dissolution, the application for annulment of adoption order shall be filed in the court which issued the Adoption Order.

Regulation 19 of the Adoption Regulation 2017 provides follow-up of progress of adopted child by non resident Indian, overseas citizens of India and foreign prospective adoptive parents. Clause 1 of Regulation 19 of Adoption Regulation 2017 provides:-

(1) The Authorised Foreign Adoption Agency or the Central Authority or Indian diplomatic mission or government department concerned, as the case may be, shall report the progress of the adopted child for two years from the date of arrival of the adopted child in the receiving country, on a quarterly basis during the first year and on six monthly basis in the second year, by uploading online in the Child Adoption Resource Information and Guidance System in the format provided in Schedule XII along with photographs of the child.

Section 57 of the Juvenile Justice (Care & Protection of Children) Act provides:-

Eligibility of prospective adoptive parents :-

1. The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

2. In case of a couple, the consent of both the spouses for the adoption shall be required.

3. A single or divorced person can also adopt, subject to fulfillment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

4. A single male is not eligible to adopt a girl child.

5. Any other criteria that may be specified in the adoption regulations framed by the Authority.

Regulation 5 of Adoption Regulation 2017 provides following eligibility criteria for PAP :-

1. The prospective adoptive parents shall be physically, mentally and emotionally stable, financially capable and shall not have any life threatening medical condition.

2. Any prospective adoptive parents, irrespective of his marital status and whether or not he has biological son or daughter, can adopt a child subject to following namely :-

(a) the consent of both the spouses for the adoption shall be required, in case of a married couple;

(b) a single female can adopt a child of any gender;

(c) a single male shall not be eligible to adopt a girl child;

(3) No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship.

(4) The age of prospective adoptive parents, as on the date of registration, shall be counted for deciding the eligibility and the eligibility of prospective adoptive parents to apply for children of different age groups shall

be as under :-

Age of the child	Maximum composite age of prospective adoptive parents (couple)	Maximum age of single prospective adoptive parents
Up to 4 years	90 years	45 years
Above 4 and up to 8 years	100 years	50 years
Above 8 and upto 18 years	110 years	55 years

(5) In case of couple, the composite age of the prospective adoptive parents shall be counted.

(6) The minimum age difference between the child and either of the prospective adoptive parents shall not be less than twenty five years.

(7) The age criteria for prospective adoptive parents shall not be applicable in case of relative adoptions and adoption by step-parents.

(8) Couples with three or more children shall not be considered for adoption except in case of special need of children as defined in sub-regulation (21) of regulation 2, hard to place children as mentioned in regulation 50 and in case of relative adoption and adoption by step-parent.

Regulation 3 of Adoption Regulation 2017 deals with following fundamental principles of governing adoption.

(a) the child's best interests shall be of paramount consideration, while processing any adoption placement;

(b) preference shall be given to place the child in adoption with Indian citizens and with due regards to the principle of placement of the child in his own socio-cultural environment, as far as possible;

(c) all adoptions shall be registered on Child Adoption Resource Information and Guidance System and the

confidentiality of the same shall be maintained by the Authority.

In **Sewa Bharty Matruchhaya, Durg through its Secretary Dilip Desmukh (Crl. Rev. No.97/2018)**, the Hon'ble High Court of Chhatisgarh, Bilaspur in Para-18 of the Judgment pleased to issue certain directions to the court concerned and the SAA, while dealing with an adoption case under J.J Act 2015 shall henceforth positively comply with the following directions :-

(1) While deciding an adoption application, the Court shall strictly adhere to the time limit of two months as provided by Section 61(2) of the Juvenile Act, 2015, Rule 46 of the Model Rules, 2016 and Regulation 12(6) of the Adoption Regulations, 2017.

(2) If an adoption case is not disposed of within the aforesaid period of two months, the Court shall record a specific reason therefor.

(3) The Court shall conduct proceedings of an adoption case in camera.

(4) The Court shall not treat an adoption case as an adversarial litigation.

(5) While deciding an adoption case, the Court shall strictly adhere to Rule 45(2) of the Model Rules, 2016 with regard to applicability of the procedure laid down in the Juvenile Act 2015 and the Adoption Regulations, 2017.

(6) Looking to Regulation 12(7) of the Adoption Regulation, 2017, the adoptive parents shall not be asked to execute any bond or make any investment in the name of the child.

(7) Since an adoption case is a non-adversarial litigation in nature, the Specialized Adoption Agency shall not make any opposite party or Respondent in the adoption application. Along with an application for adoption, names and details of PAPs shall be kept in a covered and sealed envelope.

(8) Though as provided in Regulation 19(1) of the Adoption Regulations, 2017, in a case of inter-country adoption, it is mandatory that the Authorized Foreign Adoption Agency or the Central Authority or Indian Diplomatic Mission or Government Department concerned, as the case may be, shall report progress of the adopted child for two years from the date of arrival of the adopted child in the receiving country, on a quarterly basis during the first year and on a six monthly basis in the second year. I deem it appropriate to direct that in addition to the above a welfare report and a detailed educational report of the adopted child shall also be obtained on a six monthly basis till the adopted child attains majority and such reports shall be monitored properly.

Yours faithfully,

(Sanjeeta Srivastava)
Addl. Principal Judge,
Addl. Family Court, Dhanbad

Q No. 1 Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the family Court. Discuss the impediments and possible remedies.

Ans. No. 1 The matrimonial disputes have grown too large that it drew the special attention of legislator and courts. Prior to 1984, the matrimonial disputes were tried by civil courts having original jurisdiction. But, after coming into force of family court Act 1984 Family Courts have been established. The litigants to matrimonial disputes are loaded with much of emotions and mental pressure with such a stressful mind when they entered in the court for seeking some remedy. Prior to enactment of Family Court Act 1984 the proceeding was taken care by pleaders in the absence of parties this in fact could not enable the court to arrange for conciliation. The constitution of family Courts is dealt with in Section 3 of Act. The main object of Family Court Act is provide to opportunity and conciliation to litigant and to pave way for speedy disposal. By strengthening mediation and conciliation process speedy disposal of matrimonial cases and other pending matters in family court can achieve.

Section 10 of Family Courts Act provide Special power where the Family Court Judge can formulate his own ways and means within the scope of law to help the litigants to arrive at settlement. The Speedy disposal of matrimonial matters pending in family court can also be accelerated by seeking the assistance of legal experts, psychiatrist and NGOs working in this field. The Family Court Act is silent about engagement of legal practitioner and pleaders as Amicus Curies by party themselves. Every litigant cannot expected to have exposure of law, practice and procedure, so they required necessary assistance of legal practitioner. Section 13 of Family Court Acts declines the right of parties to be represented by legal practitioner as a matter of right.

The matrimonial disputes and other matters pending in Family Court can be speedy dispose off by availing the services of counsellors for undergoing the

process of conciliation between the parties at the time of their appearance or filing W.S. The judge of Family Court shall prepare a list of expert councillors who are well versed in counselling process. The Councillors assist both the parties and court for speedy disposal of matrimonial cases. The speedy disposal of matrimonial and other matters pending in Family Court can also be accelerated by mediation process and the mediation centre with attached with family court are also conducting mediation. The mediator attached with mediation centre would preferably with an advocate who would be well trained in field of mediation. Well trend mediator is to bring down motion of litigating spouses and naturalized them by placing them on the pan of equity, thereafter, the chance of amicable settlement of matrimonial dispute becomes more and more.

In case where the case is not settled at mediation centre the case is referred back before the family court and now and the family court have ample power U/s 10 (3) of Act to have conciliation with parties in which family court judge has to motivate the parties to arrive a settlement by explaining them regarding the importance of family and its bondage and by increasing them with ground reality of adversarial procedure and its consequences and explaining to them about win- win situation in case of arriving their settlement.

Even after this attempt of conciliation by family court judge is not able to make the parties arrive at settlement then the court fixed time frame regarding the production of witnesses by the parties. The provision of Order VIII Rule 1 of Code of Civil Procedure in wishes that written statement shall be filed within 30 days from the date of receipt of summons and such time could be extended up to 90s days as the case may be by recording the reasons thereon. But, in respect to the matrimonial dispute the process of conciliation, mediation and conciliation involved large span to time. The leniency extension of time for written statement could not be taken.

Recording of oral evidence in suits or proceeding before family court shall not be very lengthy and the lengthy evidence as examination of witnesses must be controlled by judge and the family court must take the evidence of formal character on affidavit.

Family Court cases may be disposed speedy by receiving as evidence any report statement document, information or matter that may in opinion of court assist to deal effectually with dispute. In case of Sarla Sharma Vs. State of Rajasthan division bench of Hon'ble High Court of Rajasthan decided that the courts strongly leaves against a construction which reduces to statute to a futility. The court shall read the statute so as to make it effective and operative unless the words used in instituted cannot be given any other meaning. Section 13 to includes the family courts authority to permit engage of lawyers and Advocate of parties in exceptional circumstances, but permission for representation by lawyer is upon the discretion of family court and family court in his discretion may permit advocate to appear in court whenever, family court feels that it is necessary in the interest of justice. Thus, by virtue of above decision of Hon'ble Rajasthan High Court and decision of Apex Court an Advocate can permitted in family court with certain limitation.

The cases pending before Family Court can also be disposed speedy by taking the help of technology. More time of family courts are taken in proceeding for the service of notice of notice and summons, Hence taking the recourses of information technology the service summons and notice can be effectively served within few span time.

As regard to the family matrimonial dispute judge handling family dispute cases and matrimonial cases must be sensitive. A family court judge must be sensitized time to time towards the speedy disposal of matrimonial cases, but as regard to the matrimonial dispute a series of decision from Hon'ble Apex court would make us to understand the sorry state affairs the insensitive

judge handling the family court who allow the advocates or the litigants to dominate the court proceeding. In case is Shamima Farooqui Vs. Sahid Khan Hon'ble Apex Court had expressed very serious concern in respect of delayed adjudication regarding unnecessary adjournment leading to prolonged pendency of cases, so, in light of aforesaid anxiety of Apex Court unnecessary adjournment should not be given by family Court in family Court disputes. The family Courts have been established for adopting and conciliation procedure and dealing with family dispute in speedy and expeditious manner so the practice of grating adjournments in routine manners by family Courts should be deprecated because family court judge is expected to be sensitive to the issue for dealing with extremely delicate and sensitive issues pertaining to the marriage and family relations. The family disputed really cored the human relationship not only today but it will also have impact for years to come so, the family court by adopting a tactic of control over the proceeding and by not permitting the lis to swim in unpredictable grand river of time without knowing when shall it land on shores or take shelter in a corner tree that stands still on some unknown bank of river.

Tools and techniques for speedy disposal of matrimonial cases and other matters pending in Family courts:-

Mainly by adopting followings tools and techniques in Family court matrimonial and other matters pending in the Family court can speedily disposed:-

- A. There should be full utilization of court workinghours by adopting tools and technique of court management and case manangement.
- B. Family Court should not allowed unnecessary adjournments in routine manner the adjournment must be limited.
- C. The cases filed in family courts on similar matters and points should be clubbed together and decided accordingly. The notice must be served

another party for appearance promptly and without delay by using substituted service of summon like publication in daily newspaper circulating in area where parties residing and also by taking the help of information technology.

- D. After service of summon/notice if opposite party not appearing in time before court then ex-parte proceeding should be ordered against not appearing party.
- E. The opposite party should not be given long time for filing his/her show-cause/ written statement.
- F. The unnecessary adjournment should not be given to the parties at the stage of evidence and matter should be posted for day to day proceeding.
- G. The family court holds both criminal as well as civil power so, the provision of Section 309 of CrPC must be invoked strictly for granting the adjournment and also heavy cost should be imposed. The provision of granting adjournment should also be strictly maintained as per provision enumerated in order XVII of Code of Civil Procedure.
- H. The interlocutory application like interim maintenance U/s 125 CrpC and Section 24 of H.M Act should be disposed of without any delay.

Impediments:-

The impediments towards speedy disposal of matrimonial and other matters pending in family court are as follows:-

1. Generally notices are not served in time to opposite party. It is very difficult to serve notice/summons to other party residing at far away from jurisdiction of family court specially in other districts and states. Some times the petitioner not giving correct present address of opposite party so notices/summons not properly served due to in correct address. The

notices/summons send by registered speed post returned undelivered with the connivance of postal department.

2. Even after proper service of notice/summons opposite party not promptly appear in the case before family Court and if opposite party appear did not filed show-cause or written statement in time rather opposite party only one to take adjournments.

3. The petitioner/first party also filed a long examination in chief through affidavit and also filed voluminous documents which are not essential so far as proceeding before family court is concerned. Other side for the purpose of delaying of proceeding generally used to filed frivolous petition for delay of disposal and when such petition disposed of by an order then they used to file petition to go on higher court for revision only for the purpose of unnecessary adjournments.

Following remedies should be taken to remove the impediments:

1. The plaint/petition filed by petitioner/plaintiff must be mentioned correct address of parties. Notices/summons to opposite party must be served in time promptly by Nazarat of Civil Court or by any other agencies. The agencies serving notices/summons must be strengthened. When opposite party not appeared before the family court in spite of service of summons through Nazarat, speed post and even on publication of notice/summons in daily news paper, ex-parte proceeding must be started as soon as possible and when opposite party appear before the court for recalling order of ex-parte hearing heavy cost must be imposed.

2. Opposte party/ defendant/respondent should not be given much time in filing his show-cause/ written statement and the procedure for filing show-cause/ W.S must be follows as per law provided in CPC. After framing of issues or after filing of show-cause when case comes at the stage of evidence then the evidence should be taken on day to day basis and both the parties must file a list

of their witnesses. Both the parties should not be granted adjournment in mechanical manner at the time of evidence and only reasonable adjournment should be give of the parties for adducing their evidence.

3. The family court must also strictly follow the provisions mentioned in Order XVII of CPC. The mediation and conciliation process should be taken for early disposal of the cases, but it should not be allowed to be taken as a tools by other side for delaying and prolonging the matter.

4. Generally one party to matrimonial dispute always trying to abscond or not regularly appearing before the Family Court for which family court is truthless and helpless.

5. The Family Court has no any separate agency for service/summons/notices and they are depend for service/summons/notice upon civil court Nazarat which is over burdened. So, service/summons of notice take more time.

Q No. 2:- In what manner and to what extent the procedure in family courts can be evolved for speedy disposal of cases? Explain with reference to the relevant provisions of the Family Courts Act and Rules.

Ans. No. 2:- Section 7 & 10 of the Family Courts Act 1984 clearly says that family court has jurisdiction of criminal matters and civil matters. So, the provision recording the speedy disposal as mentioned in code of civil procedure and court of criminal procedure shall be applied so, other side should not be allowed to take unnecessary adjournment for prolonging cases in filing show-cause/ written statement/reply so, the provision of order VIII Rule 1 of CPC must be followed in letter and sprit for the speedy disposal of cases. Order VIII Rule 1 of Code of Civil procedure says that the defendent shall, within 30 days from date of service of summons on him, present written statement of his defence.

Provided that where the defendant failed to provide written statement within the period of said 30 days, he shall be allowed to file the same on such other day, as may be specified by the court, for the reasons to be recorded in writing, but which shall not be later than 90 days from the service of summons.

So, the opposite party/ defendant should not be given more time for filing show-cause/ written statement beyond the prescribed period as per order VIII, Rule 1 of CPC. The family court should also be strict in applying the provisions of Order XVII of CPC regarding granting of adjournment of speedy disposal of cases. The family court should also be follow the provisions of section 309 of CrPC in its letter and sprit of speedy disposal of the cases, so, no adjournment shall be granted at the request of the parties accept where the circumstances are beyond the control of that party. The court shall not grant adjournment on the fact that pleader of the parties engage in another court. Where a witness is present in court, but party are his pleader is not present or the party of his pleader though present in court is not ready to examine and crossexamine the witnesses the court may it think fit record the statement of witnesses and pass such order as thinks fit dispensing with the examination in chief or cross-examination of witness as the case may be.

The family court is not an ordinary civil court, the family court should dispose of the matter as expeditiously as possible and adjournment should be restricted. Section 9 of the Family Court Act says that in every suit or proceeding, endeavour shall be made by the family court in the first instance, where it is possible to do so consist with the nature and circumstance the case to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or poroceeding and for this purpose a family court may subject to any rules made by the high court follow such procedure at it may deem fit. Section 9 of Family Court Act alsosay that if any suit or proceeding at any stage, it appears to family Court that there is a reasonable possibility of a

settlement between the parties. The family court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement. Section 9 of the Family Court Act provides power to family Court to make efforts for settlement and for which ADR mechanism must be followed for arriving on settlement. If the parties come to the settlement at first instance then it helps early disposal of the cases. The mediation and conciliation, Lok Adalat or better alternative dispute resolution mechanism for settlement of family dispute between the parties and for speedy disposal of cases, so, it is bounded duty of family court for using the mechanism of ADR for speedy disposal of the cases in first instance. The prime object behind it is to promote and preserve the interest of the parties to a marriage so family court must take an attempt for mediation reconciliation between the parties for disposal of the cases amicable and expeditiously. As per Section 10 (3) of Family Court Act the family court has power to lay down own procedure by ignoring all the procedure, with a view to arrive at a settlement in respect of the subject matter of the suit or proceeding or at the truth of the fact alleged by one parties and denied by other parties which help for speedy disposal of cases by ignoring some of complicated procedure. Section 12 of the family Court Act also says for taking assistance of medical and welfare experts which are helpful to family court in early and speedy disposal of cases. Section 14 of the Family Court Act help the family court speedy disposal of cases because the provision of Indian Evidence Act are not applying in family Court in strict manner and the complicity of marking the exhibits on the document and also taking evidence, so, the provision of section 14 of Family Court Act will help in speedy disposal of family Court matters. Provision of Section 15 of Family Court Act also help family court towards speedy disposal of cases. Family court not to record the evidence only memorandum of substance of deposition of witness should be recorded which save the time of family court against the lengthy recording of

evidence which helps the early disposal of case. Section 16 of Family Court Act says that evidence of any person where such evidence is of a formal character may be given by affidavit and may, subject to all just exception be read in evidence in any suit or proceeding before a family court.

The petitions regarding interim maintenance u/s 125 CrPC and U/s 24 of H.M Act regarding maintenance pendente lite and expenses of proceeding should be disposed of without delay and they must be disposed of within 60 days from the date of service of notice on the wife or husband as the case may be.

Rule 22 & 23 of Family Court (Jharkhand High Court) Rule 204 says that the petition should be fixed and shall not be adjourned in High Court unless there are circumstances justifying such adjournment and to meet the ends of justice. The court shall record its reasons for adjourning a matter. Rule 23 of Family Court Rule 204 also says that judgment shall contain a concise statement of cases, the points for determination, the decision thereon and reasons for such decision. So according to Rule 23 the family court should not pass lengthy and complicated judgments, the judgment should be precise and clear that a common or litigant must understand judgment. The language of judgment should be sober, temperate and clear. So, when the judgment would not be lengthy and complicated it will save time and help in speedy disposal of cases.

By adopting and following the aforesaid provision in its letter and spirit the cases pending before the family court will help towards speedy disposal.

Q No. 3 In a matrimonial suit for divorce filed by the husband on the ground of cruelty and desertion the wife appears and admits desertion but makes counter allegation of cruelty. Can the divorce suit be decreed on the ground of desertion on admission? Will the situation be different if there is no allegation of cruelty by the husband? Whether the limitation of cooling off period applies in such cases.

Ans No. 3:- In a matrimonial suit for divorce filed by husband on the ground of cruelty and desertion the wife appears and admits desertion, but makes counter allegation of cruelty in this circumstance divorce cannot be granted on the ground desertion on admission, because court has to examined the full facts whether the desertion on the parte of wife was due to the cruelty happened on her and she was forced to leave her husband to live together. The desertion must be wilful and without any causes and thereafter, it can be accepted as a ground of divorce, but here in this case in the first circumstances the wife of has also alleged counter allegation of cruelty against her husband so court has evaluate the evidence and circumstances of both the parties that who has committed cruelty because some times desertion is the result of curlety and when wife has to be established cruelty on her by evidence and so that she was forced to leave the house of husband due to cruelty committed on her and her life will be indanger due to the cruelty done upon her by her husband at her matrimonial house. Personal liberty is the paramount consideration as enumerated U/s 21 of Indian Constitution. Law is settled that a decree on admission is not a matter of right but rather a description of court which must be exercised in accordance with known judicial canons. In case of Vijay Gupta Vs. Ashok Kr. Gupta reported in AIR 2007 Delhi 166 Hon'ble Delhi High Court observed that it is also a settled principle of jurisprudence that judgment on admission is not a matter of right and rather it is a matter of descretion of court. Before granting decree on admission, the court has to satisfy whether essential erequirement U/s 13 (1) (1-B) of H.M Act is satisfied or not which requires that respondent has deserted the petitioner for a continous period of not less then two years immediately proceeding the presentation of the petition.

Desertion means desertion of petitioner by other party of the marriage without reasonable cause and without the consent or against the vis of such party, and includes the wilful neglect by other party, and its gramitical variation and

cognate expressions shall be construed accordingly. So, the explanation of desertion must be without reasonable cause so in this circumstance even discretion is admitted by wife but wife has counter allegation of cruelty so on admission desertion divorce cannot be granted. The second part of this question is if the situation be different if there is no allegation of cruelty by husband against his wife then in such circumstances if wife admits desertion without reasonable cause and without consent or against the wish then on admission of desertion decree of divorce can be granted on admission. The limitation of cooling off period is mention Section 13 (B) of H.M Act and the cooling of period is applied when the case of divorce according to Section 13 (B) (1) is filed by both the parties on the ground that they have been living separate for the period of one year or more and they have not been lived together and they had mutually agreed that there marriage should dissolve so when both the spouses living separately without allegation and counter allegation against each other by adjustment and they are not able to live together and they filed a case for mutual divorce, then in such circumstances cooling period applied, but in the instance to the circumstances in this question limitation of cooling of period not applied because one party has alleged and another party counter alleged in this case, hence, the limitation of cooling off period is not applicable in such cases. In case of Amardip Singh Vs. Harveen Kaur it was held by Hon'ble Apex Court that the court dealing with matter is satisfied, that case is made out to waive the statutory period U/s 13 (B) (2), it can do so after considering – (1) the statutory period of six months specified in section 13 (B) (2), in addition to the statutory period of one U/s 13 (B) (1) of separation of parties is already over before the first motiton itself, (2) all efforts for mediation/conciliation have been failed and there will be no chance of reunion, (3) the parties have genuinely settled their difference, (4) the wating period will only prolgon their agony if the above

conditions are satisfied the waiver of cooling of waiting period for second motion will be indiscretion of concerned court. In present question and case.

The limitation the cooling of period will not applied the said case will not be filed by both the parties to a marriage together U/s 13 (B) of H.M and both the parties have not mutually agreed to dissolve their marriage. A petition for divorce is not like any other commercial suit. A divorce not only affects the parties their children if any and their family but also effect the society and the society also feels its reversion stress also be on preserving the institution the marriage. That is the requirement of law.

Q No. 4 Due to strained relations between the parents, a child who ideally needs the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective considerations to be kept in mind in awarding “ Shared Parenting” orders. Discuss in the light of latest case laws on the point.

Ans. No. 4. Due strange relationship between the parents a child who ideally needs the company of both the parents feels tormented. The task is then on the court to decide as whom the custody should be given. For the development and upbringing of child love and affection both mother and father is necessary. Hon'ble Supreme Court in case of Gyatri Bajaj Vs. Jitan Bhalla had discussed the case of Mausmi Moitra Ganguly Vs. Jayant Ganguli that it is the welfare and interest of the child and not the right of the parents which is determined factor for deciding the question of custody of child it was further view that the question of welfare of child has to be considered in the context of the fact of each case and decided case on issue may not be appropriate to be considered as binding precedents in that case it was observed by Hon'ble Court that an order of custody of minor children either under the provision of the Guardians and Wards Act 1890 or Hindu Minority and Guardians Act 1956 it is required made

by the court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parents that could require adjudication while deciding their entitlement to custody the desire of child coupled with the availability a conducive and appropriate environment for proper bringing together with ability and means of concerned parents to take care of the child are some of the relevant factor that have to be taken into account by the court while deciding the issue of custody of minor. What must be emphasised is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must right the determination required to be made by the court.

While determining the question to which parents care and control of the child should be given and the paramount consideration remains welfare and interest of child nor the right of the parents under statute. While determining the welfare of child the moral and welfare of the child must also weigh with the court as well physical well being the child cannot be treated as property or commodity and therefore, such issue have to be handled by the court with care and caution, love and affection by applying the human touch to the problems.

The issue of welfare covers-

1. Economical capacity of parents.
2. Love and affection given and taken from the side of parents and the child.
3. Suitability and availability of parents and children.
4. The age and sex of the child.
5. The cause for separation between parents.
6. Circumstances in which parents are living.
7. Nature and parents of children and other factors.

In case *Tejawshini Gour Vs. Shkhar Jagdish Prasad Tiwari* 2019 (7) SCC 42 the Hon'ble Apex Court observed that welfare of the child shall include

various factors like ethical upbringing economic well being of the guardians, child's ordinary comfort, containment, health education etc.

Shared Parenting:-

The term shared parenting or joint custody means are joint legal custody where both parties retained joint responsibility for the care and control of the child and joint authority to make decision concerning the child even though the child's primary resident may be with only one parent and joint physical custody where both parent share physical and custodial of the child are any combination of joint legal and joint physical custody which court seems to be in the best interest of the child.

Report No. 257 on reforms in guardianship and custody laws in India the law commission of India emphasises the welfare of child as a paramount consideration in adjudicating custody and guardianship matter decided to study the issue of adopting a shared parenting system in India.

In case Tushar Bishnu Ubale Vs. Mrs. Archana Tusar Ubale Hon'ble High Court has been pleased hold that in the custody matter the child, the mother and the father are the main stake holder and the law repeatedly have emphasised a settled position that the welfare of the child is the paramount consideration. However, one has to take note that today the family are nuclear and the couple restrict the family the one or two childed the society become complex and the parents have to struggle hard to run the house hold and give better future of the child under these circumstances along with well fare of the child, it is necessary for court to consider sympathetically the financial physical mental stress the parents carry and the emotional plights of the parents while awarding custody if the parent are psychologically stable positive and happy, then, they can provide healthy welfare of the child. Usually, the child is not a problem the problem lies in the parenting.

The Hon'ble court further observed in prar 15, 16 &19 of his judgment that the spouses who are staying away from each other and fighting for child the ward custody connets inherent crysis of sharing. To get company love and affectioin of both the parents means a shared custody.

A child wants to share his joy and sarrow failure and success with his parents simeltiniouslay such simeltiously association is required for the healthy upbringing of the child. A father and mother had different responses towards the child's share which is also necessary the child must gest a sence of belonging and social security and he should not feel that he has a broken family and should not developed self pity. The child may become a centre of either curiosity or comments, stairing or sympathy from his friends, classmets and relatives. Peer pressure has negative impact on the tender and impressionable mind of the child. In the absence simaltinious associationwith both the parents the child misses complitness of his relationship. Therefore, shared custody may be an option open for the court to of her parents and make them aware of not only their child's needs but also child right's. The 257 report of law commission is not only about share parenting, but these are recommendations on guardianship and custody laws in India, where under different chapters, the law commission has pened down its concept of join custody mediation in child cases and, also in chapter 5, the consideration for deciding child cases. Number of factors of to be taken into account in custody case in the best interest of child and parenting plan is one of his consideration.

The law commission voiced the seeds of globally accepted concept of shared custody can be sown and the samplings can be planted in the mind of the parents so that the fruits of the company of both the parents can be enjoyed by a child of the warring parents . the law commission of India has also commented on the crystallization of the roles and number of issues of the child in respect of

the child's development. The judges require to be active and sensitive while deciding issues of custody and access.

Thus, parenting plan is a mutual arrangement of custody and access which is and out come of mature parenting. The ideal situation is that joint parenting is a rule and single parenting is an exception. There may be a single mother or a single father left behind due to a blow of destiny, then the child has no option. However, when both the parents are available their association with the child cannot be artificially denied only due to fights and hatred and vindictive approach of the parent. Hence, though it is not mandatory that all the parents should adopt a parenting plan it is advisable that the family court to invite a parenting plan in the cases found suitable upon the law commission which has taken formal cognisance of legal right involved in joint parenting. This of course, may be attuned to circumstances and must account for the special needs the particular child.

Thus, in the light of aforesaid decision and preposition of law, it can be said that before deciding as to whether the custody of child should be given to the mother or the father or partially to the other on in the share parenting, the court must take into account the wishes of the child concerned access the psychological impact of child if any, the court while dealing with the custody case neither bound by statute nor by strict rules of evidence or procedure nor by precedence. The court has to give due weight to the child's ordinary comfort, containment, health education, intellectual development and favour surroundings. But over and above physical comfort moral or ethical values cannot be ignored they are equally or more important, essential and indispensable conditions.

Q. NO. 5 What are the practical difficulties in execution of an order for grant of maintenance U/s 125 CrPC? Discuss the available option in law before a

family judge for a realization of maintenance of amount awarded U/s 125 CrPC with special reference to the case laws.

Ans. No. 5 The provision for execution of an order for grant of maintenance u/s 125 CrPC is provided in Sub-section 3 of Section 125 CrPC which runs as follows:

(1) If any person so ordered fails without sufficient cause to comply with the order, any such magistrate, may for every breach of the order, issue a warrant of levying the amount due in the manner provided for levying fines and may sentence such person or the whole or any part of each month's along remaining unpaid after the execution of warrant to imprisonment for a term which may extent to one month or until payment is sooner made:

Provided that no warrant shall be issued for recovery of any amount due under this section unless application be made to the court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition with living with him and she refuses to live with him such magistrate may consider any ground for refusal stated by her and may make an order under this section not with standing such offers, if he is satisfied that there is just ground for doing so. Sub-section 3 of Section 125 CrPC refers to enforcement of maintenance order passed and order 125 (CrPC) due to none payment without sufficient cause. The none payment of maintenance can be enforced by issue of process as far levying of fines provided u/s 421 of CrPC or imprisonment. Before issuing a process/ distress warrant as far levying fines, show-cause notice must be issued. Section 421 of CrPC provides warrant of levying of fines. A warrant for levy of amount of maintenance by attachment and sale of moveable property belonging to opposite party and warrant is issued to the collector of District authorizing him to realize the amount and arrears of land revenue from movable or immovable property or both from opposite/defaulters. When the family Court

issue distress warrant to Collector under clause B of sub-section 1 of Section 421 CrPC the collector shall realized the amount in accordance with the law relating to arrears or land revenue and if such warrant were certificate used under such law.

Provided that no such warrant shall be executed by the arrest or detention of imprisonment are opposite party or defaulter.

2. Realization of maintenance amount awarded U/s 125 CrPC by attachment of salary and assets if opposite party is salaried person and he has movable property then the maintenance amount awarded to petitioner U/s 125 CrPC can be realized from his salary. For the recovery of arrears of maintenance issue of warrant for attachment of salary is permissible as reported in case of Ahmed Pasha, 1983 Cr.LJ 479 (AP) and in case of Ali Khan 1981 Cr. LJ 682.

3. By issuing warrant an imprisonment maintenance allowance awarded U/s 125 of CrPC can be realized . The period of imprisonment in default of payment is one month from each month arrear and another month for balance of arrear for a portion of a month. Sub section 3 of Section 125 CrPC confirms two independent powers to Family Judge which are as follows:

(a) To issue warrant.

(b) Sentenced the persons/opposite party also. The power to sentence opposite party is not dependent the issue of warrant. The power is in respect of full or any part of each month allowance remaining unpaid to sentence the person/opposite party or term not exceeding one month. Practical difficulties in execution of order of maintenance grant U/s 125 CrPC

1. Frequent change of address of opposite party/respondent specially south side the stated and out side country. None execution of distress warrant. In several cases service report of distress warrant/warrant as the case may be has not been received in spite of issuance of reminder. The execution of maintenance order also faces difficulties in cases where the property is not sole name of opposite

party /respondent which clear difficulty in attachment of property because co-share can claim over the property.

2. In some of the case opposite party/respondent admit not to give maintenance to petitioner/applicant and ready to go jail. In case of Kuldip Kuar Vs. Surendar Sing and Ors. AIR 1989 SC 232 Hon'ble Apex Court pleased to hold that a person who without cause refuses to comply with the order of the court to maintain his wife or children would not be absolved of his liability merely because he prefers to go to jail. Sentencing a person to jail only a mode of enforcement and not mode of satisfaction the liability can be satisfied only by making actual payment of arrears. Keeping the defaulting responding in jail is only an alternative for ensuring/ facilitating regular recovery of maintenance amount. The imprisonment that is ordered is not a punishment but a merely a measure to make him pay the unpaid portion of maintenance. The imprisonment is to be concerned as a coercive method to effect recovery rather than a punishment for failure to make payment. In case of Mehboob Basa Vs. Nainima @ Hazra Bibi and Anr. Reported in 2005 (1) law weeking Criminal 354 the Hon'ble Madras High Court after having considered the Apex Court judgment passed in Sahada Khatoon and others Vs. Amzad Ali Vs. Ors. 1999 SCC Cr. 129 has held that under sub section 3 and Section 125 CrPC it has been made clear that the power of Magistrate imposing imprisonment on the failure of the husband to maintenance has been restricted to only one month or until payment if sooner made. After the one month for every brich for none compliance of the order of Magistrate wife can approach the Magistrate once again for similar relief.

Q. No. 6 what are the Principles for computation of maintenance in a case U/s 125 CrPC? How will the quantam of maintenance of vary in case the competent court has awarded maintenance under domestic violence Act and/ or U/s 24 of H.M Act.

Ans. No. 6 Section 125 CrPC legislated as a tool for social justice which is secular in nature it is applicable on every person irrespective of their religion. It provides an effective remedies for neglected persons to seek maintenance the object of this provision is to provide a summary remedy to the dependent wife, children and parents from destitute and to serve a social purpose.

Section 125 CrPC is specially enacted to provide to social justice and protect and woman and children. In case of Captain Ramesh Chandra Kaushal Vs., Mrs. Veena Kausal and ors. Reported in AIR 1978 SC 1807 Hon'ble Apex Court observed that provision of Section 125 CrPC is meant to achieve a social purpose the object is to prevent a vagrancy and destitution. Its provision for special remedy for providing food, clothing and shelter to deserted wife it gives effect to fundamental right and nature duty of a man to maintain his wife, children and parents and when they are unable to maintain themselves the aforesaid position was also highlighted in case of Sabitaben Suma Bhai Bhatia Vs. State of Gujarat and Ors. (2005) (2) Supreme Court 5003

In case of Chitra Sen Gupta Vs. Dhurb Jyoti Sen Gupta AIR 1988 Kolkata 98 Hon'ble Apex Court please to hold that quantum of maintenance would depend upon various factors such as the ability of the respondent, needs of wife, the social status, age, education and other requirements. The court would have regard to the position and the status of the parties. In case of Bhagwan Vs. Kamla Devi AIR 1975 Supreme Court 83 Hon'ble Apex court held that the wife should be in position to maintain standard of living which is neither luxurious nor penurious, but what is consistent with the status of family. The expression "unable to maintain herself" does not mean that wife must be absolutely destitute before she can seek and apply for maintenance U/s 125 CrPC.

In case of Kalyan Dey Choudhury Vs. Rita Dey Choudhary, Neenady AIR 2017 Supreme Court 2383 Hon'ble Supreme Court opined that 1/4th of the income should be granted as maintenance.

As observed in the decision of Hon'ble Supreme Court in case of Jasbir Kaur Sehgal Vs. District Judge Dehradun and others reported as (1997) 7 SCC, it is settled law that no set formula can be laid down for fixing amount of maintenance payable and the calculation the same would always dependent upon the facts and circumstances of each case. In the case of Chandani Sharma Vs. Gopal Dutta Sharma the methodology adopted as adopted in Annu Rita Bohahra Vs. Sandeep Bohahra reported as 110 (2004) DLT 546 and S.S. Bindra Vs. Tarbindar Kaur to be useful tool to determine the monthly salary of respondent, in order to calculate maintenance payable to petitioner in the aforesaid cases, after taking into account the compulsory deduction from the salary, the remaining income was divided equally by the court between all the family members entitled to maintenance with one extra portion/share being allotted to the earning spouse solely or extra expenses that will necessary occur. The principle for computation of maintenance in case U/s 125 CrPC is depend upon meand and capacity of person against whom the award has to be made should be taken into consideration for determining the quantam of maintenance. In fact, in case of husband, it is not only the actual earning, but also his potential earning capacity, which must be considered that is there is presumption that every able body person has capacity to earn and maintain his wife. The income of the husband is a significant factor to be considered by the court in fixing the quantam of maintenance. It is disposable income and not the gross income, which is to be considered. Section 23 (2) of H.A.M Act states the factor to be considered in determining the amount of maintenance payable to wife, children and aged parents and they are as follows:-

- (a) The position and status of parties.
- (b) The reasonable wants of claimants, the claimant is living separately is justified or not, the income of claimant and the value of property of claimant.

Now I am coming to next part of the question that how will the quantum of maintenance vary in case. The competent court has awarded under D.B Act and/ or under 24 of H.M Act?UB

Section 20 of the D.B Act deals with monetary relief. Section 20 of D.B Act regarding the monetary reliefs to meet the expenses incurred and losses suffered by the persons and child of the aggrieved person as a result of domestic violence and such relief may include but not limited the loss of earning, medical expenses, last cause due to disreputation or removal of any property for control of the aggrieved persons and the maintenance of aggrieved persons as well as her children if any including an order under or in addition to an order of maintenance U/s 125 CrP or any other law for time being enforce.

Section 20 (6) of D.B Act provides that upon the failure on the part of the respondent to make payment in terms of the order the Magistrate may direct the employer or debtor of respondent to directly pay to the aggrieved person or to deposit with the court a portion of wages or salaries or debt due to or accrued to the credit of respondent which amount may be adjusted towards the monetary relief payable by the respondent. Section 20 (1) (D) of D.B Act makes it clear that the maintenance which can be granted under the said act can be in addition to an order of maintenance U/s 125 of CrPC and or any other law for time being enforce. Whereas sub Section (3) of Section 23 of D.B Act enjoining the duty on the aggrieved person to inform the Magistrate if she has obtained any relief available U/s 18, 19, 20, 21 and 22 in other legal proceeding filed by her before Civil Court, Family Court or criminal. The purpose of underlying the said provision is explicit that the Magistrate must be in position to take reasonable decision while awarding the maintenance. There is no such provision U/s 125 CrPC but section 125 CrPC enjoining the duty upon the court to award fair and appropriate amount of maintenance meaning there by that it shall not be in

adequate or insufficient and at the same time shall not be excessive or unreasonable. The amount of interim maintenance awarded under D.B Act shall be liable to adjust in the amount of maintenance finally awarded U/s 125 CrPC, so long as the aggrieved persons are receiving such amount.

Section 24 of the Hindu Marriage Act deals with maintenance pendente lite and expenses of proceeding which is as follows:

“where in any proceeding under Hindu Marriage Act it appears to the court that either the wife or the husband as the case may be has not independent income sufficient for her or his support and the necessary expenses of proceeding it may, on the application of the wife or the husband order the respondent to pay to the petitioner the expenses of proceeding and monthly during the proceeding such sum as, having regard to petitioner’s own income and the income of the respondent it may seem to the court to be reasonable”

The law is settled that the wife and child can claim maintenance U/s 125 CrPC U/s 20 r/w section 23 of D.B Act. The wife additionally can claim interim alimony u/s 24 of H.M Act and all these remedies are simultaneously pursued by wife. However, while fixing the quantum of maintenance pendente lite, the court can take into account the amount being paid to them in pursuance of an order passed under other enactments.

In case of Vishal son of Raja Saheb Gore Vs. Sow Aparna wife of Vishal Gore Hon’ble Bombay High Court has pleased to observe that wife and children can claim maintenance U/s 125 CrPC, U/s 18 and 20 of Hindu Adoption and Maintenance Act and also U/s 20 r/w 23 of and also claim U/s 20 r/w 23 Domestic Violence Act the wife additionally can claim interim alimony U/s 20 of Hindu Marriage Act. In case of Sangita Kumari Vs. State of Jharkhand, Hon’ble Jharkhand High Court has held that although the provision granting maintenance U/s 125 CrPC and Section 24 of H.M Act are different the husband does not obligate

to pay maintenance twice rather he is only require to pay higher amount amonts the two. However, when there are order of maintenance U/s 125 CrPC and 24 of H.M Act the claimant shall not be entitled to get maintenance simalte monusely rather, he/she would be entitled to get only the higher amount of maintenance out of both the provisons.

In the light of above preposition of law it can be said that wife can calim miantencen U/s 125 CrpC, under modestice violence and Section 20 of H.M Act similtenuously but it would not be permissible for the wife to claim the maintenance amount awarded in each of the said proceeding independently and the amount so awarded is adjustable against the amount awarded in matrimonial proceeding or D.B Act and and the adjustment is permissible and adjustment can be allowed of the lower amount against the higher amount.

Q No. 7 What is the differences in jurisdiction of courts under the courts nd wards Acts and Minority & Guardianship Acts in appointment of Guardians of a Minor?

Ans. No. 7 Section 9 of Gardian and Wards Act deals with court having jurisdiction to intertain application :-

Sub section 1 if the application is with respect to guardian ship of the person of the minor, it shall be made to the District court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to guardianship of property of the minor it may be made either to district court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in place where he has property.

(3) If an application with respect to the guardianship of property of minor is made to a District Court other than that having jurisdiction in the place where the minor ordineraly resides, the court may return the application if in its

opinion the application would be disposed of more justly or conveniently by any court other than District court having jurisdiction.

IN case of Ruchi Mazoo Vs. Sanjeev Mazoo (2011) 6 SCC 479 Hon'ble Apex Court held that the test to determine the jurisdiction of court to entertain the application of Guardianship of Minor is the place of ordinary residence of minor so, according to Section 9 (1) of Guardian and Wads Act in respect of the Guardianship of person of minor will be entertained the District Court having jurisdiction in place where the minor ordinarily resides but section 9 (2) to says that if the application with respect of the property of the minor it may be made either to the District Court in whose jurisdiction the minor ordinary resides or the property is minor is situated then either court in which jurisdiction the minor ordinary resides or the property is situated of minor is situated. If only application is filed to Guardianship of person of minor then family Court will entertain such petition where the minor ordinarily resides. But, if the Guardianship of property of minor is also involved then the District Judge having jurisdiction will entertain said petition. In Hindu minority and guardianship act the natural guarding of hindu minor has been defined in Section 4 (C) means any of the guardian mention in section 6. So, section 6 of the Hindu Minority and guardianship deals with natural guardian of Hindu Minor hence, the court having jurisdiction to entertain the petition in whose jurisdiction the natural guardian is residing and doing business which has been held by Hon'ble Apex court which has been held in Manmohan Suri Vs. Sunil Kumar Arora.

Q No. 8 What are the major differences in procedure for adoption by Indian prospective adoptive parents living in India and inter country adoption? What are the eligibility criterion for prospective adoptive parents? Discuss with relevant provision of law and latest case laws.

Ans. No. 8 The term adoption has been defined U/s 2 (2) of Juvenile Justice C & T) Act 2015 which provides that adoption means the process which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.

Section 56 (1) of Juvenile Justice (Care & Protection of Children) Act provides that adoption shall be resorted to for ensuring right to family for orphan, abandoned and surrendered children as per the provision of this Act, the Rules made thereunder and the adoption regulations framed by the authorities.

Nothing in this Act shall apply to the adoption of children made under the provision of the Hindu Adoption and Maintenance Act 1956.

All inter country adoption shall be done only as per provisions of the Act and the adoption regulation framed by authority. Any person, who takes or sends a child to a foreign country or takes part in any arrangement for transferring the care and custody of child to another person in a foreign court without a valid order from country shall be punishable as per the provision of section 80 of this Act.

Followings are differences in procedure for adoption by Indian prospective adopting parents (PAP) living in India and inter country adoption:-

Procedure for Indian Prospective adoptive parents (PAP):-

Section 58 of Juvenile Justice (Care and Protection of Children) Act provides procedure for adoption by Indian prospective adoptive parents living in India which runs as follows:-

1. Indian Prospective parents living in India, irrespective of their religions, if interested to adopt an orphan or abandoned or surrendered child may apply for the same to a specialized adoptive agency, in the manner as provided in the adoption regulations framed by authority.

2. The specialized adoptive agency shall prepare the home study report of the respective adopting parents and upon finding them eligible will refer a child declared legally free for adoption to them along with the child study report and medical report of the child in the manner as provided in the adoption regulation framed by authority.

3. On the receipt of acceptance of child from prospective adopting parents along with child study report and medical report of the child signed by such parents, the specialized adoption agency give the child in pre adoption foster or and filed an application in the court for obtaining the adoption order in the manner as provided in the adoption regulation framed by the authority.

4. On the receipt of certified copy of the court order, the specialized adoption agency shall send immediately, the same to the prospective adopting parents.

5. The progress well being of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulation framed by authority.

Section 59 of Juvenile Justice (Care and Protection of children) Act 2015 provides procedure for inter country adoption of an orphan or abandoned or surrendered child:-

1. If an orphan or abandoned or surrendered child could not place with an Indian or none-resident Indian prospective adoptive parents despite the joint effort of the specialized adoption agency and state agency within 60 days from the date the child has been declared legally

Provided that children with physical and mental disability, siblings and children above 5 years of age may be given preference over other children for such inter country adoption in

accordance with the adoption regulation, as may be framed by authority.

2. An eligible non-resident Indian or overseas citizen of India or person of Indian origin shall be given priority in inter country adoption of Indian children.
3. A non-resident of Indian or overseas citizen of India or a person of Indian origin or foreigner, who are prospective adopting parents living abroad, irrespective of their religion if interest to adopt and orphan or abandoned or surrendered child from India may apply for the same to an authorized foreign adoptive agency or central authority or a concerned government department in our court of habitual residence as the case may be in the manner as provided the adoption regulation framed by authority.
4. The authorized foreign adoptive agency or central authority, or a concerned government department as the case may be shall prepare the home study report for such prospective adoptive parents and upon finding them eligible with sponsor their application to authority for adoption of a child from India in the manner as provided in the adoption regulation framed by authority.
5. On receipt of application such prospective adopting parents, the authority shall examine and if it finds the application suitable, then it will refer the application to one of the specialized adopting agency where children legally free from adoption are available.
6. The prospective adoptive parents receipt of certified copy of court order specialized adopting agency shall send the same to authority, state agency and to the prospective adoptive parents obtained a passport for child. The authority shall intimate about

the adoption to the immigration authority of Indian and the receiving country of the child. The prospective adopting parents shall receive the child in person from specialized adoption authority as soon as the passport and visa issued to the child.

The authorized foreign agency or the Central authority or the concerned government department, as the case may be shall ensure the submission of progress report about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption in consultation with authority and concerned Indian Diplomatic mission, in the manner as provided in the adoption regulations framed by the authority.

A foreigner a person of Indian origin or an overseas citizen of India who has habitual residence in India, if interested to adopt a child from India may apply to authority for the same along with a no objection certificate from the Diplomatic mission of his country in India for further necessary action as provided in adoption regulation framed by authority.

Section 60 of Juvenile Justice Care and Protection Children Act 2015 deals with the procedure for inter country relative adoption. According to Section 60 (1) a relative residing abroad who intends to adopt a child from his relative in India shall obtain an order from the court and apply for no objection certificate from authority in the manner as provided in regulation framed by authority. (2) the authority shall on receipt of order and the application from either the biological parents or from adoptive parents issue no objection certificate under intimation to immigration authority of India and of receiving country of the child. (3) the adopting parent shall after receiving no objection certificate received child from biological parent and shall facilitate the

contact of the adopted child with his siblings and biological parents from time to time.

Section 57 of Juvenile Justice Care and Protection of Children Act 2015 deals with the eligibility of prospective adoptive parents which are as follows:-

1. The prospective adoptive parents shall be physically fit financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him
2. In case of couple the consent of both the spouses for the adoption shall be required.
3. A single or divorced person can also adopt subject to fulfilment of the criteria and in accordance with the provision of adoption regulations framed by authority.
4. A single male is not eligible to adopt a girl child.
5. Any other criteria that may be specified in the adoption regulation framed by the authority.

The Central Adoption and Research Authority commonly known as CARA under the Ministry of Women and Child Development Govt. Of India has given the detailed guidelines to be followed up for adoption procedure for Indian prospective adopting parents living in India, for non-resident Indians, overseas citizen of India and foreign prospective adoptive parents regarding the registration and home study report. The no objection certificate of authority and pre-adoption foster care, passport and visa intimation to immigration authority conformity certificate and birth certificate. In case of Sewa Bharti Matru Chhaya Durg through its secretary Dilip Desh Mukh Hon'ble High Court of Chhatisgarh Bilaspur issue certain directions to the court concerning SAA, quite dealing with

an adoption case under J.J Act 2015 shall hence forth positively comply with the following directions:-

While deciding and adoption application, the court shall strictly adhere to the time limit of two months as provided by section 61 (2) of Juvenile Act 2015, Rule 46 of the Model Rule 2016 and Regulation 12 (6) of the Adoption Regulation 2017. If an adoption case is not disposed of within the aforesaid period of two months the court shall record a specific reason therefore. The court shall conduct proceeding of an adoption case in camera and court shall not treat and adoption case as a adversarial litigation while deciding an adoption case the court shall strict adhere to rule 45 (2) of the Model Rules 2016 with regard to applicability of procedure laid down in Juvenile Act 2015. Since, an adoption case non adversarial litigation in nature the specialized adoption agency shall not make any opposite party respondent in the adoption application. Along with an application name and details PAP shall be kept in sealed and covered envelope. Though as provided regulation 19 (1) of Adoption regulation 2017 in case inter country adoption it is mandatory that the authorized foreign adoption agency or the central authority or Indian diplomatic mission or government department concerned as the case may be shall report progress for adoptive child from the date of arrival of adopted child in the receiving country on a quarterly basis during in the first year and on six monthly basis in second year.

With regards

Satya Prakash No. II

Principal Judge, Family Court,
Dhanbad

09.05.2020

Answer No. 1:- In disposal of matrimonial disputes the role of police administration being order complying agency is very important but in practical there is no compliance of the notices issued to the respondents and the parties appear after ex parte disposal of the cases and file miscellaneous applications for restoration of the case. Then a fresh trial began and as such the petitioner do not get fruit of the judgment. There is one another aspect relating to the lawyers who generally cause delay in the proceedings. Certainly, long litigation in family conflict in itself in humane and unvoice. Litigation is not always the ultimate method for resolving the contrasting interets in the Family Courts.

There is a need to develop differnt legal cultural and profession approach in dealing with family cases. A family Court lawyer therefore needs a separate training and different forensic approach. Generally, mediation not litigation works as the real solution in many cases. A re-conciliatry approach based on matured understanding and mutual forgiveness can resolve many of the issues. However there are instances of unilateral abuse and intense exploitation which need stringent judicial remedy.

The family Courts act 1984 was enacted for adopting a humane approach to the settlement of family disputes and achieving socially desirable results.

For speedy disposal of matrimonial cases there should be video conferencing facility in the court besides the availability of legal aids service. The witnesses should be given cost for travel, lodging and boarding. The Family Court should not show undue haste in patience. Rather, should be wisely anxious and conscious about dealing with a situation. He

should avoid procrastination he must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with. The Family Court judges shall remain alert to decide the matter as expeditiously as possible keeping in view the objects and reasons of the Act. He should be very sensitive to the cause.

In Santhani Vs. Vijay Venkatesh it has been held that "Video Conferencing is gender neutral in fact it ensures that one of the spouses cannot procrastinate and delay the conclusion of the trial. Delay, it must be remembered, generally, defeats the cause of party which is not the dominant partner in a relationship "

Answer No.2:- In order to promote conciliation in and secure speedy settlement of dispute relating to marriage and family affairs and for matter connected therewith the Family Court Act, 1984 has been enacted . Section 4 of the Family Court Act deals with the appointment of the judges. Section 5 provides for association of social welfare agencies. Section 6 provides for concillors officers and other employees of family Courts. Section 7 deals with the jurisdiction of the Family Court is quite extensive. A family Court has to exercise jurisdiction exercisable by any district Court or any subordinate Civil Court under any law relating to a suit or a proceeding between the parties to a marriage or a decree of nullity of marriage declaring a marriage to be null and void or annulling a marriage as the case may be or restitution of conjugal right or judicial separation or dissolution of marriage. Section 9 prescribes the duty of Family Courts to make efforts for settlement by rendering assistance and persuading the parties for arriving at a settlement in respect of the subject matter of the suit or proceeding. For the said purpose, it may

follow the procedure laid down by the High Court. Section 11 provides for proceedings to be held in camera. Section 12 stipulates for assistance of medical and welfare experts for assisting of family Court in discharging the functions imposed by the Court. The reconciliatory measures are to be taken as the first instance and emphasis on efforts for reconciliation failing which the court should proceed for adjudication and command on the family court is to hold it in camera if either party so desires. Section 9 clearly recognizes a descretion in the Family Court to determine how to structure the process(Santhani Vs. Vijay venkatesh) .

As per section 18 (1) of the Act a decree or an order other than an order under chapter IX of the Cr.P.C. 1973 passed by a family Court shall have the same force and effect as a decree or order of civil court and shall be executed in the same manner as is prescribed by the CPC, 1908 for the execution of decrees and orders .

(2) an order passed by a family Court under chapter 09 of Cr.P.C. shall be executed in the manner prescribed for the execution of such order by that court.

(3) a decree or order may be executed by the family Court which passed it or by the other family Court or ordinary Civil Court to which it is sent for execution.

Answer No. 3:- In a matrimonial suit for divorce filed by the husband on the ground of cruelty and desertion the wife appears and admits desertion but makes counter allegation of cruelty then the suit will not be decreed on the ground of desertion on admission of wife because before granting relief on the ground of desertion the court must be satisfied

that the matrimonial offence complained of his established. In **Bipin Chandra Vs. Prabhavati (AIR 1957, SC 176)** the Hon'ble Supreme Court held that "It is also well settled thatthe plaintiff must prove the offence of desertion beyond all reasonable doubts." In **Laxman Vs. Mina (AIR 1964 SC 40)** the Hon'ble Apex Court held that the onus lies on the petitioner to establish that the desertion was without cost and stressed the importance of avoiding the fallacy which lies in a failure to distinguish between a legal burden of proof which is raised on the petitioner and a provisional burden raised by the state of evidence which may shift from one party to another. The legal burden throughout the case is on the petitioner to prove that the wife (for instance where the husband is petitioner) deserted him without cost.

Situation will also not be different if there is no allegation of cruelty by the husband. In Principles of Hindu Law, MULLA has quoted that "This section (13 (1)(ib)) however, envisages the desertion of one of the spouses qua the other therefore in India at present such mutual desertion is not a ground for divorce (**Gurubachan Kaur Vs. Pritam Singh, AIR 1958, ALL -140**).

The Court can pass a decree for divorce u/s 13.B on the basis of only mutual consent of the parties. The Court while passing its decree u/s 13.B has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclosed such consent.

In **Amardip Singh vs Harveen Kour (2017) 8 SCC 746**, it has been held that ,

"18. that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13.B(2), it can do so after considering the following :

i) the statutory period of six months specified in Section 13.B(2), in addition to the statutory period

of one year under Section 13.B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

19. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver.

20. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.

21. Since we are of the view that the period mentioned in Section 13.B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of

Divorce by mutual consent was introduced as an amendment to the Hindu Marriage Act in 1976. The waiting period under Section 13.B was mandated to prevent couples from taking any hasty decision to end their marriage. Marriage is a sacrament in the Hindu religion.

Divorce was granted only after the cooling-off period and once the court found there was no further chance for reconciliation.

“The waiting period will only prolong their agony,” Justice Goel said in the 2017 judgement.

The apex court had held that the waiting period should be done away with in cases where there is no way to save the marriage and all efforts at mediation and conciliation have run their course; where parties have genuinely settled their differences including alimony, custody of child, etc, between themselves; and already a year and a half has passed since their first motion for separation.

The court had observed that application for waiver of waiting period can be filed in court within a week of their first motion for separation. The proceedings can be done through video-conferencing

Answer No. 4:- Where relation between the parents are strained a child who ideally needs the company of both parents and the parents feels tarmented, the court should give the child in custody of both the parents. Share parenting is best formula to bring up a child where parents are not able to resolve disputes. Becuse both the parties had equal rights over the child. The apex court has repeatedly held that where the parties are not able to resolve thier differnces and state whether then share parenting is the best formula to bringup a child.

In **DSG Vs. AKG, 2019, SCC online Del 7767 it has been held that** children are the primary victims of matrimonial dispute and custody claims. In paragraph 35 of Jasmit Kaur VS. State of NCT Delhi and Another decided on 12.12.2019 it has been held

that " In view of the discussion we are clearly of the view that it is in the best interest of the child to have parental care of both the parents if not joint then at least separate. We are clearly of the view that if the wife is willing to go back USA then all orders with regard to custody, maintenance etc. Must be occurred into by the jurisdictional court in USA.

In **Tejaswani Gaud Vs. S.J.P.Tiwari (Criminal Appeal no. 838 of 2019 decided on 06.05.2019)** the Hon'ble Supreme Court has also recognized the theory of shared parenting by stating that " As the child is in tender age i.e. IV 2 years , her choice cannot be ascertained at this stage. With the passage of time, she might develop more bonding with the appellants and after some time, she may be reluctant to go to her father in which case, the first respondent might be completely deprived of her child's love and affection.

Likewise, in **Sheila B. Das Vs. P.R. Sugashree (Appeal (Civil) 6626 of 2004) decided on 17.06.2006** the Hon'ble Supreme Court has held that " We therefore feel that the interest of minor will be best serve if she remains with the respondent but with sufficient excess to the appellant to visit the minor at frequent intervals but so as not to disturb and disrupt her normal studies and other activities.

In **Dr. V. Ravichandran Vs. Union of India & Others** the Hon'ble Supreme Court has also ordered the parties who share joint legal physical custody of the minor child.

Answer No. 5:- The practical difficulties in execution of an order for grant of maintenance u/s 125 Cr.P.C. are the lethargic approach of the administration and Police .Apart that, the conduct of the opposite party who flout the orders of the court by fleeing away . Though Section 125 (3) empowers the

court that if any person so ordered fails without sufficient cause to comply with the order any such magistrate may for every breach of the order issue a warrant for levying the amount due in the manner provided for levying fines and may sentence such person for the whole or any part of which months allowance for the maintenance or interim maintenance and expenses of proceeding as the case may be remaining unpaid after execution of the warrant to imprisonment for a term which may extend to one month or until payment if sooner made provided that no warrant shall be issued for the recovery of any amount due under this section unless the applicant be made to the court to levy such amount within a period of one year from the date on which it became due.

In Ramesh Chandra Kaushal Vs. Vina Kaushal (1978 4 HCC, 17), it has been held that ,

“this provision is a measure of social justice especially enacted to protect women and children and false within the constitutional sweep of Article 15 (3) reinforced by Article 39. We have no doubt that sections of statutes calling for constrution by Courts are not petrified print but vibrant workds with social functions to fulfil. 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 advance the cause the cause of the derelicts.”

Answer No. 6:- The purpose of the provision u/s 125 is to prevent vagrancy and destitution in society and the court must apply its mind to the options having regard to the facts of the particular case. In paragraph no.5 of **Chaturbhuj Vs. Sita Bai reported in (2008)- 2 SCC 316**) the principle for computation of maintenance has been given which reads as under: "the object of the maintenance proceeding 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. The phrase "unable to maintain herself" in the instant case would mean that 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 desertion to survive somehow. Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal V. Mrs. Veena Kaushal and Ors. (AIR 1978 SC 1807) falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India, 1950 (in short the 'Constitution'). It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya V. State of Gujarat and Ors. (2005 (2) Supreme 503).

In **Manish Jain Vs. Akansha Jain (Civil Appeal No. 4615 of 2017, decided on 30.03.2017)** Hon'ble Mrs. Justice R. Bhanumati has held that "An order for maintenance pendente lite or for costs of the proceedings in conditional on the circumstance that

the wife or husband who makes a claim for the same has no independent income sufficient for her or his support or to meet the necessary expenses of the proceeding . It is no answer to a claim of maintenance that the wife is educated and could support herself . Likewise, the financial position of the wife's parents is also immaterial. The Court must take into consideration the status of the parties and the capacity of the spouse to pay maintenance and whether the applicant has any independent income sufficient for her or his support. Maintenance is always dependent upon factual situation; the Court should therefore mould the claim for maintenance determining the quantum based on various factors brought before the Court.

Section 25 (1) and (2) empowers the Courts to modify vary or discharge permanent alimony or maintenance due to changing circumstances. In Kalyan Dey Choudhary Vs. Rita Dey Choudhary Nee Nandy (Civil Appeal No. 5369 of 2017 decided on April, 19, 2017. It has been held that amount of permanent alimony awarded to wife must be defeating status of parties and capacity of spouse to pay maintenance. Maintenance is always dependent on factual situation of case and could be justified in moulding claim for maintenance passed on various factors.

Answer No. 7:-

(1) Section 20 of Court of Wards Act deals with appointment of guardian. Section 20 reads as under:

20. "**Appointment of managers and guardians.**- The Court may appoint one or more managers for property of any ward, and one or more guardians for the care of the person of any ward under the charge of the

Court and may control and remove any manager or guardian so appointed.

[When any person, other than a proprietor of whose property the Court has taken charge under clause (d) of sub section (1) of section 6 or a trustee of whose trust property the Court has taken charge under clause (e) of the said Sub-section, becomes a Ward, The Court may, as its discretion, confirm or refuse to recognise any appointment of a person to be the guardian of such ward which may have been made by a will.]

But in Hindu minority and Guardianship Act, 1956, there are 3 types of guardian who are in the following:

Natural Guardian

Testamentary Guardian

A Guardian appointed by the Court

According to [Section 4\(c\)](#) of the Act, the natural guardian assigns to the father and mother of the minor. For a minor wife, his husband is the guardian.

As per [Section 6](#) followings are the natural guardian :

Father- A father is the natural guardian of a boy or unmarried girl, the father is the first guardian and the mother is the next guardian of the minor. It is given in the Act that only up to 5 years the mother is the natural guardian of the child.

Mother- The mother is the first guardian of a minor illegitimate child, even if the father is existing.

Husband- For a minor wife his husband is the natural guardian.

(2) As per Court of Wards Act guardians are appointed for all persons and properties which at the commencement of this Act are under the charge of the Court of Wards, as constituted by Bengal Act IV of 1870, shall be deemed to be under the charge of the Court of Wards, as constituted by this Act.

And all persons and properties which at the commencement of this Act are under the charge of the Collector by virtue of an order of the Civil Court under section 11 of [Act 35 of 1858], or under section 12, section 14 or section 21 of Act 40 of 1858s, shall from such commencement be deemed to be under the charge of the Court of Wards.

Section 3 of Court and Wards Act "*ward*" means any person who is under the charge of the Court of Wards or whose property is under such charge, or a trustee or any joint trustees, the property in the charge of whom as trustees, has been taken over by the Court of Wards under the provisions of this Act.

On the other hand, the Hindu minority guardianship Act is applicable to any person who is a Hindu, Buddhist, Jain or Sikh.

(3) In Hindu minority and Guardianship Act guardians are appointed for guardianship or custody of child and Under Section 13 of the Hindu minority and Guardianship Act, 1956, while the appointment of any person as guardian is going on by a Court, the advantage of the minor shall be the primary consideration whereas in Court of Wards Act guardians are appointed for the superintendence of the property or the person and property of such a minor or a persons adjudged by a competent court to be of unsound mind and capable of managing his affairs custody of the Ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires. In Court of Wards Act the guardian is entitled for

remuneration but in Hindu minorities and guardianship Act there is no such provision.

(4) Under Section 6 of Hindu Minority and Guardianship Act no person will be designated to perform like the natural guardian of a minor under this portion, which is in the following:

1. If he/she ceased to be a Hindu.
2. If he/she has completely renounced the world that they are becoming an ascetic (sayansi) or hermit (vanaprastha).

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

(5) [The Guardians and Wards Act, 1890](#) shall apply to the application for getting the permission of the Court if the application is for getting the permission of the Court under [Section 29](#) of that Act and in these grounds:

Under [Section 9](#), of the Hindu Minority and Guardianship Act, 1956 testamentary guardian only authorized by a will. It is compulsory for the testamentary guardian to receive the guardianship adoption which may be expressed or implied. A testamentary guardian has the right to decline the appointment, but once he /she receives the guardianship then he/she can not decline to perform or resign without the permission of the Court.

The guardian who is appointed by the Courts, he/she will be known as a certified guardian.

(6) According to Section 12 of the Hindu Minority and Guardianship Act, 1956

Where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no

guardian shall be appointed for the minor in respect of such undivided interest:

(7) Under [Section 13](#) of the Hindu Marriage and Guardianship Act, 1956, while the appointment of any person as guardian is going on by a Court, the advantage of the minor shall be the primary consideration. But there is no such kind of provision in Court of Wards Act.

(8) Sectio.2 of the the Hindu Minority and Guardianship Act, 1956, provides that ,

“The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act,1890.”

it thus appears that the Hindu Marriage and Guardianship Act, 1956, should be read with the Guardians and Wards Act,1890. The Act does not apply to minors with court guardians. Provisions of the Act are supplementary to that of Guardianship and Wards Act.- AIR 1981 Cal 206.

(9) Order XXXII, Rule 3 C.P.C. deals with the appointment Guardian for the suit for minor defendant. Order XXXII, Rule 3 C.P.C. reads as under :-

(1) Where the defendant is a minor the Court, on being satisfied of the fact of his minority , shall appoint a proper person to be guardian for the suit for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the propped

guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, father or where there is no father, to the mother, or where there is no father or mother, to other natural guardian], to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

[The Court may, in any case, if it thinks fit, issue notice under sub-rule (4) to the minor also]

(5) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement or removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any Appellate or Revisional Court and any proceedings in the execution of a decree.]

As per order XXXII, Rule 11, where the guardian for the suit desires to retire or does not do his duty and where other sufficient ground is made to appear the Court may permit such guardian to retire or may remove him and may make such order as to costs as it thinks fit.

In ABC Vs. State (NCT of Delhi, Civil Appeal No. 5003 of 2015) the head notes reads as under:-

Guardians and Wards Act, 1890-Ss. 77 and 11 - Interpretation of, should be in secular context and not in light of tenets of parties' religion- India is a secular nation and it is a cardinal necessity that

relation be distanced from law- Even if Christian unwed mother seeking guardianship of her child born outside wedlock is in disadvantaged position in comparison to Hindu counterpart, who in view of S. 6 (b) of Hindu Minority and Guardianship Act, 1956 is natural guardian, 1890 act has to be interpreted on basis of legislative intent irrespective of religion of parties.

"Guardian and Wards Act, 1890-S. 7- Appointment of guardian of child born outside wedlock- If mother is sole caregiver of child while putative father remains uninvolved and unconcerned. mother's application for declaring her as sole guardian deserves acceptance- Welfare of child is of paramount consideration vis-a-vis rights of parents Hindu Minority and Guardianship Act, 1956- Ss 6 to 8."

"Guardian and Wards Act, 1890-S.11 - Applicability- S.11 applies where a third party seeks guardianship of child- Where one of the parents of child born outside wedlock, mother in this case, applies under S. 7 for appointing her as sole guardian, notice under S.11 to putative father who remains uninvolved and unconcerned, not mandatory-" Parents" in S.11 should be construed to mean mother alone when she is sole caregiver of child-S. 11 being purely procedural, can be relaxed to attain intent of the Act i.e. to protect welfare of child-- Hindu Minority and Guardianship Act, 1956 - Ss. 6 to 8."

"Guardians and Wards Act, 1890-Ss. 7 and 11- Appointment of guardian of child born outside wedlock- Where mother applies under S. 7 for her appointment as sole guardian as putative father remains uninvolved and unconcerned, she cannot be compelled by court to disclose identity of putative father for serving notice under S. 11 to him- Such

compulsion would be violative of her fundamental right to privacy - Non-disclosure would , instead protect the child from social stigma and controversy- Although child also has right to know father's identity, but that right would not be affected in the instant case as mother furnished particulars of putative father to Supreme Court which have been placed in sealed envelope and could be read only under specific direction of the Court- Constitution of India- Art. 21- Right to privacy" .

"Section 6 (b) of the Hindu Minority and Guardianship Act, 1956 makes specific provisions with respect to natural guardians of illegitimate children, and in this regard gives primacy to the mother over the father. Mohammedan Law accords the custody of illegitimate children to the mother and her relatives. The law follows the principle that the maternity of a child is established in the woman who gives birth to it, irrespective of the lawfulness of her connection with the begetter. However, paternity is inherently nebulous especially where the child is not an offspring of marriage . Furthermore, as per Section 8 of the Succession Act, 1925 , which applies to the Christians in India, the domicile of origin of an illegitimate child is in the country in which at the time of his birth his mother is domiciled. This indicates that priority, preference and pre-eminence is given to the mother over the father of the child concerned.

Answer No.8:- Section 58 of the Juvenile Justice (Care and Protection of Children) Act, 2015 deals with the procedure for adoption by Indian prospective

, adoptive parents living in India. It reads as under :-

(1) Indian prospective adoptive parents living in India, irrespective of their religion, interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a Specialised Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.

(2) The specialised Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority.

(3) On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(4) On the receipt of a certified copy of the court order, the Specialised Adoption Agency shall send immediately the same to the prospective adoptive parents.

(5) The progress and well-being of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the Authority.

Section 59 of the J.J. Act provides the procedure for inter country adoption of an orphan or abandoned or

surrendered child which reads as under (I) If an orphan or abandoned or surrendered child could not be placed with an Indian or non - resident Indian prospective adoptive parent despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter country adoption: Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.

(2) An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children.

(3) A non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

(4) The authorised foreign adoption agency, or Central Authority, or a concerned Government department, as the case may be shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority.

(5) On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialised Adoption Agencies, where children legally free for adoption are available.

(6) The Specialised Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency.

(7) On receipt of the acceptance of the child from the prospective adoptive parents, the Specialised Adoption Agency shall file an application in the Court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

(8) On the receipt of a certified copy of the court order, the specialised adoption agency shall send immediately the same to Authority, State Agency and to the prospective adoptive parents, and obtain a passport for the child.

(9) The Authority shall intimate about the adoption to the immigration authorities of India and the receiving country of the child.

(10) The prospective adoptive parents shall receive the child in person from the specialised adoption agency as soon as the passport and visa are issued to the child.

(11) The authorised foreign adoption agency, or Central Authority, or the concerned Government

department, as the case may be shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption, in consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority.

(12) A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, jfor further necessary actions as provided in the adoption regulations framed by the Authority.

Section 57 of J.J. Act deals with eligibility of prospective adoptive parents.-

(1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

(2) In case of a couple, the consent of both the spouses for the adoption shall be required.

(3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

(4) A single male is not eligible to adopt a girl child

(5) Any other criteria that may be specified in the adoption regulations framed by the Authority 10.
Section 58 deals with procedure for adoption by

Indian prospective adoptive parents living in India, which is to the following effect:-

In Union of India and Another Vs. Ankur Gupta & Others (Civil Appeal No. 2017 -2020 of 2019 decided on 25th. February, 2019 the Hon'ble Supreme Court has observed that ,

“Section 58 and 59 provides for two different mechanisms for adoption. As per Section 59 (1) , if an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parents despite the joint effort of the specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption. Thus, sixty days period has to be elapsed from the date when the child has been declared legally free for adoption. ”

In S.J. Beckar Vs. State and Others (Civil Appeal No. 153 of 2013) the Hon'ble Supreme Court that “ it is our considered view that having regard to the totality of the facts of the case the proposed adoption would be beneficial to the child apart from being consistent with the legal entitlement of the foreign adoptive parents. If the above is the net result of the discussions that have preceded , the court must lean in favour of the proposed adoption.

QUESTION 1: Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the family court. Discuss the impediments and possible remedies.

ANSWER: Prior to 1984, the matrimonial disputes were tried by Civil Courts having original jurisdiction. The Civil Courts are usually very much burdened with multi-various cases. The litigants to the matrimonial disputes were loaded with much of emotions and mental pressure. The Judicial Officers could pay least attention. The opportunity for conciliation was not even offered.

Hence, in order to provide an opportunity to conciliate the disputes in a fair manner, it was considered fit, that the litigants should be given chance to have direct interaction. It was also emphasized for speedy disposals of matrimonial disputes. When case was filed for a relief, such as divorce, or nullity of marriage or for restitution of conjugal rights, the summons, are ordered to be issued on the other party. Prior to the enactment of the Family Courts Act 1984, the respondent would engage a pleader of his/her choice and the appearance of the party before the Court was not mandatory. The proceedings would be taken care by the pleaders in the absence of the parties. There was no conciliation. The importance of conciliation was felt very much when there was frequent dissolution of the marriages which are considered to be sacramental. The apprehension that the society is moving towards a wrong direction of dissolving the bond so lightly was the main concern. The pleadings of the parties and the evidence alone were to be taken into account to decide a case. The need of separate Family Courts Act was felt for speedy disposal of family matters. Hence the necessity for a separate frame work where the matrimonial issues could be dealt with was felt. Thus came in to existence the Family Courts Act 1984. (In short The Act) The constitution of the Family Courts is dealt with in section 3 of the Act, which states that the Family Courts shall be constituted in every City/town where the population exceeds one million. However the drawback of the Act is that in many large towns, the Family Courts are still not constituted for the reasons of lesser population than that of the required population of one million. The mofussil/Taluk Head Quarters do not have Family Courts due to the lesser number of population as stipulated in the above provision. Thus, the matrimonial disputes in respect of Taluk Head Quarters of a District would have Subordinate Judge(s) Court to try the cases, who would not be governed by the Act. The main object of the Family Courts Act 1984 was to provide the opportunity of conciliation to the litigants and to pave way for speedy disposal. The Courts are provided with Special Powers under section 10 of the Act, wherein the Judge can formulate his own ways and means within the scope of Law, to help the litigants to arrive at a settlement. The prime salient feature of the Act is that of section 13, which declines the rights of the parties to be represented by a legal practitioner as a matter of right. The object of the legislators was not to take away the rights of the parties in total. Instead the provision to the above section empowers the Court to seek the assistance of a legal practitioner as *amicus curiae*. The section is also silent about engagement of a pleader as *amicus curiae* by the parties themselves. Every litigant cannot be expected to have exposure to Law, practice and procedure. Certainly they require the assistance of a legal practitioner. The exact phrase employed in section 13 of the Act is that "as of right, to be represented by a legal practitioner". This does not take away the right of the Lawyer in total. In short, the object of the legislators was that the litigants shouldn't stay away from Court proceedings so as to be represented by their Lawyers and such exercise shall not be taken up as a matter of right. This in a way helps the Court to have a direct interaction with the litigants.

The Family Courts constituted under the Act, shall have to avail the services of the Counselors. In simple words, when the respondent receives summons from Court, he/she shall have to make the appearance mandatory before the Judge of the Family Court. The Judge without insisting them to file their counter/written statement would refer them to the counselor for undergoing the process of counseling. This is because at times, when the respondent/defendant is compelled to file the written statement/counter, it may lead to aggravation of circumstances. There is list of counselors before the Judge of a Family Court who are well versed in counseling. Such counselors shall be attached with

the respective Family Courts. The number of Counselors shall be determined by the State Government in consultation with the High Court. The provision of section 6 of the Act deals with the above subject. The roles and responsibilities of a counselor are not defined under the Act. Rather the provision of section 23 of the Act empowers the High Court to frame rules to govern such issues. The responsibilities of the counselors and their powers to handle the matrimonial disputes and help the Courts in settling matrimonial dispute. The prime requisite quality of a counselor is to have the quick understanding ability of the issue and to act unbiased and to provide necessary advise to the litigating spouses so as to enable them to arrive at a settlement.

The counselors are not bound to disclose the minutes of the discussion between the spouses who are before them for counseling. The counselor shall send a report indicating whether the settlement could be arrived or not. In certain cases the counselor could indicate as to the necessity of consulting a psychologist or a psychiatrist. This would help the Court to take a further decision without entering into the adversarial procedure.

The Mediation Centers attached with Family Courts are also constituted so as to conduct mediation in family disputes. The mediator attached with the mediation center would preferably be an advocate who would be well trained in the field of mediation. The role of mediator is to bring down the emotions of the litigating spouses and neutralize them and place them on the pan of equity. Thereafter, the discussion would go on in a joint session and thereafter in a private session which is also termed as Caucus. The process of mediation is purely voluntary. The litigating spouses should be explained with the importance of mediation. Once reference is made, the mediation would go on for a maximum of 60 days which is extendable till 90 days. When the parties arrive at a settlement, the mediator sends the report to the Court along with the memorandum of understanding entered by the parties. Thus, the case concludes amicably by virtue of inquisitorial process without adversarial adjudication. In case where the case is not settled at the Mediation Center, the case is referred back to the Court. Now again the Judge of the Family Court has ample powers under Section 10(3) of the Act to have a conciliation with the parties. The ethics prevent the Judge from hearing to the facts of the case during conciliation. The apprehension is that the Judge having heard the facts of the case during conciliation and discussion, might get prejudiced. Such apprehension should not be in the minds of the litigants. Hence, the Judge has to motivate the parties to arrive at a settlement by explaining them the importance of the Family and it's bondage and shall also encourage them with the ground reality of adversarial procedures and it's consequences and to explain about the win-win situation in case of arriving at a settlement. Even after this attempt if the Judge is not able make the parties arrive at a settlement, then the adversarial procedure commences. Thereafter the Judge shall have to direct the defendant/respondent to file the written statement/counter within the time frame fixed by the Court. The provisions of section 10 (1) of the Act would indicate that the procedures laid down under the Code of Civil Procedure 1908 have to be followed. The provisions of Order VIII Rule 1 of the Code of Civil Procedure 1908 envisages that the written statement shall be filed within 30 days from the date of receipt of summons and such time could be extended up to 90 days, as the case may be, by recording the reasons thereon. But as regards to the matrimonial disputes, the process of counseling, mediation and conciliation involve large span of time. At times it may go even up to a year. However, the practical application of Order VIII Rule 1 of the Code of Civil Procedure would come into play when the Judge decides that the matter could not be settled. Thus, the leniency of extension of time for written statement/counter could be availed by virtue of the powers conferred under section 10(3) of the Act. The role of a Lawyer is also very vital during the counseling, mediation or the conciliation processes. They assist the parties out of Court. Thereafter when the matter is posted for written statement/counter, the entry of a Lawyer is made through section 13 of the Act. The litigating spouses could take the assistance of a Lawyer in preparation of written statement/counter. In support of the petition under section 13 of the Act, they shall have to file an affidavit narrating the reasons for taking the assistance of a pleader. The admission of such petition is purely the discretion of the Court, and the same could be withdrawn by the Court at anytime, when there is an apprehension of miscarriage of justice. After such petition is admitted, the role of a Lawyer assumes much significance here. The preparation of the counter or written statement would be the pleadings for the

respondent in the case, which would be anchoring the stand of the respondent. Such written statement/counter shall also have to contain the denial or admission as to the averments made in the plaint/petition.

The Act also brought civil and criminal jurisdiction under one roof. This is seen as a positive measure to centralize all litigation concerning women. Secondly, the very nature of criminal courts facilitated quicker disposal of applications to a civil court. Thirdly, there is seriousness and a sense of intimidation associated with a criminal court, which would act in a woman's favour. The Act brought under one roof, matters which were handled by several magistrates. While the Act laid down the broad guidelines it was left to the State Government to frame the rules and procedure. Rajasthan and Karnataka were the first two states to set up family courts. Wide powers have been given to the marriage counsellors e.g. to make home visits, to ascertain the standard of living of the spouses and the relationship with children, seek information from the employer, etc. While a rare and sensitive marriage counsellor makes use of this power in the interest of women, more often these powers are used against the women in the interest of the family since it is imbibed into the minds of such counsellors that their primary commitment is to preserve the institution of marriage. Further, the reports prepared by marriage counsellors based on their investigation, are not binding on the judges. The report of the marriage counsellor is kept confidential, **and** not made a subject of cross-examination. After the preliminary meeting with the marriage counsellor, the case would proceed as per the rules of the Code of Civil Procedure. The rules do not simplify procedures but merely reproduce the Code of Civil Procedure with the minor addition that parties should be present in person.

Critical Analysis / Suggestions

The Family Courts Act 1984 was enacted with a view to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. Though this was aimed at removing the gender bias in statutory legislation, the goal is yet to be achieved. Mechanism of the family courts must develop systems and processes, perhaps with the help of civil society organizations, to ensure that atrocities against women are minimized in the first place. Family courts should align themselves with women's organizations for guidance in matters related to gender issues. In the context of family courts, action forums should be initiated and strengthened by incorporating NGOs, representatives of elected members and the active members of the departments such as Urban Community Development, as members. State level monitoring mechanisms could be established to review the functioning and outcome of the cases related to women in the family courts. Women judges and those who have expertise and experience in settling family disputes should be appointed. These special courts should have the authority to try cases against an accused even if the female victim is not willing to testify or is bent upon withdrawing her case. The marriage counsellors should not be frequently changed as it causes hardship to a woman who has to explain her problems afresh to the new counsellor each time. The family courts committed to simplification of procedures must omit the provisions relating to Court Fees Act. Each additional relief should not be charged with additional court fee. To begin with, an example where the objective of the family court is diminished due to procedural lapses may be cited. Rules formulated are yet to provide a specific format for the interim applications, summons, etc. Many lawyers still use the format which is provided in the Civil Procedure Code which uses words like 'Counsel can be heard by; Counsel for the Petitioner', although the lawyers are not allowed to represent clients.

Absence of Lawyers

The requirement of following the provisions of the Civil Procedure Code makes things even more difficult for the lay person who is completely unaware of the legal jargons. The Act and Rules exclude representation by lawyers, without creating any alternative and simplified Rules. Merely stating that the proceedings are conciliatory and not adversarial does not actually make them so. The situation has worsened because in the absence of lawyers, litigants are left to the mercy of court clerks and peons to help them follow the complicated rules. Women are not even aware of the consequences of the suggestions made by court officials. For instance, when a woman files for divorce and maintenance, the husband turns around and presses for reconciliation only to avoid paying maintenance. It is crucial to the woman that people who are mediating are aware of these strategies. If a judge or a counsellor feels that a woman

should go back to the husband simply because he is making the offer and as a wife it is her duty to obey him, it will be detrimental to the woman's interest.

QUESTION 2: In what manner and to what extent the procedure in family court can be evolved for speedy disposal of cases? Explain with reference to the relevant provisions of the family court act and rules.

Different High Courts have laid down different rules and the procedure. There is a need for a uniform set of rules. The Act provides that persons who are appointed to the family courts should be committed to the need to protect and preserve the institution of marriage and to promote the settlement of disputes by conciliation and counselling. Preference would also be given for appointment of women as Family Court Judges. Section-5 enables the State Government to associate institutions engaged in promoting welfare of families, especially women and children, or working in the field of social welfare, to associate themselves with the Family Courts in the exercise of its functions. The State Governments are also required to determine the number and categories of counsellors, officers etc. to assist the Family Courts (sec. 6). Section 7 confers on all the family courts the power and jurisdiction exercisable by any District Court or subordinate civil court in suits and proceedings of the nature referred to in the explanation to section 7(1) of the Act. These, inter-alia relate to suits between parties to a marriage or for a declaration as to the validity of marriage or a dispute with respect to the property of the parties, maintenance, guardianship etc. In addition, the jurisdiction exercisable by family court under Chapter IX of the Cr.P.C. i.e. relating to order for maintenance of wife, children or parents, has also been conferred on the family courts. There is also an enabling provision that the family courts may exercise such other jurisdiction as may be conferred on them by any other enactment. Provision has also been made to exclude jurisdiction of other courts in respect of matters for which the family court has been conferred jurisdiction. Chapter IV of the Act deals with the procedure of the family court in deciding cases before it (sec. 9). It has been made incumbent on these courts to see that the parties are assisted and persuaded to come to a settlement, and for this purpose they have been authorized to follow the procedure specified by the High Court by means of rules to be made by it. If there is a possibility of settlement between the parties and there is some delay in arriving at such a settlement, the family court is empowered to adjourn the proceedings until the settlement is reached. Under these provisions, different High Courts have specified different rules of procedure for the determination and settlement of disputes by the family courts. In the rules made, the family court judge is also involved in the settlement, and if a settlement cannot be reached then a regular trial follows. It is also provided that the proceedings may be held in-camera if the family court or if either party so desires. The family court has also been given the power to obtain assistance of legal and welfare experts. Section 13 provides that the party before a Family Court shall not be entitled as of right to be represented by a legal practitioner. However, the court may, in the interest of justice, provide assistance of a legal expert as *amicus curiae*. Evidence may be given by affidavit also and it is open to the family court to summon and examine any person as to the facts contained in the affidavit. The judgement of the family court should be concise and simple containing the point for determination decision and the reason for the same. The decree of the Family Court can be executed in accordance with the provisions of the CPC or Cr.P.C., as the case may be. An appeal against judgement or order of family court lies to the High Court. The Act gives power to each of the High Courts to make rules for the procedure to be followed by the family courts in arriving at settlements and other matters. The Central Government has been given the power to make rules for the family court. The State Government has also been empowered to make rules providing terms and conditions of service of counsellors and other procedural matters. The Act was expected to facilitate satisfactory resolution of disputes concerning the family through a forum, and this forum is expected to work expeditiously, in a just manner and with an approach ensuring maximum welfare of society and dignity of women. Matters of serious economic consequences, which affect the family, like testamentary matters are not within the purview of the family courts. Only matters concerning women and children - divorce, maintenance, adoption etc. - are within the purview of the family courts. The Act also

brought civil and criminal jurisdiction under one roof. This is seen as a positive measure to centralize all litigation concerning women. Secondly, the very nature of criminal courts facilitated quicker disposal of applications to a civil court. Thirdly, there is seriousness and a sense of intimidation associated with a criminal court. The Act laid down broad guidelines, it left to the State Government to frame the rules and procedure. Wide powers have been given to the marriage counsellors. While a rare and sensitive marriage counsellor makes use of this power in the interest of women, more often these powers are used in the interest of the family since it is imbibed into the minds of such counsellors that their primary commitment is to preserve the institution of marriage. Further, the reports prepared by marriage counsellors based on their investigation, are not binding on the judges. The report of the marriage counsellor is kept confidential, and not made a subject of cross-examination. After the preliminary meeting with the marriage counsellor, the case would proceed as per the rules of the Code of Civil Procedure. The rules do not simplify procedures but merely reproduce the Code of Civil Procedure with the minor addition that parties should be present in person. The Family Courts Act 1984 was enacted with a view to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. Though this was aimed at removing the gender bias in statutory legislation, the goal is yet to be achieved. Mechanism of the family courts must develop systems and processes, perhaps with the help of civil society organizations, to ensure that atrocities against women are minimized in the first place. Family courts should align themselves with women's organizations for guidance in matters related to gender issues. In the context of family courts, action forums should be initiated and strengthened by incorporating NGOs, representatives of elected members and the active members of the departments such as Urban Community Development, as members. State level monitoring mechanisms could be established to review the functioning and outcome of the cases related to women in the family courts. Women judges and those who have expertise and experience in settling family disputes should be appointed. These special courts should have the authority to try cases against an accused even if the female victim is not willing to testify or is bent upon withdrawing her case. The marriage counsellors should not be frequently changed as it causes hardship to a woman who has to explain her problems afresh to the new counsellors each time. The family courts committed to simplification of procedures must omit the provisions relating to Court Fees Act. Each additional relief should not be charged with additional court fee. To begin with, an example where the objective of the family court is diminished due to procedural lapses may be cited. Rules formulated are yet to provide a specific format for the interim applications, summons, etc. Many lawyers still use the format which is provided in the Civil Procedure Code which uses words like Counsel can be heard by; Counsel for the Petitioner although the lawyers are not allowed to represent clients. The requirement of following the provisions of the Civil Procedure Code makes things even more difficult for the lay person who is completely unaware of the legal jargons. The Act and Rules exclude representation by lawyers, without creating any alternative and simplified Rules. Merely stating that the proceedings are conciliatory and not adversarial does not actually make them so. The situation has worsened because in the absence of lawyers, litigants are left to the mercy of court clerks and peons to help them follow the complicated rules. Women are not even aware of the consequences of the suggestions made by court officials. For instance, when a woman files for divorce and maintenance, the husband turns around and presses for reconciliation only to avoid paying maintenance. It is crucial to the woman that people who are mediating are aware of these strategies. If a judge or a counsellor feels that a woman should go back to the husband simply because he is making the offer and as a wife it is her duty to obey him, it will be detrimental to the woman's interest.

In addition to procedural lacunae, other problems connected with substantive law persist. Family courts have been set up to deal with problems that arise on the breakdown of a marriage, divorce, restitution of conjugal rights, claims for alimony and maintenance and custody of children. The setting up of family courts does not in any way alter the substantive law relating to marriage. Divorce disentitles a woman to the matrimonial home. Whether or not she gets maintenance during a separation or after divorce depends on her ability to prove her husband's means. In a situation where women are often unaware of their husband's business dealings and sources of income, it is difficult,

if not impossible, to prove his income. To make matters worse, the existence of a parallel black economy makes it impossible to identify the legal source of income. In such a situation, unless the law changes in radical ways conferring rights on women and creating new rights in their favour, the setting up of family courts will not help to alter their position. The right to community of matrimonial property would be the first step in ensuring security for women. This would mean that all property acquired after the marriage by either party, and any assets used jointly, such as the matrimonial home, will belong equally to the husband and wife. Based on such a law, family courts would be able to provide effective relief to women in case of breakdown of the marriage. Even otherwise, courts must be empowered by law, to transfer the assets or income of a husband to his wife and children or to create a trust to protect the future of the children of a broken marriage. But as the law stands today, courts have no power to create obligations binding on the husband for the benefit of the wife or children. The other much neglected area of law for women is domestic violence. Wife beating is prevalent in all classes and yet there is no effective law to prevent it or protect a woman against a violent husband. Such a law is urgently required. With these changes in substantive laws, family courts would be empowered to protect women, but without them these courts have ended up being poor substitutes for civil courts. The adversarial system is unsuited to the needs of women who are in any case disadvantaged and have no access to their husband's assets and income. Family Courts must have investigative powers to be able to compel disclosures of income and assets for passing appropriate orders of maintenance. The Family Courts Act does not explicitly empower the court to grant injunctions preventing violence or ouster of violent husbands. Though some courts have started giving these injunctions based on the rights of the wife and children to reside in the matrimonial home and based on recognition of the husband's obligation to maintain his wife and children which includes residence, there remains a long path yet to be covered. As a result the Act has ended up being an ineffective instrument to impart justice to women. The total lack of infrastructure and basic facilities make the fight for justice a Herculean task. The Law Commission had, in its 59th Report issued in 1974, stressed that in dealing with disputes concerning women, the court must adopt a radically different approach than that adopted in ordinary civil proceedings. In any case, a great deal of time of the civil courts was being consumed in family disputes which could be handled at much less cost of time and money by family courts. It was felt that these courts would right from the start, adopt a radical approach to family disputes by attempting counselling even before the start of proceedings. Rigid rules of procedures and evidence could also be done away with in such courts.

The provision to the section empowers the Court to seek the assistance of a legal practitioner as *amicus curiae*. The section is also silent about engagement of a pleader as *amicus curiae* by the parties themselves. Every litigant cannot be expected to have exposure to Law, practice and procedure. Certainly they require the assistance of a legal practitioner. The exact phrase employed in section 13 of the Act is that "as of right, to be represented by a legal practitioner". This does not take away the right of the Lawyer in total. In short, the object of the legislators was that the litigants shouldn't stay away from Court proceedings so as to be represented by their Lawyers and such exercise shall not be taken up as a matter of right. This in a way helps the Court to have a direct interaction with the litigants. The Family Courts constituted under the Act, shall have to avail the services of the Counselors. The Judge without insisting them to file their counter/written statement would refer them to the counselor for undergoing the process of counseling. This is because at times, when the respondent/defendant is compelled to file the written statement/counter, it may lead to aggravation of circumstances. The roles and responsibilities of a counselor are not defined under the Act. Rather the provision of section 23 of the Act empowers the High Court to frame rules to govern such issues. It envisages the responsibilities of the counselors and their powers to handle the matrimonial disputes and to what extent they could help the Courts in settling a matrimonial dispute. The prime requisite quality of a counselor is to have the quick understanding ability of the issue and to act unbiased and to provide necessary advice to the litigating spouses so as to enable them to arrive at a settlement. The process of mediation is purely voluntary. The litigating spouses should be explained with the importance of mediation. Once reference is made, the mediation would go on for a maximum of 60 days which is extendable till 90 days. When the parties arrive at a settlement, the mediator sends the

report to the Court along with the memorandum of understanding entered by the parties. In case of failure the Family Court has ample powers under Section 10(3) of the Act to have a conciliation with the parties. Even after this attempt if the Judge is not able to make the parties arrive at a settlement, then the adversarial procedure commences. Thereafter the Judge shall have to direct the defendant/respondent to file the written statement/counter within the time frame fixed by the Court. The provisions of section 10 (1) of the Act would indicate that the procedures laid down under the Code of Civil Procedure 1908 have to be followed. The provisions of Order VIII Rule 1 of the Code of Civil Procedure 1908 envisage that the written statement shall be filed within 30 days from the date of receipt of summons and such time could be extended up to 90 days, as the case may be, by recording the reasons thereon. In support of the petition under section 13 of the Act, they shall have to file an affidavit narrating the reasons for taking the assistance of a pleader. The admission of such petition is purely the discretion of the Court, and the same could be withdrawn by the Court at anytime, when there is an apprehension of miscarriage of justice. After such petition is admitted, the role of a Lawyer assumes much significance here. The preparation of the counter or written statement would be the pleadings for the respondent in the case, which would be anchoring the stand of the respondent. Such written statement/counter shall also have to contain the denial or admission as to the averments made in the plaint/petition. After the pleadings on either side is complete, the enquiry is commenced with the petitioner. The chief examination of the petitioner is done by way of an affidavit. The provision of section 15 and 16 of the Act lays down the procedure for recording evidence. The provisions lay down that the evidence shall not be lengthy and shall contain the memorandum of substance alone. A careful perusal of the above provision would make us to understand that there is no way made out for cross examination of a witness. The evidence shall have to be in formal character,

it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record. The Code of Civil Procedure is very well applicable to this Act as per the section 10(1) of the Act. According to the Code of Civil

QUESTION 3: In a matrimonial suit for divorce filed by the husband on the ground of cruelty and desertion the wife appears and admits desertion but makes counter allegation of cruelty. Can the divorce should be decreed on the ground of desertion on admission? Will the situation be different if there is no allegation of cruelty by the husband? Whether the limitation of cooling off period apply in such cases.

Answer: Section 13 of the Hindu Marriage Act speaks about divorce. Section 13(1)(i-a) speaks about one of the grounds of divorce is cruelty whereas Section 13 (i-b) says about desertion. Section 13 says that a marriage solemnized whether before or after the commencement of this Act may on the petition presented by either the husband or the wife be dissolved by a decree of divorce on the grounds with the other party (i) x x

x x x x

(i-a) has, after solemnization of the marriage, treated the petitioner with cruelty or ;

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

In the act cruelty has not been defined. However, in Judgment *Russel vs Russel* (1897) SC 395 the term cruelty has been examined by the court which speaks that it is danger to life, limb or health, it may be bodily or mental, a reasonable apprehension of it to constitute cruelty. In the *Dastaney Vrs. Dastaney* AIR 1975 SC 1534 the cruelty contemplated u/s 13 (i-a) of the Act constitutes a conduct of such type that the petitioner cannot reasonably be expected to live with the other party.

Either party can file a matrimonial suit on the ground of cruelty and desertion. The act itself discloses for bringing a case under desertion time is one of the essential ingredients.

To bring a divorce suit the period of continuous desertion shall not be less than two years immediately before presenting the petition. The other condition for desertion is that it must be voluntarily and without reason. The desertion cannot be said to be forceful or under compulsion. The party, who is the wife is not living with the husband under compulsion, cannot be said as a ground of desertion. If the husband proves cruelty committed on him by his wife who is also voluntarily not living with the husband, in such circumstances the husband is entitled for a decree of divorce but once through an evidence the other party (wife) able to bring evidence that she has not left the matrimonial home voluntarily though she admitted the desertion but if the desertion in the case is not voluntarily but as because the cruelty was committed on her. If the wife proves that she suffers cruelty in the hands of the husband while staying in the matrimonial home and she admitted that because of the said reason she is not staying with the husband. In such case even though desertion is admitted by the wife a decree of divorce cannot be granted as desertion is not willful rather she is compelled to leave the matrimonial home. In case a husband files a decree of divorce only on the ground of desertion and it is proved that the desertion is willful the wife voluntarily not staying with the husband despite best efforts taken by the husband. If it has been proved that she is living in her parental house or any other place other than matrimonial home without any proper, just and reasonable cause continuously more than the period of two years from filing of the petition then the petitioner is entitled for a decree of divorce on the ground of desertion. The limitation of cooling-off period does not apply in the cases where the petition is filed u/s 13(1) of the Hindu Marriage Act.

QUESTION 4: Due to strained relation between the parents, a child who ideally needs the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective considerations to be kept in mind in awarding “shared parenting” orders. Discuss in the light of latest case laws on the point.

Answer: **Shared parenting, shared residence, joint residence, shared custody, and joint physical custody**, all refers to a child custody arrangement after divorce or separation, in which both share the responsibility of raising their children, with equal or close to equal parenting time. It is based on the idea that children have the right to and benefit from a close relationship with both their parents, and that no child should be separated from his/her parent.

The term *Shared Parenting* is applied in cases of divorce, separation or when parents do not live together. *Shared parenting* is different from split custody, where some children live primarily with their mother while one or more of their siblings live primarily with their father. *Bird's nest custody* is an unusual form of shared parenting where the child always lives in the same home, while the two parents take turns living with the child in that home. Its long term use can be expensive as it requires three residences, and it is most commonly used as a temporary shared parenting arrangement until one parent has found a suitable home elsewhere.

The law governing custody of children is closely linked with that of guardianship. Guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor, while custody is a narrower concept relating to the upbringing and day-to-day care and control of the minor. Shared parenting is an arrangement where both father and mother of the child are looking after and caring the minor. The court has greater responsibility to decide the custody matter when the shared parenting is not in the welfare of child. There are several acts exist governing custody of minor.

(1) Guardians and Wards Act, 1890: This Act is a secular law regulating questions of guardianship and custody for all children within the territory of India, irrespective of their religion.

a) Hindu Minority and Guardianship Act, 1956: Hindu law did not contain principles dealing with guardianship and custody of children. However, in modern statutory Hindu law, the Hindu Minority

and Guardianship Act provides various provisions concerning the matters of guardianship and custody of minor Hindu children.

(b) Hindu Marriage Act, 1955: Section 26 of the Hindu Marriage Act authorises courts to pass interim orders in any proceeding under the Act, with respect to custody, maintenance and education of minor children, in consonance with their wishes. The Section also authorises courts to revoke, suspend or vary such interim orders passed previously.

(iii) Islamic Law: In Islamic law, the father is the natural guardian, but custody vests with the mother until the son reaches the age of seven and the daughter reaches puberty. The concept of Hizanat provides that, of all persons, the mother is the most suited to have the custody of her children up to a certain age, both during the marriage and after its dissolution. A mother cannot be deprived of this right unless she is disqualified because of apostasy or misconduct and her custody is found to be unfavorable to the welfare of the child.

(iv) Parsi and Christian Law: Under Section 49 of the Parsi Marriage and Divorce Act, 1936 and Section 41 of the Divorce Act, 1869, courts are authorised to issue interim orders for custody, maintenance and education of minor children in any proceeding under these Acts.

(v) Marriages registered under Special Marriage Act, 1954: This Act provides for a special form of marriage which can be taken advantage of by any person in India and by all Indian nationals in foreign countries irrespective of the faith which either party to the marriage may profess. Couples who register their marriage under Special Marriage Act can take resort to Section 38 of the Act for the purposes of custody of children. Section 38 empowers the district court to pass interim orders during pendency of proceedings and make such provisions in the decree as it may seem to it to be just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes wherever possible.

While taking a decision regarding custody or other issues pertaining to a child, “welfare of the child” is of paramount consideration, *Sheoli Hati v. Somnath Das*, (2019) 7 SCC 490. It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the court. It is the welfare of the minor and of the minor alone which is the paramount consideration, *Saraswatibai Shripad Vad v. Shripad Vasanji Vad*, 1940 SCC OnLine Bom 77.

Principles in relation to custody of child

An order of custody of minor children either under the provisions of the Guardians and Wards Act, 1890 or the Hindu Minority and Guardianship Act, 1956 is required to be made by the court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the child are **some of the relevant factors** that have to be taken into account by the court while deciding the issue of custody of a minor, *Gaytri Bajaj v. Jiten Bhalla*, (2012) 12 SCC 471 .

Object and purpose of the Guardians and Wards Act, 1890 is not merely physical custody of the minor but due protection of the rights of ward’s health, maintenance and education. In considering the question of welfare of minor, due regard has, of course, to be given to the right of the father as *natural guardian* but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship, *Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840.

Children are not mere chattels nor are they toys for their parents. **Absolute right of parents** over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them, *Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 SCC 42 .

Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy-duty is cast on the court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration, *Mausami Moitra Ganguli v. Jayant Ganguli*, (2008) 7 SCC 673.

The word “welfare” used in Section 13 of the Hindu Minority and Guardianship Act, 1956 has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its *parens patriae* **jurisdiction** arising in such cases, *Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 SCC 42.

Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the **natural guardian** of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor, *Surinder Kaur Sandhu v. Harbax Singh Sandhu*, (1984) 3 SCC 698.

Even an **interim order of custody** in favour of the parent should not insulate the minor from the parental touch and influence of the other parent which is so very important for the healthy growth of the minor and the development of his personality, *Ruchi Majoo v. Sanjeev Majoo*, (2011) 6 SCC 479. Before deciding the issue as to whether the custody should be given to the mother or the father or partially to one and partially to the other, the must (a) take into account the wishes of the child concerned, and (b) assess the psychological impact, if any, on the change in custody after obtaining the opinion of a child psychiatrist or a child welfare worker. All this must be done in addition to ascertaining the **comparative material welfare** that the child/children may enjoy with either parent, *Mamta v. Ashok Jagannath Bharuka*, (2005) 12 SCC 452.

The principles laid down in proceedings under the Guardians and Wards Act, 1890 are **equally applicable** in dealing with the custody of a child under Section 26 of the Hindu Marriage Act, 1955, 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, *Vikram Vir Vohra v. Shalini Bhalla*, (2010) 4 SCC 409. It is not the “negative test” that the father is not “unfit” or disqualified to have custody of his son/daughter that is relevant, but the **“positive test”** that such custody would be in the welfare of the minor which is material and it is on that basis that the court should exercise the power to grant or refuse custody of a minor in favour of the father, the mother or any other guardian, *Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413.

win objectives of the “welfare principle”

The welfare principle is aimed at serving twin objectives. In the first instance, it is to ensure that the child grows and develops in the best environment. The best interest of the child has been placed at the vanguard of family/custody disputes according to the optimal growth and development of the child and has primacy over other considerations. This right of the child is also based on individual dignity. The second justification behind the welfare principle is the public interest that stands served with the optimal growth of the children. Child-centric human rights jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation, *Vivek Singh v. Romani Singh*, (2017) 3 SCC 231.

Considerations governing grant of custody-

A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. The court has to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development, and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor, *Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413.

The welfare of the child shall include various factors like ethical upbringing, economic well being of the guardian, child's ordinary comfort, contentment, health, education, etc., *Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari*, (2019) 7 SCC 42. The crucial factors which have to be kept in mind by the courts for gauging the welfare of the children and equally for the parents can be, *inter alia*, delineated, such as (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual, *Lahari Sakhamuri v. Sobhan Kodali*, (2019) 7 SCC 311.

Issues common to all child custody disputes are: (a) continuity and quality of attachments, (b) preference, (c) parental alienation, (d) special needs of children, (e) education, (f) gender issues, (g) sibling relationships, (h) parents' physical and mental health, (i) parents' work schedules, (j) parents' finances, (k) styles of parenting and discipline, (l) conflict resolution, (n) social support systems, (o) cultural and ethnic issues, (p) ethics and values and religion. Though the prevailing legal test is that of the 'best interests of the child', the Courts have also postulated the "least detrimental alternative" as an alternative judicial presumption, *J. Selvan v. N. Punidha*, 2007 SCC OnLine Mad 636.

The objective of 'shared parenting'?

Firstly, shared parenting goes wider than the time each parent spends with their children. It must involve the child spending a significant proportion of their time with each parent. But it does not imply a stated or fixed proportion of parenting time being allocated to each parent, much less that the child's time be divided equally between the two parents in every case.

If children only spend a limited amount of time with their non-resident parent, such as a fortnightly visit with some time around holidays, this is not considered shared parenting. Parents with so little

active parenting time can not be effectively involved in any important decisions that need to be taken. It is important to note that shared parenting does not imply a single time in a child's life. It refers to a childhood-long parenting plan. The plan is reviewed periodically and adapted to fit a child's emotional, scholastic and physical needs as they grow.

The definition from Families Need Fathers revolves around the objectives to be achieved.

These are as follows:

- 1) That the children feel that they have two properly involved parents.
- 2) That one parent is not able to dominate the lives of the children at the expense of the other or to control the other parent via the children.
- 3) That the parents have broadly equal 'moral authority' in the eyes of the children and that the children have free access to both their parents if there are issues affecting them.
- 4) That the children are able to share the lives of both their parents 'in the round' - for example not spending all 'routine time' with one parent and only 'leisure time' with the other.
- 5) That the parents are in a position of legal and moral equality, and are considered in this light by the children as well as friends, neighbours, teachers etc as well as public authorities, this would apply to routine as well as major matters.
- 6) That there is no part of the children's lives, for example their school life or having friends, that one parent is excluded from by virtue of the allocation of parenting time or the law on separation/divorce and children.
- 7) That the children are not by virtue of the allocation of parenting time excluded from any part of either parent's life.
- 8) That the children spend enough time with both parents to be able to negate any attempts at 'parental alienation'.
- 9) That the children do not develop stereotyped ideas from their parents about the roles of the sexes, for example that a father's role is chiefly financial and a 'giver of treats', and that mothers have responsibility for everything else.

QUESTION 5: What are the practical difficulties in execution of an order for grant of maintenance under section 125 cr.p.c? Discuss the available options in law before a family judge for the realization of the maintenance amount under section 125 cr.p.c with special reference to the case law.

Answer: The recovery of the monthly amount awarded by the Court presents numerous difficulties and poses several problems. The awardee would have to approach the court every time the person liable to pay the allowance neglects to make the payment. The awardee would have to engage a lawyer and to incur expenditure in connection with the payment of professional fees and other incidental expenses once again and frequently from time to time if payment is withheld often. In order to recover the amount in arrears, the awardee may well have to spend a few months' allowance.

3. After passing an award u/s 125 of the Cr.P.C. it is the duty of the opposite-party to make the payment of the award amount voluntarily. The problem arises when the order passed by the Family Court is not complied. In such circumstances the petitioner / awarding (wife) has to move an application before the court for execution of the order passed by the Family Court. For the said execution the destitute woman / wife has to engage her lawyer without any support who is on the

verge of starvation. The wife has to spend money to execute the warrant. The execution of the warrant is not also an easy task. Even after execution of the warrant if the husband appears before the court then the realisation of the amount is practically depends upon the will of the husband. If the husband fails to make the payment then the Court have power to send the husband in judicial custody. The realisation of awarded amount is still a difficult task. The wife has to find out details of the property of the husband for execution which is again a difficult task for the wife. It is very difficult for the wife to find out the property of the husband, so that the awarded amount shall be realised after disposing of the assets of her husband. Section 128 (3) specifically deals the execution of the order passed u/s 125 of the Cr.P.C.

4. whether it needs to be clarified by way of adding an explanation that whilst determining the amount of monthly allowance not only the present income of the person liable' to pay the allowance but also all' his other resources such as the property possessed by him and his interest, if any, in joint family properties should be taken into account. And also that the gifts made by him in the twelve months immediately preceding the institution of the application claiming. The maintenance and during the pendency of the proceedings arising therefrom and the sale proceeds or realisations from the alienations made during this period should be taken into account. All the resources of the person liable for payment of 'maintenance should be taken into account

QUESTION 6: What are the principles for computation of maintenance in a case under section 125 cr.p.c? How will the quantum of maintenance vary in case the competent court has awarded maintenance under domestic violence act and/or under section 24 of the hindu marriage act?

Answer: Delhi High Court: A Division Bench of G.S. Sistani and Jyoti Singh, JJ. allowed an appeal filed by the appellant-wife against the order of the Family Court whereby two applications filed by her against the respondent-husband were dismissed.

The appellant had filed two applications — one under Section 24 of the Hindu Marriage Act, 1955 seeking maintenance for herself, and the other under Section 26 seeking custody of the two minor children. Both the applications were dismissed by the Family Court. The application under Section 24 was rejected on the sole ground that maintenance of Rs 2000 per month already stood fixed in proceedings arising under Protection of Women from Domestic Violence Act, 2005.

The High Court, on a conjoint reading of Sections 20, 26 and 36 of the Domestic Violence Act, was of the opinion: “the provisions of DV Act dealing with maintenance are supplementary in the provisions of other laws and therefore maintenance can be granted to the aggrieved person(s) under the DV Act which would also be in addition to any order of maintenance arising out of Section 125 of CrPC.” Furthermore, “On the converse, if any order is passed by the Family Court under Section 24 HMA, the same would not debar the Court in the proceedings arising out of DV Act or proceedings under Section 125 CrPC instituted by the wife/aggrieved person claiming maintenance.”

The Court also clarified: “However, it cannot be laid down as a proposition of law that once an order of maintenance has been passed by any Court then the same cannot be re-adjudicated upon by any other Court. The legislative mandate envisages grant of maintenance to the wife under various statutes such as HMA, Hindu Adoption and Maintenance Act, 1956, Section 125 CrPC as well as Section 20 of DV Act. As such various statutes have been enacted to provide for the maintenance to the wife and it is nowhere the intention of the legislature that once any order is passed in either of the proceedings the intention of the legislature that once any order is passed in either of the proceedings, the said order would debar re-adjudication of the issue of maintenance in any other Court.”

In such view of the matter, the impugned order rejecting maintenance to the appellant under Section 24 HMA was set aside. The Family Court was directed to reconsider the applicants in terms with the law. [RD v. BD, 2019 SCC OnLine Del 9526, decided on 31-07-2019]

While awarding maintenance under Section 125 Cr.P.C. or maintenance pendente lite under Section 24 of the Hindu Marriage Act or the maintenance under Section 18 of the Hindu Adoption or Maintenance Act, Courts are not only guided by the income of the husband in determining the amount of monthly maintenance. The Higher Courts have held that several factors including the status of the parties, liabilities, if any, of the husband and number of persons to be maintained by the husband would be some of the factors to be taken into consideration. In Alok Kumar Jain v. Purnima Jain, 2007(96) DRJ 115, a co-ordinate Bench of this Court while examining grant of maintenance, pendente lite, observed as under:

“10. Law under Section 24 of the Hindu Marriage Act is well crystallized. From the judicial precedents, factors which can be culled out as required to be kept in mind while awarding interim maintenance are as under

- (i) Status of the parties,
- (ii) Reasonable wants of the claimant,
- (iii) The income and property of the claimant,
- (iv) Number of persons to be maintained by the husband
- (v) Liabilities, if any, of the husband,
- (vi) The amount required by the wife to live a similar life style as she enjoyed in the matrimonial home keeping in view food, clothing, shelter, educational and medical needs of the wife and the children, if any, residing with the wife and
- (vii) Payment capacity of the husband.

11. Further, where it is noted that the respective spouses have not come out with a truthful version of their income, some guesswork has to be resorted to by the Court while forming an opinion as to what could possibly be the income of the spouses. This guesswork has to be based on the status of the family, the place where they are residing and the past expenses on the children, if any.”

7. In Dev Dutt Singh v. Smt. Rajni Gandhi, AIR 1984 Del 320, the learned Single Judge of this Court(Avadh Behari Rohtagi, J.) observed that there cannot be any mathematical formula for award of the maintenance amount such as 1/3rd or any other proportion of the husband’s income. It was held that the law has to operate in a flexible and elastic manner to do complete justice between the parties. The factors to be taken into consideration were laid down in paras. There are numerous judgments in 125 CrPC maintenance rejects one-third rule. The judgment asserts that there is no strict criterion that one-third of husband’s income has necessarily to be awarded as maintenance to wife. Lalit Bhola vs Nidhi Bhola & Anr. on 12 February, 2013. While awarding maintenance under Section 125 Cr.P.C. or maintenance pendente lite under Section 24 of the Hindu Marriage Act or the maintenance under

Section 18 of the Hindu Adoption or Maintenance Act, Courts are not only guided by the income of the husband in determining the amount of monthly maintenance. The Higher Courts have held that several factors including the status of the parties, liabilities, if any, of the husband and number of persons to be maintained by the husband would be some of the factors to be taken into consideration. In *Alok Kumar Jain v. Purnima Jain*, 2007(96) DRJ 115, a co-ordinate Bench of this Court while examining grant of maintenance, pendente lite, observed as under:

“10. Law under Section 24 of the Hindu Marriage Act is well crystallized. From the judicial precedents, factors which can be culled out as required to be kept in mind while awarding interim maintenance are as under

(i) Status of the parties,

(ii) Reasonable wants of the claimant,

(iii) The income and property of the claimant,

(iv) Number of persons to be maintained by the husband,

(v) Liabilities, if any, of the husband,

(vi) The amount required by the wife to live a similar life style as she enjoyed in the matrimonial home keeping in view food, clothing, shelter, educational and medical needs of the wife and the children, if any, residing with the wife and

(vii) Payment capacity of the husband.

11. Further, where it is noted that the respective spouses have not come out with a truthful version of their income, some guesswork has to be resorted to by the Court while forming an opinion as to what could possibly be the income of the 2 spouses. This guesswork has to be based on the status of the family, the place where they are residing and the past expenses on the children, if any.”

7. In *Dev Dutt Singh v. Smt. Rajni Gandhi*, AIR 1984 Del 320, the learned Single Judge of this Court (Avadh Behari Rohtagi, J.) observed that there cannot be any mathematical formula for award of the maintenance amount such as 1/3rd or any other proportion of the husband's income. It was held that the law has to operate in a flexible and elastic manner to do complete justice between the parties. The factors to be taken into consideration were laid down in paras 12 to 15 of the judgment, which are extracted hereunder:

“12. The substance of these judgments is this. Each case must be determined according to its own circumstances. No two cases are alike. These cases do not lay down any proposition of law. On the facts of the particular case the Court adjudicated what allowance will be reasonable to award “having regard to the petitioner's own income and the income of the respondent”. If the present case illustrates anything it is this that rigid adherence to “one-third” rule may not always be just. Section 24 is not a code of rigid and inflexible rules, arbitrarily ordained, and to be blindly obeyed. It leaves everything to the Judge's discretion. It does not enact any mathematical formulae of one-third or any other proportion. It gives wide power, flexible and elastic, to do justice in a given case.

13. In most cases the standard of living of one or both of the parties will have to suffer because there will be two households to support instead of one. When this occurs, the Court clearly has to decide what the priorities are to be and where the inevitable loss should fall. Generally speaking, wife is the financially dependent spouse. She is potentially likely to suffer greater financial loss from the dissolution of marriage than the husband. For her support the Court has to award a reasonable amount. The cases decided under the Act should not be followed slavishly. In the words of Searman L.J. :

“It would be unfortunate if the very flexible and wide- ranging powers conferred upon the Court should be cut down or forced into this or that line of decisions by the Courts.” (Chamberlain v. Chamberlain, (1974) 1 All ER 33, 38 CA).

14. What is the right figure of periodical payment is essentially a practical decision on the facts. The ultimate evaluation is left to the adjudicator.

15. What is a proper proportion of the husband’s income to be given to the wife as maintenance pendente lite is a question to be determined in the light of all the circumstances of a particular case; the very flexible and wide-ranging powers vested in the Court make it possible to do justice.”

Although, there is no strict formula to award a particular percentage of the husband’s income towards maintenance of the wife, normally the Courts have been taking 1/3rd of the husband’s income towards maintenance of the wife. This may be increased or decreased keeping in view the circumstances of each case, like the number of persons to be maintained by the husband and other liabilities. In *Sudhir Diwan v. Smt. Tripta Diwan & Anr.*, 147 (2008) DLT 756, 1/3rd of the husband’s income was awarded towards the wife’s maintenance.

QUESTION 7: What is the difference in jurisdiction of the court under the court’s and ward’s acts and minority and guardianship acts in appointment of guardians of a minor?

Answer: “District Court” has the meaning assigned to that expression in the Code of Civil Procedure, 1882 means—

- (a) the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian; or
- (b) where a guardian has been appointed or declared in pursuance of any such application—
 - (i) the Court which, or the Court of the officer who, appointed or declared the guardian or is under this Act deemed to have appointed or declared the guardian; or
 - (ii) in any matter relating to the person of the ward the District Court having jurisdiction in the place where the ward for the time being ordinarily resides; or
- (c) in respect of any proceeding transferred under section 4A, the Court of the officer to whom such proceeding has been transferred;]

[4A. Power to confer jurisdiction on subordinate judicial officers and to transfer proceedings to such officers.—

(1) The High Court may, by general or special order, empower any officer exercising original civil jurisdiction subordinate to a district court, or authorize the Judge of any District Court to empower any such officer subordinate to him, to dispose of any proceedings under this Act transferred to such officer under the provisions of this section.

(2) The Judge of a district court may, by order in writing, transfer at any stage any proceeding under this Act pending in his Court for disposal to any officer subordinate to him empowered under sub-section (1).

(3) The Judge of a district court may at any stage transfer to his own Court or to any officer subordinate to him empowered under sub-section (1) any proceeding under this Act pending in the Court of any other such officer.

(4) When any proceedings are transferred under this section in any case in which a guardian has been appointed or declared, the Judge of the District Court may, by order in writing, declare that the Court of the Judge or officer to whom they are transferred shall, for all or any of the purposes of this Act, be deemed to be the Court which appointed or declared the guardian.]

7. Power of the Court to make order as to guardianship.—

(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

(a) appointing a guardian of his person or property or both, or

(b) declaring a person to be such a guardian the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

2) The Court of Wards may exercise all or any of the powers conferred on it by this Act, either or through the Dupty Commissioner of the district within the limits of which any ward may at any time reside or any part of the property of any ward may besituate, or through any other person whom it may, at any time, in respect of any ward, or the whole or any part of the property of any ward, appoint in that behalf.

(3) The Court of Wards may, with the sanction of the Government from time to time, by general or special order, or by rule made under this Act, delegate any of its powers to any Deputy Commissioner or other person as aforesaid, and may, at anytime, with the like sanction, revoke any such delegation.

(4) The powers and authority by this Act vested in the Court of Wards shall beexercised by it, subject to the control of the Government.

(5)Power of the Government to make order, in certain cases, directing the Court of Wards to assume superintendence of properties of land – holders.—

(1) Any land-holder may apply to the Government to make an order directing that his property be placed under the superintendence of the Court of Wards, and, upon receiving any such application, the Government may, if it considers it expedient in the public interest so to do, make an order accordingly. (2)

When it appears to the Government that any land-holder is— (a)by

reason of being a female ; or

physical or mental defect or infirmity ; or

having been convicted of a non - bailable offence and to hisvicious habits or

or

having entered upon a course of wasteful extravagance likely to dissipate his

incapable of managing or unfitted to manage hisaffairs,

The Government may make an order directing that the property of such land - holder be placed under the superintendence of the Court of Wards :Provided that such an order shall not be made on the ground stated in clause(c) or on the ground stated in clause (d) unless such land-holder belongs to a family of political or social importance and the Government is satisfied that it is desirable, on ground of public policy or general interest, to make such order.(3)Every order made by the Government under sub - section (1) or sub- section(2), shall be final and shall not be called in question in any Court of law. 6.Power of Court of Wards, of its own motion, to assume superintendence.—When any land-

holder is a minor or a person adjudged by a competent Court to be of unsound mind and incapable of managing his affairs, the Court of Wards may make an order assuming the superintendence of the property or the person and property of such land-holder.

7. Court of Wards shall assume superintendence in cases in which an order is made under section 5 and may do so when Deputy

Commissioner is appointed guardian under the State Court of Wards Act .-- (1) When, in respect of any land - holder, an order is made by the Government under sub - section (2) of section 5, the Court of Wards shall assume the superintendence of the property of such land - holder, and may on its discretion also assume the superintendence of his person. (2) When Deputy Commissioner is appointed or declared to be guardian of the person or property, or both, of a minor, under the provisions of section 18 of the State Guardian and Wards Act, he shall intimate the fact to the Court of Wards, and the Court of Wards may thereupon, in its discretion, either assume, or refrain from assuming, the superintendence of the person or property, or both (as the case may be), such minor, and the provisions of this Act shall, if such superintendence be so assumed, apply to the person or property, or both (as the case may be), of such minor.

8. Properties of which there are more proprietors than one .-- When there are two or more proprietors of any property and the shares of the several proprietors have not been separated off, and the Court of Wards, acting under section 6, or section 7, assumes the superintendence of the property of one or more, but not all, of such proprietors, the Court of Wards may issue the superintendence also of the shares of such joint proprietor or joint proprietors as is or are not disqualified, paying any such proprietor the surplus income accruing from his share of the property. The superintendence assumed under this section shall extend only to the management of the share of the joint proprietor in such joint property and shall not, as regards such share, include the power to sell or mortgage the same or any part thereof or to grant a lease thereof for a period exceeding 20 years or to create any charge thereon or interest therein .

9. Notification of assumption of superintendence .-- Whenever the Court of Wards assumes the superintendence of the person or property of any person under any of the provisions of this Act, the order of assumption shall be notified in the Government Gazette and shall specify the district, the Deputy Commissioner of which shall be put in charge on published under section 9, and shall be final and shall not be called in question in any Court of law.

behalf of the Court of Wards.

10. Operation and finality of orders made under sections 6, 7 and 8 .-- Every order made by the Court of Wards assuming, under sections 6, 7 and 8 respectively, the superintendence of the person or property, or both, of any person shall take effect from the date fixed in this behalf in the notification

QUESTION 8: What are the major differences in procedure of adoption by Indian prospective adoptive parents living in India and inter-country adoption? What are the eligibility criterion for prospective adoptive parents? Discuss the relevant provisions of law and latest case laws.

Who is eligible to adopt a child?

(1)The prospective adoptive parents should be physically, mentally and emotionally stable; financially capable; motivated to adopt a child; and should not have any life threatening medical condition;

(2)Any prospective adoptive parent, irrespective of his marital status and whether or not he has his own biological son or daughter, can adopt a child;

(3)Single female is eligible to adopt a child of any gender:

(4)Single male person shall not be eligible to adopt a girl child;

(5)In case of a couple, the consent of both spouses shall be required;

(6)No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship;

(7)The age of prospective adoptive parents as on the date of registration shall be counted for deciding the eligibility and the eligibility of prospective adoptive parents to apply for children of different age groups shall be as under

(8)Couples with more than four children shall not be considered for adoption;

Age of the child	Maximum composite age of prospective adoptive parents	Maximum age of single prospective adoptive parent
Upto 4 years	90 years	45 years
Above 4 upto 8 years	100 years	50 years
Above 8 upto 18 years	110 years	55 years

The minimum age difference between the child and either of the prospective adoptive parents should not be less than twenty five years;

The age for eligibility will be as on the date of registration of the prospective adoptive parents;

In-country relative adoptions:

The prospective adoptive parents shall register in Child Adoption Resource Information and Guidance System and follow due legal procedure as provided in **regulation 55**.

Consent of biological parents or permission of the Child Welfare Committee, as the case may be, shall be required as provided in **Schedule XIX or Schedule XXII** respectively.

The consent of the child shall be obtained, if he is five years of age or above.

Affidavit of adoptive parent(s) is required in cases of in-country relative adoptions in support of their financial and social status as per Schedule XXIV.

The prospective adoptive parents shall file an application in the competent court as provided in **Schedule XXX**.

Legal Procedure:

1. The prospective adoptive parents, who intend to adopt the child of a relative as defined in **sub-section (52) of section 2** of the Act, shall file an application in the competent court under **sub-section 2 of section 56 or sub section (1) of section 60** of the Act in case of in-country relative adoption or inter-country relative adoption, respectively, alongwith a consent letter of the biological parents as provided in **Schedule XIX** and all other documents as provided in **Schedule VI**.
2. The biological parent and the step-parent, who intend to adopt the child or children of the biological parent, shall file the adoption application as provided in **Schedule XXXII**, in the court concerned of the district where they reside, along with consent letter of the biological parents and the step-parent adopting the child or children, as provided in the **Schedule XX** and all other documents as provided in Schedule VI.
3. The prospective adoptive parents, in case of inter-country relative adoption, shall file the adoption application in the court concerned of the district, where the child resides with biological parents or guardians as provided in **Schedule XXXI**.
4. The prospective adoptive parents shall file an application in Family Court or District Court or City Civil Court, as the case may be.
5. Before issuing an adoption order, the court shall satisfy itself of the various conditions stipulated under section 61 of the Act, and regulations 51 to 56, as the case may be.
6. The prospective adoptive parents shall obtain a certified copy of the adoption order from the court and furnish a copy of the same to the District Child Protection Unit for online submission to the Authority.

The question regarding the validity of inter-country adoption was first debated in the well-known case of *In Re Rasiklal Chhaganlal Mehta*[x] whereby the Court held that inter-country adoptions

under **Sec 9(4) of the Hindu Adoptions and Maintenance Act, 1956** should be legally valid under the laws of both the countries. The adoptive parents must fulfill the requirement of law of adoptions in their country and must have the requisite permission to adopt from the appropriate authority thereby ensuring that the child would not suffer in immigration and obtaining nationality in the adoptive parents' country.

The Supreme Court of India in a public interest litigation petition, *Laxmi Kant Pandey v. Union of India*, had framed the guidelines governing inter-country adoptions for the benefit of the Government of India. A regulatory body, i.e., Central Adoption Resource Agency (for short 'CARA') was recommended and accordingly set up by the Government of India in the year 1989.

Since then, the agency has been playing a pivotal role, laying down norms both substantive and procedural, in the matter of inter as well as in country adoptions. The said norms have received statutory recognition on being notified by the Central Govt. under Rule 33 (2) of the **Juvenile Justice (Care and Protection of Children) Rules, 2007** and are today in force throughout the country, having also been adopted and notified by several states under the Rules framed by the states in exercise of the Rule making power under **Section 68** of the JJ Act, 2000.

In the case of *Mr. Craig Allen Coates v. State through Indian Council for Child Welfare and Welfare Home for Children*[xi] the Court held that where the adoptive parents fail to establish clearly the motive for adopting a child from another country, then the adoption process would be barred and be declared as mala fide and that CARA should ensure more stricter guidelines in this regard.

Laws of Adoption in India

At the International level, India has ratified the Convention on the Rights of Child and the Hague Convention on Inter-Country Adoption of Children. The principal law relating to adoption in India under the Hindu system is contained in the Hindu Adoptions and Maintenance Act, 1956 (HAMA).

The Juvenile Justice (Care and Protection of Children) Act, 2000 and The Amendment Act, 2006 guarantees rights to an adopted child as recognized under international obligations by all Hague member countries. The JJ Act, 2000, however did not define 'adoption' and it is only by the amendment of 2006 that the meaning thereof came to be expressed in the following terms:

"2(aa)- 'adoption' means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship".

The amendment emphasized that adoption under this legislation would allow an adopted child to become the "legitimate child of his adoptive parents, with the rights, privileges and responsibilities attached to the relationship. This is a significant move considering till then, adoption by non-Hindus was guided by the **Guardian and Wards Act, 1890**. Minority castes such as Christians, Muslims or Parsis did not recognize adoption hence the adoptive parents had to remain as guardians to their adopted children as per the Guardian and Wards Act, 1890.

In exercise of the rule making power vested by **Section 68** of the JJ Act, 2000, the JJ Rules, 2007 were enacted, which now stand repealed by a fresh set of Guidelines published by Notification dated 24.6.2011 of the Ministry of Women and Child Development, Government of India under **Section 41(3)** of the JJ Act. As a matter of fact, by virtue of the provisions of Rule 33(2) it is the Guidelines of 2011 notified under **Section 41(3)** of the JJ Act which will now govern all matters pertaining to inter-country adoptions virtually conferring on the said Guidelines a statutory flavour and sanction.

Rule 8(5) prescribes priorities for rehabilitation of a child and it is mentioned that preference has to be given for placing a child in in-country adoption and the ratio of in-country adoption to inter-country adoption shall be 80:20 of total adoptions processed annually by a RIPA, excluding special needs children.

Rule 8(5) prescribes priorities for rehabilitation of a child and it is mentioned that preference has to be given for placing a child in in-country adoption and the ratio of in-country adoption to inter-country adoption shall be 80:20 of total adoptions processed annually by a RIPA, excluding special needs children.

Rule 8(6) mentions the order of priority which is to be followed in cases of inter-country adoptions, which is as under:-

- (i) Non Resident Indian (NRI)
- (ii) Overseas Citizen of India (OCI)
- (iii) Persons of Indian Origin (PIO)
- (iv) Foreign Nationals

Rule 31 speaks about power of the State Government to constitute a Committee to be known as the Adoption Recommendation Committee (ARC) to scrutinize and issue a Recommendation Certificate for placement of a child in inter-country adoption.

Hague Convention on Inter-Country Adoption

The Hague Convention Act of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption protects children and their families against the risks of illegal, irregular, or premature adoptions internationally. The Convention operates through a system of National Central Authorities and it reinforces the UN Convention on the Rights of Child (Article 21). It seeks to ensure that intercountry adoption is made in the best interest of the child being adopted and that his/her fundamental rights are not being violated in any way. It also aims to prevent the abduction, sale of, and trafficking of the children. India became a part of this convention in the year 2003. According to the guidelines of the Convention for intercountry adoption, a NOC is required. The No Objection Certificate (NOC) is sent by the Central Authorities of the sending country after the receipt of Article 5 and Article 17 from the receiving country.

Article 5 of the Hague Convention states that adoption shall take place only if the competent authorities of the receiving state have determined that the prospective adoptive parents are eligible to adopt, if they have been counseled as necessary and if the child/children have or will get authorized to enter and reside permanently in the receiving state. Article 17 of the Convention states that any decision in the State of Origin about whether a child should be entrusted to prospective adoptive parents is only made if the Central Authority has confirmed that prospective adoptive parents agree; the Central Authorities of the receiving state has approved such decision; the Central Authorities of both states have agreed upon the adoption and; it has been ensured that all conditions of Article 5 are met.

Submitted by
Sunil Kumar Singh No.1
Principal Judge, Family court
Hazaribag.

Answer – 1.

In view of provision of the Family Court Act 1984, the dominant purpose behind the enactment and its object and reasons that the clear intention of the legislative is to provide a forum for speedy settlement of dispute which are covered under the act.

Following tools and technique can be adopted for speedy disposal of matrimonial dispute and and other mattes pending before the Family Court.

(i) When on notice both the parties appeared before the court endeavors should be made by the court for reconcilliation or settlement between the parties in a very informal manner. Meditations rules of single and joint session can be adopted just to impress upon the party for amicable settlement of the dispute.

(ii) When the dispute is not settled before the court then it can be referred to mediation center for reconciliation or mediation by trend mediators, medical and welfare expert with a direction to return the file after mediation within 15 days from reference with a report and when meditations fails both the parties are directed by the court to adduce their evidence which is formal in nature and it shall not be necessary to record the evidences of the witnesses at length and no unnecessary adjournments are allowed. Further it can be taken on day to day basis considering the assigned work before the court.

(iii) Although appearance of lawyer on behalf of the parties before the Family court can not be refused but considering provision of Family Court Act and Rules their presence can be restricted to some extent for speedy disposal of the case. However in the interest of justice Family court can take assistance of legal expert as Amicus Curiae.

Answer – 2.

Section 9 of Family Court Act 1984 make it obligatory on part of the

Family Court to endeavour in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage proceeding will be informal and rigid rules shall not apply.

Further in order to assist the Family Court section 6 of the Act provides for association of social welfare agencies, counselors etc. during conciliation stage. Section 12 provides for the assistance of medical and welfare expert. Section 11 provides proceeding may be held in camera if the court or either party so desires.

Further in view of section 13 of the Act the parties to the dispute before the Family Court shall not entitle to be represented by legal practitioner. However, the Family Court may in the interest of justice seek assistance of legal expert as Amicus Curiae. Section 23(3) of Hindu Marriage Act provides for a method to facilitate the process for the purpose of aiding the court in bringing about such reconciliation. Further rules and procedures in disposal of cases pending before the Family Court has been simplified just to deal effectively and speedy disposal of dispute. Unnecessary adjournments are not given by the Family court for speedy disposal of dispute. Further object of the Act is that the Family Court will proceed on fast track keeping general principle of C.P.C on the back of the mind.

Answer – 3.

Divorce suit filed by the husband on the ground of cruelty and desertion and wife appears admits desertion. If the allegation of cruelty and desertion by the husband is proved by the cogent evidence suit can be decreed in favour of the husband and against the wife. Even on allegation of desertion for long time by the wife suit can be decreed in favour of husband if the allegation is proved by cogent evidence.

Further all efforts for meditations and reconciliation U/s 9 of the Family Court Act to reunite the parties have failed and there is no likelihood of success. So the waiting period will only prolong their agony and in exercising discretionary

power Us 13(b)(ii) waive the cooling period if an application is filed one week after the first motion giving reasons for the purpose of waiver.

Answer – 4.

In a case of Rozy Jacob versus Jacob A Chakranakul reported in 1973 AIR 2090 Hon'ble Apex Court has discussed the various objective consideration to be kept in mind in awarding shared parenting order which are as follows :-

The children's are not mere chattels nor they are mere play thing for their parents. Absolute rights of parents over the destinies and the lives of their child has in the modern changed social condition yielded to the consideration of their welfare as human being so that they may grew up in a normal balanced manner to be useful member of the society and the guardian court in case of a dispute between mother and father is expected to strike a just and proper balance between the requirement of welfare of the minor children and the rights of their respective parents over them. The requirement of indispensable tolerance and mental understanding in matrimonial life is its basic foundation. The two spouses who are educated and cultured come from highly respectable families must realize that reasonable wear and tear and the normal jars and shocks of ordinary married life has to be put up within the larger interest of their own happiness and of the healthy normal growth and development of their offspring, whom destiny has entrusted to their joint parental care. The husband is not dis-entitled to a house and a housewife, even though the wife has achieved the status of an economically emancipated women, similarly the wife is not a domestic slave, but a responsible partner in discharging their joint, parental obligation in promoting the welfare of their children and in sharing the pleasure of their children's company. Both parents have therefore, to cooperate and work harmoniously, for their children who should feel proud of their parents and of their home, bearing in mind that their children have a right to expect from their parents such a home.

Answer – 5.

In case of *Chaturbhuj versus Sita Bai* reported in 2008 SCC 316, the Hon'ble Apex Court has observed the option in law before the Family Judge for realization of maintenance amount awarded U/s 125 of the Cr.P.C.

If any person so ordered fails without sufficient income to comply with the order any such Magistrate may for every breach of order, issued a warrant for levying the amount due in manner provided for levying fine, and may sentence such person for the whole or any part of each month allowance remaining unpaid after the execution of warrant to imprisonment for a term which may extend to one month or until payment if sooner made provided with no warrant of arrest shall be issued for the recovery of any amount due under the section unless application be made to the court to levy such amount within a period of one year from the date on which it become due.

Answer – 6.

Following principles are considered for computation of maintenance in a case U/s 125 of the Cr.P.C.

- (i) The earning of a person bound to provide maintenance or his capacity to earn.
- (ii) The status of the parties.
- (iii) The basic requirement of the person entitled to maintenance.
- (iv) The liabilities on the part of the person to provide maintenance.
- (v) Independent source of earning of a person entitled to maintenance or is quantum.
- (vi) The amount of maintenance should not be luxurious so as to prompt the wife to remain away from the husband nor it should be penurious so as to deprive the wife or children the basic necessities of life.

An order for maintenance, pendente lite or for cost of proceeding is conditional on the circumstances that the wife or husband who makes a claim for the same has no independent income sufficient for her or is sufficient to meet the necessary expenses of the proceeding. It is no answer to a claim of maintenance that wife is educated and can support herself, likewise the financial position of wife parents is also immaterial. The court must take into consideration the status of the parties and the capacity of spouse to pay maintenance and whether the applicant has any independent income sufficient for her or his support. Maintenance is always dependent upon factual situation. The court should therefore mould the claim for maintenance determining the quantum based on various factors brought before the court. The matter of granting alimony pendente lite is to be guided on sound principle of matrimonial law and to be exercised within the ambit of provision of Act and having regard to the object to the Act. The court would not be in a position to judge the merits of the rival contentions of the parties when deciding an application for interim alimony and would not allow its discretion to be fettered by the nature of allegation made by them and would not examine the merit of the case. Section 24 of the Hindu Marriage Act laid down that in arriving at the quantum of interim maintenance to be paid by one spouse to another, the court must have regard to the appellants own income and the income of the respondent.

Answer – 7.

Section 9 of Guardian and Wards Act 1890 deals with jurisdiction of court which provides that if the application is with respect to Guardianship of the person of the minor it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

If the application is with respect to Guardianship of the property of the minor it may be either to the District having jurisdiction in place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

The Hindu Minority and Guardianship Act 1956 is codified law of Hindu relating to minority and guardianship. Natural guardian for both boys and unmarried girl is first the father then the mother. Prior right of mother is recognized only for the custody of children below 5 years of age. In case of illegitimate children the mother has a better claim than the putative father. The act makes no distinction between the person of minor and his property and therefore Guardianship implies control over both whereas in case of Guardianship and Wards Act 1890 there is distinction in jurisdiction of a court in appointment of Guardianship of person of minor and Guardianship of the property of the minor. Further law relating to Guardianship and Wards Act 1890 clearly lays down that the father's right is primary and no other person can be appointed unless the father is found unfit. This act also proves that the court must take into consideration the welfare of the child while appointing a guardian under the Act. Family Court have no jurisdiction if the question involved relates to the appointment of guardian in respect of the property of a minor whether under personal law or any other law for the time being in force.

Answer – 8.

In case of Union of India versus Ankur Gupta bearing Civil Appeal No. 2017-20/19 the Hon'ble Apex Court has considered section 57, 58 and 59 of the Juvenile Justice (Care & Protection of Children) Act 2015 as well as the Adoption Regulation Act 2017 in which difference in the procedure for adoption by Indian prospective adopting parents living in India and inter country adoption and the eligibility criteria for the prospective adopting parents has been discussed.

Section 57 of the Juvenile Justice (Care & Protection of Children) Act 2015 provides eligibility of prospective adoptive parents.

(i) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.

- (ii) In case of a couple, the consent of both the spouses for the adoption shall be required.
- (iii) A single or divorced person can also adopt, subject to fulfillment of the criteria and in accordance with the provisions of adoption regulation framed by the authorities.
- (iv) A single male is not eligible to adopt a girl child.

Section 58 deal with procedure for adoption by Indian Prospective Adoptive Parents living in India which is as follows:-

- (i) Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child may apply for the same to specialized adoption agency.
- (ii) The specialized adoption agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible will refer a child declared legally free for adoption to them along with the child study report and medical report of the child.
- (iii) On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medial report of the child signed by such parents. The specialized adoption agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order in the manner as provided in the adoption regulation framed by the authority.
- (iv) On the receipt of a certified copy of the court order the specialized adoption agency shall sent immediately the same to the prospective adoptive parents.
- (v) The progress and well being of the child in the adoptive family shall be followed up and ascertained.

Section 59 provides for procedure for Inter country adoption of an orphan

or abandoned or surrendered child which are as follows :-

- (i) If an orphan or abandoned or surrendered child could not be placed with a Indian or non resident Indian prospective adoptive parents despite the joint effort of the specialized adoption agency and state agency within 60 days from the date the child has been declared legally free for adoption, such child shall be free for inter country adoption provided that children above 5 years of age may be given preference over other children for such inter country adoption.
- (ii) An eligible resident Indian or overseas citizen of India shall be given priority in inter country adoption of India children.
- (iii) A non resident Indian or overseas citizen of India or a foreigner who are prospective adoptive parents living abroad if interested to adopt an orphan or abandoned or surrendered child from India may apply for the same to an authorized foreign adoption agency or central authority or a concerned government department in their country.
- (iv) The authorized foreign adoption agency or central authority shall prepare the home study report of such prospective adoptive parents and upon finding them eligible will sponsor their application to authority for adoption of a child from India.
- (v) On the receipt of the application of such prospective adoptive parents the authority shall examine and then it will refer the application to one of the specialized adoption agencies where children legally free for adoption are available.
- (vi) The specialized adoption agency will match a child with such prospective adoptive parents and sent the child study report and medical report of the child to such parents who in turn may accept the child and return the child study report and medical report duly signed by them to the said agency.
- (vii) On receipt of the acceptance of the child from the prospective adoptive parents the specialized adoption agency shall file an application in the court for

obtaining the adoption order.

(viii) On the receipt of a certified copy of court order the specialized adoption agency shall send immediately the same to the authority, state agency and to the prospective adoptive parents and obtain a passport for the child.

(ix) The authority shall intimate about the adoption to the immigration authorities of India and the receiving country of the child.

(x) The prospective adoptive parents shall receive the child in person from the specialized adoption agency as soon as the passport and visa are issued to the child.

(xi) The authorized foreign adoption agency or the central authority shall ensure the submission of progress reports about the child in the adoptive family.

(xii) A foreigner or a person of Indian origin who has habitual residence in India if interested to adopt a child from India may apply to the authority for the same along with no objection certificate from the Diplomatic Mission of his country in India.

(Sunil Kumar Singh)

Principal Judge, Family Court,
East Singhbhum, Jamshedpur.

Answer 1.

The Indian judicial system today suffers with this curse of increasing pendency of cases. While, over the years, the disposal of cases have increased but , the pendency problem still hasn't seen a proper solution. The matrimonial cases deal with family disputes involving sensitive matters relating to family which is the unit of the society. Since the main objective of the Family Court is to promote settlement of disputes through conciliation and counselling , the process at many times does get prolonged .

The **impediments in the speedy disposal** of cases are many , To name a few..

1. The lack of assistance of medical welfare experts due to their non availability in the district
2. The lack trust of the parties on the concerned lawyers compels them to change them frequently.
3. The O.P. does not respond to the notice issued inspite of knowledge of the proceeding , till the Ex parte proceedings are initiated and the petitioner has incurred the cost of publication or the Ex Parte proceedings have reached to fag end.
4. Often the parties to the suit resort to unnecessary adjournments . They do not turn up for mediation sessions also the attendance of witnesses is not ensured on the date fixed.

Tools and Techniques for Speedy disposal of cases in Family Court .

Firstly, By not allowing unnecessary adjournments that are being asked for .

Secondly, the cases that are filed on similar points should be clubbed together and decided accordingly. This can be achieved with the help of technology.

Thirdly,, it must be stressed upon the parties to the dispute that they must ensure their presence in the court as and when directed.

Fourthly, the witnesses be produced on date to date basis except for unavoidable circumstances.

Fifthly, assistance of medical welfare experts (E.g. Psychiatrists and Psychologists) would help the court to understand the parties at initial stage.

Sixthly, the court management of the cases , fixing reasonable number of cases for the day will definitely help to resolve more disputes as the P.O. will have enough time to deal with them .

The remedying the pendency problem can help fasten the process of disposal of cases which would help people evade the wrath of the judicial process as 'justice delayed is justice denied'.

Answer 2.

The Family Courts can very well evolve procedures for speedy disposal of cases. Adhering to the provisions of Family Court Act 1984, and The Family Court Rules (Jharkhand) .

The various provisions of the Act aid the court to expedite the family matters .

(1) **Section 5** contains the provision which enables the Family Court to function with the association of institutions or organisations engaged in social welfare or the persons working in the field of social welfare, with a view to effectively exercise its jurisdiction.

(ii) **Section 6** contains the provision which enables the Family Court to obtain assistance in its functioning from Counsellors, Officers and employees.

(iii)**Section 9** imposes a duty on the Family Court to make all efforts in bringing about an amicable settlement of disputes between the parties before it.

(iv)**Sub-section (3) of Section 10**, which empowers the Family Court to evolve its own procedure in bringing about settlement of matters before it and finding the truth of the disputed facts in matters before it, frees it from the shackles of rigid rules of procedure by which ordinary Courts are bound.

(v) So also, **Section 14**, which empowers the Family Court to receive as evidence any report, statement, document, information or matter for effectively deciding the dispute before it, frees it from the shackles of rigorous Rules of evidence as to relevancy or admissibility of evidence under the **Indian Evidence Act, 1872**, by which ordinary Courts are bound.

(vi) Besides, while **Section 15** relieves the Family Court of the burden of recording evidence of witnesses at length by permitting it to make a memorandum of the substance of such evidence,

(vii) **Section 16** permits the Family Court to receive evidence of formal character given by affidavit.

Answer 3.

In a matrimonial suit for divorce filed by the husband on the ground of cruelty and desertion, the wife appears and admits desertion but makes counter allegation of cruelty. Whether as to a decree of divorce be awarded to the petitioner on the admission of the respondent who has made counter allegation of cruelty depends upon the evidence brought to record by the parties.

In the case of **Savitri Pandey** (supra), the **Apex Court** held that in any proceedings under the Act whether defended or not the Court would decline to grant relief to the petitioner if it is found that the petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated under Section 23(1) of the Act.

A **decree on admission** is not a matter of right, but rather a discretion of the Court, which discretion must be exercised in accordance with known judicial canons. In the case of **Vijay Gupta v. Ashok Kumar Gupta**, reported in **AIR 2007, Delhi 166**, the **Delhi High Court** has observed as under :- :

"It is also a settled principle of civil jurisprudence that judgment on admission is not a matter of right and rather is a matter of discretion of a Court. Where the defendant has raised objection which will go to the very root of the case, it would not be appropriate to exercise this discretion. The use of the words 'May' and 'make such orders' or 'give such judgment' spells out that power under these rules are discretionary and use of discretion would have to be controlled in accordance with the known judicial canons.

The cases which involves questions to be decided upon regular trial and the alleged admissions are not clear and specific, it may not be appropriate to take recourse to these provisions.

The said acceptance of the respondent of divorce cannot be said to be an admission under **Order 12 Rule 6**. The grounds on which divorce is sought by the petitioner i.e. cruelty and desertion are not accepted by the respondent and are in fact contested by him.

No, a decree of divorce cannot be passed only on the basis of admission of desertion where there is counter allegation of cruelty by the respondent.

In case the wife is able to prove cruelty against the petitioner, her deserting the respondent would not be a valid ground for divorce.

"Rayden on Divorce" which is a standard Work on the subject at p. 128 (6th Edn.) has summarised the case-law on the subject in these terms:-

"Desertion is the separation of one spouse "Rayden on Divorce" which is a standard Work on the subject at p. 128 (6th Edn.) has summarised the case-law on the subject in these terms:-

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but **the physical act of departure by one spouse does not necessarily make that spouse the deserting party**".

The parties residing separate from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end **without reasonable cause** and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".

Here the wife alleges cruelty , ie; the desertion admitted is not without reasonable cause , it is constructive desertion. **Constructive desertion** happens when one partner causes the other partner to leave the marital home through misconduct. If one partner is forced to leave the home because the other's misconduct, he or she has been **constructively** deserted.

The Apex Court in the case of **Rohini Kumari v. Narendra Singh**[(1972) 1 SCC 1 while considering the case of judicial separation on the ground of desertion under **Section 10(1)(a)** of the Act read with the Explanation, held, 'The requirement that the deserting spouse must intend to bring cohabitation to an end must be understood to be subject to the qualification that if without just cause or excuse a man persists in doing things which he knows his wife probably will not tolerate and which no ordinary woman would tolerate and then she leaves, he has deserted her whatever his desire or intention may have been. The doctrine of "constructive desertion' It is stated that desertion is not to be tested by merely ascertaining which party left the matrimonial home first. **If one spouse is forced by the conduct of the other to leave home it may be that the spouse responsible for the driving out is guilty of desertion.** There is no substantial difference between the case of a man who intends to cease cohabitation and leaves the wife and the case of a man who with the same intention compels his wife by his conduct to leave him.

A similar observation was made by the Apex court in **Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi, reported in 2001 AIR SCW 4641 : AIR 2002 SC 88.**

However, in case the wife is unable to prove cruelty against the petitioner , and on the other hand the petitioner is able to prove cruelty he would be entitled for a decree of divorce.

In case the petitioner does not allege cruelty against the respondent and the respondent wife is also not able to prove her counter allegation of cruelty , the petitioner would be entitled to a decree of divorce on ground of desertion. The suit has to be decided after appreciation of the evidence on record.

In **Amardeep Singh vs Harveen Kaur 2017**, the **Hon'ble Apex Court** held that the limitation of cooling off period of 6 months in **section 13 (B)2** is directory and not mandatory.

The limitation of cooling off period does not apply in instant situation . It applies in divorce by mutual consent.

Answer 4.

Due to strained relations between the parents, a child who ideally needs the company of both the parents feels tormented. The various objective considerations to be kept in mind while awarding 'Shared Parenting' has been discussed in a recent Apex Court judgment.

Parenting Plan is a mutual arrangement of custody and access which is an outcome of matured parenting. The ideal situation is that joint parenting is a rule and single parenting is an exception. There may be a single mother or a single father left behind due to a blow of destiny, then, the child has no option. However, when both the parents are available, their association with the child cannot be artificially denied only due to fights and hatred and vindictive approach of the parents. Hence, though it is not mandatory that all the parents should adopt a Parenting Plan, it is advisable that the family Court to invite a Parenting Plan in the cases found suitable upon the Law Commission which has taken formal cognisance of the legal right involved in joint parenting. This, of course, may be attuned to circumstances and must account for the special needs of the particular child.

One such plan devised by **THE HIGH COURT OF JUDICATURE AT BOMBAY (CIVIL APPELLATE JURISDICTION) (IN WRIT PETITION NO.5403 OF 2015)** is as follows:

The mother is to be given a sufficient period of custody each month during which she would be responsible for the upbringing of the child. The mother shall pick up the child on the first day of each month and have custody of the child continuously for 9 days and on the 10th day after lunch or the school time drop the child at the father's house. The child shall live with the mother continuously during such period. The mother shall attend to the needs of the child. On the last day of such period, the child shall be sent either directly to the school or to the father. Thereafter, the mother will take the child on the third Wednesday of the month after school hours and will drop the child at the house of the father at around 1/2 pm or after lunch on the third Sunday. Thus, the child will not feel disconnected from the mother and there shall be continuous and simultaneous association with the mother. The child shall have the love, care and company of both the parents she loves for a reasonable stretch of days as also weekends. The school vacations shall, as is usual, be shared equally in this upon mutual arrangement and understanding between the parties. Besides absent parent may call the child on phone morning and evening and may talk for 5 to 10 minutes. The parents shall have equal say on attending school meetings and on deciding child's education, day schedule, hobby classes without taxing child. The birthday of the child is to be celebrated together in the presence of the parents. In respect of the meeting of the other family members of

both the sides and celebrations of important events in the family the both the parents being quite mature, will take the decision accordingly, keeping in mind the best interest of their child. Thus, complete flexibility in taking decisions on such issues is left to both the parents. In the event of dispute, the other party can approach the Court for necessary orders.

In a recent judgment, in Criminal appeal No.127 of 2020

Yashita Sahu versus state of Rajasthan and others

The Hon'ble SC held that---

It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child. If welfare of the child so demands then technical objections cannot come in the way. However, while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child.

The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very wary of what is said by each of the spouses.

A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every re-union may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing

with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

The concept of visitation rights is not fully developed in India. Most courts while granting custody to one spouse do not pass any orders granting visitation rights to the other spouse. As observed earlier, a child has a human right to have the love and affection of both the parents and courts must pass orders ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

Hence, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the visitation rights must be given over long weekends, breaks, and holidays. In cases like one where the parents are in two different countries effort should be made to give maximum visitation rights to parent who is denied custody.

In addition to 'Visitation Rights', 'Contact rights' are also important for development of the child specially in cases where both parents live in different states or countries. The concept of contact rights in the modern age would be contact by telephone, e-mail or in fact, we feel the best system of contact, if available between the parties should be video calling. With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible. Unless there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 5-10 minutes everyday. This will help in maintaining and improving the bond between the child and the parent who is denied custody. If that bond is maintained the child will have no difficulty in moving from one home to another during vacations or holidays. The purpose of this is, if we cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each.

Answer 5.

The Chapter IX of the Code of Criminal Procedure deals with the order for maintenance of wives, children and parents. The provisions dealing with the enforcement of **Order u/s 125 Cr.P.C.** have been incorporated under **clause 3 of section 125 Cr.P.C.**

Section 125(3) of The Code Of Criminal Procedure, 1973 states as ,

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such

Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

A sentence of jail is no substitute for the recovery of the amount of monthly allowance which has fallen in arrears. Monthly allowance is paid in order to enable the wife and child to live by providing with the essential economic wherewithal. Neither the neglected wife nor the neglected child can live without funds for purchasing food and the essential articles to enable them to live. Instead of providing them with the funds, no useful purpose would be served by sending the husband to jail. Sentencing to jail is the means for achieving the end of enforcing the order by recovering the amount of arrears. It is not a mode of discharging liability. The section does not say so. At the cost of repetition it may be stated that it is only a mode or method of recovery and not a substitute for recovery.

In Kuldip Kaur v. Surinder Singh and Anr. (1989) 1 SCC 405 held the provision of sentencing Under Section 125(3) to be a "mode of enforcement" as distinguished from the "mode of satisfaction" of the liability which can only be by means of actual payment. It is further held that a distinction has to be drawn between a mode of enforcing recovery on the one hand and effecting actual recovery of the amount of monthly allowance which has

fallen in arrears on the other. Sentencing a person to jail is a "mode of enforcement". It is not a "mode of satisfaction" of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge. Be it also realised that a person ordered to pay monthly allowance can be sent to jail only if he fails to pay monthly allowance "without sufficient cause" to comply with the order. It would indeed be strange to hold that a person who "without reasonable cause" refuses to comply with the order of the court to maintain his neglected wife or child would be absolved of his liability merely because he prefers to go to jail.

In the case of Shahada Khatoon v. Amjad Ali 1999 Cr.L.J.5060 in which Section 125(3) impose imprisonment for a term extending one month or until payment if sooner made. The **Hon'ble Apex Court** held that after the sentence has been suffered for one month, the wife could again approach the Magistrate the or similar reliefs, but the Magistrate could not impose sentence for more than one month. This observation came to be made upon rejection of the contention that the liability was a continuing one. For each offence the liability was separate and distinct.

This aspect is also came to be considered by a Division Bench of Bombay High Court in the case of **Gorakshnath Khandu Bagal v. State of Maharashtra and Ors. 2005 Criminal Law Journal 3158**. In that case various judgments of various Courts, including the judgment in the case of Shahada Khatoon (supra) came to be considered. The question of whether the liability of the husband was continuing or not was seen. It was observed that what was considered in the case of Shahada Khatoon (supra) was that until an amount is paid, the husband was not required to be kept in jail. Hence the Division Bench considered that for every breach of the order the maximum sentence was one month and that even if the breach continued the husband would have to be released if he had served one month s sentence for one breach. This judgment in paragraph 9 considered the consequences of a number of breaches in a single Application that If there are arrears for more than one month then the imprisonment exceeding for a period of one month can be imposed. It further observed that in view of the first proviso to the Section, 12 defaults could be clubbed together and after every 12 defaults, a separate Application is to be filed. Consequently, it is further observed that in that eventuality in each application, as there are maximum 12 defaults, the Magistrate may impose imprisonment extending upto a period of 12 months, but that is outer limit.

This view is reiterated in case of Manoj Thorat vs State of Maharashtra 2010(1)Crimes749 . In **Shantha alias Ushadevi and Anr. v. B.G. Shivananjappa (2005) 4 SCC 468** it has been held that the liability to pay maintenance Under Section 125 Code of Criminal Procedure is in the nature of a continuing liability.

In the case of **Sachin Suresh Bodhane vs. Sushma Sachin Bodhane 2015 (1) ABR Criminal 435** an interim order was passed granting monetary relief the husband had not paid the amount. A non bailable warrant was issued for non payment of interim maintenance.

As such the first option available to the Magistrate was to issue a warrant for levying fine. If whole of the amount was recovered by adopting the procedure under Section 421 of the Code of Criminal Procedure, the question of putting the defaulter in prison did not arise. In case amount was not recovered or part of it was recovered and part of it was not recovered, then the question would have arisen as to how much sentence should be imposed on the defaulter as per the provision laid down in the Code of Criminal Procedure. The stage of issuing warrant comes only after sentencing and not before that.

Answer 6.

So far as the legal provision regarding the quantum of maintenance provided in Cr.P.C. is concerned ,

The section **125 Cr.P.C. (I) d** states as,

.....
.....

.....order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

The provision enjoins the duty on the magistrate to award fair and appropriate amount of maintenance , meaning thereby it shall not be inadequate or insufficient and at the same time shall also not be excessive or unreasonable.

Merely because wife is capable of earning is no reason to reduce the maintenance awarded to her.

The Apex Court through various pronouncements has made it clear that the maintenance amount should be reasonable befitting the status and standard of living of the respondent.

The Apex court made a remarkable observation in **Shailja & anr V. Khobanna** regarding the quantum of maintenance. In the case of **Kalyan Dey Chowdhury V. Rita Dey Chowdhury Nee Nandy** held that 25% of husband's net salary would be just and proper as maintenance to wife. The Apex court reiterated the same in **Dr. Kulbhushan V. Rajkumari & anr.** It was also observed by the Court :

- That the amount of permanent alimony awarded to the wife must be befitting the status of the parties and the capacity of the spouse to pay maintenance.
- That maintenance is always dependent on the factual situation of the case and the Court would be justified in moulding the claim for maintenance passed on various factors.

The Apex Court in a catena of decisions, has held that the **concept of sustenance does not necessarily mean to live the life in penury and roam around for basic maintenance. The wife is entitled in law to lead a life in the same manner as she would have lived in the house of her husband with respect and dignity.**

The settled *Principle* so far the Maintenance awarded under sec 125 Cr.P.C. besides under other legal provisions u/s 24 H.M.Act, D.V.Act is that the amount of maintenance awarded under section 24 of Hindu Marriage Act and section 125 Cr.p.c the adjustment is permissible and can be allowed of the lower amount against the higher amount. The husband is not supposed to pay twice.

Answer 7.

The Hindu Minority And Guardianship Act 1956 deals with the appointment of a Guardian of any person who is Hindu by religion , Buddhist , Jain , or Sikh but is not a Muslim , Christian , Jew. or Parsi.

Whereas **the Wards And Guardianship Act 1890** deals with the appointment of Guardian of the person and also Guardian of the property. If the application is with respect to the guardianship of **the person of the minor**, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides. If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property. If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.

Answer 8 .

The concept of Inter-Country adoption is relatively a new concept. It did not find place in the top priorities of the legislators. There was not and still is not exist a legislation which primarily provides for the rules regarding Inter-Country adoption. But in the year 1984, the **Hon'ble Supreme Court of India in a landmark case of Laxmikant Pandey Vs. Union of India** laid down few principles governing the rules for Inter-Country adoption. The case was instituted on the basis of a letter addressed to the court by a lawyer, Laxmikant Pandey alleging that social organisations and voluntary agencies engaging in the work of offering Indian children to foreign parents are indulged in malpractices. It was alleged that these adopted children were not only exposed to long horrendous journey to distant foreign countries at the risk of their life but they also ultimately become prostitutes and beggars. Supreme Court in this case expressed its opinion and framed certain rules for Inter-Country adoption. The Hon'ble Court asserted in para 8 of the judgement that, " while supporting Inter-Country adoption, it is

necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the people, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able provide to the child a life of moral and material security or the child may be subjected to moral and sexual abuse or forced labour or experimentation for medical or other research and may be placed in worse situation than that in his own country ." It further went on to give the prerequisites for foreign adoption. It stated that " In the first place, every application from a foreigner desiring to adopt a child must be sponsored by social or child welfare agency recognised or licensed by the government of the country in which the foreigner is a resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social welfare agency in India working in the area of Inter-Country adoption or by any institution or centre or home to which children are committed by the juvenile court." The Supreme Court did not stop at that. It also insisted the age within which a child should be adopted in case of Inter-Country adoption. " if a child is to be given in Inter-Country adoption, it would be desirable that it is given in such adoption before it completes the age of 3 years." Such a ruling was delivered by the Supreme Court because it felt if a child is adopted by a foreign parent before he/she attains the age of 3, he/she has more chances of assimilating to the new environment and culture. Another important rule framed by the Court during the course of judgement was " Since there is no statutory enactment in our country providing for adoption of a child by foreign parents or laying down the procedures which must be followed in such a case, resort had to be taken to the provisions of **Guardian and Wards Act, 1890** for the purpose of facilitating such adoption.

Following this judgement, the Indian courts gradually broadened the scope of adopting child to other countries. In the later judgments, the courts have also interpreted the word ' custody' to make adoption easier. **The Bombay High Court in Re Jay Kevin Salerno [AIR1988 BOM139]** reiterated that " where the custody of a child is with an institution, the child is kept in a private nursing home or with a private party for better individual care of the child, it does not mean that the institution ceases to have the custody of the

child." Therefore it may be submitted that in the absence of any explicit legislation on the subject, the Supreme Court has played a pivotal role in regulating the adoption of tendered aged children to foreign parents. It has taken the help of various international guidelines and subject to Indian culture framed the rules thereof.

Appointment of guardian: Now the question arises how the guardian is to be appointed? This aspect is very important because if care is not taken in selecting the parents then it may lead to trafficking in children. It must be stated in this respect that the provisions of Guardian and Wards Act, 1890 are applicable in case of Inter-Country adoption. Section 7 of the said act provides that, when the district court is satisfied that appointment of the guardian will be for the welfare of the minor, it appoints one. But the person appointed should come under any of the four categories mentioned in the section 8 of the act. These four categories are:

- a) Any person desirous of being guardian of the minor
- b) any relative or friend of the minor
- c) The collector of the district within whose jurisdiction the minor resides or in which he has property
- d) The collector having authority with respect to the class to which the minor belongs.

The foreign parents desirous of making the adoption of an Indian child makes an application to the court for being appointed guardian of the person and property of the child whom he wishes to take in adoption and on being appointed the guardian, for leave of the court to take the child with him to his country for taking it in adoption. As because most of the children sought to be adopted are destitute and orphans, notice under section 11 of the act has no specific meaning. In their case there is no agency, which can look into the question whether the proposed adoption will be in their welfare, or not. Thus, the Delhi High Court rules provide that, a notice should be sent to Indian Council of Child Welfare whereas the Bombay and Gujrat High Court rules provides for notice being sent to Indian Council for

Social Welfare. Every child welfare agency is required to get license. They are also required to maintain a register in which the names and particulars of all the children proposed to be given in Inter-Country adoption through it should be kept. The child welfare agency processing the adoption must place sufficient material before the court to satisfy that the child is legally available for adoption. It is imperative that the application for adoption of an Indian child by a foreigner should be sponsored by a social or child welfare agency recognized and licensed by the government of the country in which the foreigner is a resident. There are three reasons for this.

a) It will reduce the possibility of profiteering and trafficking in children.

b) The court won't be able satisfy itself about the eligibility of the parents unless it is sponsored by the agency of the country in which the foreigner resides.

c) In case, adoption is made without the intervention of any agency, there would no authority or agency, which could be made responsible for supervising the growth of the child.

These agencies are required to submit a Home Study Report that includes amongst others the following:

a) Source of referral

b) schooling facilities

c) current relationship between husband and wife etc. Along with this report the agency is also required to send a photograph of the family and a declaration stating that the family is willing to adopt the child in accordance with the law prevailing in their country.

In case, child's biological parents exist, then they should be properly assisted in making a decision about giving away the child in adoption to foreign parents by the child welfare agency to which the child is surrendered for making arrangement for its adoption. If the child is an orphan or destitute child then the agency must try to trace its biological parents before giving in adoption. If the agency is a non-registered agency, then it must contact a registered agency for giving in adoption. The district court is required to dispose of all the application at the earlier but in no case later than two months from the date of filing of an application. **Section 17 of the Guardian and Wards Act, 1890** provides that in appointing guardian of a

minor, the court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor and in considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor. The main function of the Council of Social Welfare or Council for Social Welfare or any other recognized agency in the Inter-Country adoption is to help the court in finding what is for the welfare of the people. For this purpose the council prepares a report called 'Child Study Report'. This report contains legal and social data regarding the child. The report should also contain an assessment of child's behavioral pattern and its intellectual, emotional and physical development. It should also contain the recent photograph of the child, information about original parents.

Adoptions among the Different Religions within India

In India there is no general law for adoption, it is regulated by the personal laws of the community. Among Hindus adoptions are regulated through the Hindu Adoptions and Maintenance Act, 1956. The Act does not cover adoptions for Muslims, ` Christians, Parsees, and Jews. These communities do not have personal laws for adoptions except a section of Muslims. The other communities indirectly invoke The Guardian and Wards Act, 1890 to obtain guardianship of the child during minority, but do not deal with adoption as such.

Adoption Under Hindu Law

The Shastric Hindu Law considers adoption as a sacramental rather than a secular act. The Supreme Court has observed that the objects of the adoption are two fold:

1. The first object was religious, i.e., to secure spiritual benefit to the adopter and his ancestor, by having a son for the purpose of offering funeral cakes and libations of water to the means of the adopter and his ancestors;
2. The second was to preserve the continuance of one's lineage. Presently, the adoption under Hindu Law is governed by the **Hindu Adoption and Maintenance Act, 1956**. It only applies to Hindus, defined under Section-2 of the Act and includes any person who is Hindu by religion, including Buddhists, Jains, and Sikhs and to any other person who is not a Muslim,

Christian, Parsi or Jew by religion. It also includes any legitimate or illegitimate child who has been abandoned both by his father and mother or whose parentage is unknown and who is in either case brought up as Hindu, Buddhist, Jain or Sikh.

Before the commencement of this Act, only male could be adopted but after this Act was introduced a female may also be adopted.

Requirements for a valid adoption(Hindus). The Act reads,

No adoption is valid unless

The person adopting is lawfully capable of taking in adoption

The person giving in adoption is lawfully capable of giving in adoption

The person adopted is lawfully capable of being taken in adoption

The adoption is completed by an actual giving and taking and The ceremony called data homan (oblation to the fire) has been performed.

Sec.41 (5) of Juvenile Justice (Care & Protection of Children) Act, 2000

provides that a child shall be offered for adoption on fulfillment of the following requirements:

In case of abandoned child, if two members of the Committee declare the child legally free for placement.

In case of surrendered child, if the period two months for reconsideration by the parents is lapsed.

In case of a child who can understand and express his consent, if his/her consent is obtained in this regard.

Sec. 41 (6) Juvenile Justice (Care & Protection of Children) Act, 2000 that the court is empowered by Sec.41 of the Act to allow a child to be given in adoption to the following persons:

1. A person irrespective of his/her marital status,
2. The parents to adopt a child of the same sex irrespective of the number of existing biological sons or daughters.
3. The childless couples

Adoption Under Muslim Law

Mohammedan law does not recognise the concept of adoption and argues that it is against the Quran. They take into account the concept of acknowledgement. If a Muslim adopts a child, the paternity of the child cannot be established. Before the Shariat Act, 1937 adoptions were recognised according to customs, but in matters of adoption Muslim personal laws do not automatically apply on a person. Muslims never acknowledge another's child as their own. Unlike the Hindu Law, the adoptive parents do not get the status of natural parents under Muslim Law. It has been believed that the Prophet himself disapproves of adoption. The relevant verse of Quran as contained in S.33. A4-6 will reveal that it does not prohibit adoption, it merely says that the adopted child is to be called by their father's name and if the name of the father is unknown then it shall be called as mulla or brother. It is nowhere mentioned that if one adopts a child it will be against the dictates of the Allah. Thus it is interpreted that the Holy Quran does not prohibit adoption.

Eligibility criteria for prospective adoptive parents

1. The prospective adoptive parents shall be physically, mentally and emotionally stable, financially capable and shall not have any life threatening medical condition.

2. Any prospective adoptive parents, irrespective of his marital status and whether or not he has biological son or daughter, can adopt a child subject to following, namely:-

1. the consent of both the spouses for the adoption shall be required, in case of a married couple;
2. a single female can adopt a child of any gender;
3. a single male shall not be eligible to adopt a girl child;
3. No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship.
4. The age of prospective adoptive parents, as on the date of registration, shall be counted for deciding the eligibility and the eligibility of prospective adoptive parents to apply for children of different age groups shall be as under:-

Age of the child	Maximum composite age of prospective adoptive parents (couple)	Maximum age of single prospective adoptive parent
Upto 4 years	90 years	45 years
Above 4 and upto 8 years	100 years	50 years
Above 8 and upto 18 years	110 years	55 years

- 5.
6. In case of couple, the composite age of the prospective adoptive parents shall be counted.
7. The minimum age difference between the child and either of the prospective adoptive parents shall not be less than twenty-five years.
8. The age criteria for prospective adoptive parents shall not be applicable in case of relative adoptions and adoption by step-parent.
9. Couples with three or more children shall not be considered for adoption except in case of special need children as defined in sub-regulation (21) of

regulation 2, hard to place children as mentioned in regulation 50 and in case of relative adoption and adoption by step-parent.

Q.1 Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the Family Court. Discuss the impediments and possible remedies.

Ans. These are the tools and techniques for the speedy disposal of matrimonial and other matters pending in the Family Court :

Firstly, we have to take maximum utilization of court working hours that means both that the Advocates as well as the Judges should arrive on time and there should not be taken any unnecessary adjournments.

Secondly, we have to take appropriate steps for clubbing together the matters relating to single point and decided accordingly and this can be achieved with the help of technology.

Thirdly, for the speedy disposal of matrimonial and other matter it is essential that the judgments must be deliver with a reasonable time.

Fourthly, tools and techniques for speedy disposal of matrimonial and other matters that the days of vacation should be reduced as well as the working time should be increased.

Fifth points for the speedy disposal the lawyers should not repeat their arguments and should be precised on their points and judges should be also endeavour for writing their judgments in such a way that it does not give path to further litigation on the same matters and points by filing appeal and revision of the same case. And

The last tool for the speedy disposal of matrimonial and other matters is that the lawyers who are officers should not resort to strike under any circumstances.

Therefore after discussing all the aforesaid points, I am in the opinion that these are the important remedies as well as tools and techniques for the speedy disposal of matrimonial and other matter pending in the Family Court.

Q.2 In what manner and to what extent the procedure in family courts can be evolved for speedy disposal of cases ? Explain with reference to the relevant provisions of The Family Courts Act and Rules.

Ans. The family cases designed for speedy trial and quick disposal of matrimonial disputes i.e. the dispute between the husband and wife in view of the increase the number of cases of the matrimonial disputes as well as increasing pendency of the cases in civil and criminal courts. Judges and women organization etc. requested the central court to pass a special legislation to deal exclusively with matrimonial matters. Therefore the Law Commission vide its report 54 & 55 (1974) recommended the government to pass a special enactment for establishment of courts to deal with family matters and therefore the Family Court Acts was passed in 1984 for the establishment of Family Court in India.

Thus the concept of Family Court employees and inter graded broad best service to families in trouble. Its stipulates that Family Court structure should be such as is mean to preserve the family and help to establish the marriage. Therefore for such system the anniversary litigation system is hardly appropriate. The object of the establishment of Family Court is to promote conciliation, mediation and speedy settlement of disputes relating to marriage and family affairs. The High Court of the state is empowered to establish the Family Court in consultation with the state government for those towns and cities whose population exceed one million. The judges of the Family Courts are appointed by the state government with the consent of the High Court.

Section 7 of the Family Court Act. Section 8 of the Family Courts Act, 1984 provides the list. It can exercise jurisdiction in the following cases :-

1. A suit or proceeding between the parties to a marriage for a decree of nullity, Restitution of Conjugal Rights, Judicial Separation and Divorce.
2. A suit or proceeding as to the validity of a marriage or as to the Matrimonial status of any person.

3. A suit or proceeding between the parties with respect to the property.

Therefore the purpose for the establishment of the Family Court in each district for the speedy disposal of the cases of the matrimonial cases relating to husband and wife and the main moto of the Family Court is to provide the remedy for the women in a short stipulated of the time. The litigants who filed their cases before the Family Court are getting relief in short span of time.

Q. 3 *In a matrimonial suit for divorce filed by the husband on the ground of cruelty and desertion the wife appears and admits desertion the wife appears and admits desertion but makes counter allegation of cruelty. Can the divorce suit be decreed on the ground of desertion on admission? Will the situation be different if there is no allegation of cruelty by the husband? Whether the limitation of cooling off period apply in such cases.*

Ans. Hindu marriage is a holy sacrament in the life of a Hindu and other various sacraments which are known as important for a complete life and marriage is the valid way of male and female to live together and transform their duties and husband-wife are considered to be one in-law.

Prior to the 1976 amendments in Hindu Marriage Act 1955 cruelty was not a ground for claiming the divorce under the Hindu Marriage Act, but it was only ground for claiming judicial separation U/s 10 of the Act, but by 1976 amendment the cruelty was made ground for incorporated are as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party. There are various ground for claiming on the basis of cruelty and types of cruelty and have given following explanations within the scope of cruelty U/s 13(1)(1)(a) of H. M. Act and it is sufficient that if the cruelty is of such types that it became impossible for spouses to live together.

The Hon'ble Supreme Court held that the word cruelty is used in Section 13(1)(1)(a) of the Act in the contest of Human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. Physically violence is not absolutely essential to constitute cruelty mental cruelty may consists of verbal abuses and insults by filthy languages.

There are many grounds for divorce provided by Law but since we are mainly conserved to the cruelty and in context of this we have seen how the courts have interpreted cruelty within the boundary of the Law according to the situation.

No decree of divorce could be granted on the ground of desertion in the absence of pleading and proof. The word "desertion" for the purpose seeking divorce under that means the intensional permanent for seeking an abandonment of one spouse by the other without the other consent and without reasonable cause.

In Smt. Shalini Singh Vrs. Alok Kumar Singh the aforesaid case file by the respondent for divorce on the ground of desertion has been decreed. Condition necessary for decree of divorce on the ground of desertion must have been satisfied on the date of filing.

Q. 4 *Due to strained relations between the parents, a child who ideally needs the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective considerations to be kept in mind in awarding "Shared Parenting" orders. Discuss in the light of latest case laws on the point.*

Ans. In Yashita Sahu Vrs. State of Rajasthan and others in Criminal Appeal No. 127 of 2020 the Hon'ble S C held that in this case various facts to be taken in the consideration what is best in the interest of child. No hard and fast

rules can be let down and each case has to be decided on its own merit. We are also not oblivious of the fact that when the two parents are at war with each other, it is impossible to provide a completely peaceful environment to the child. The Court has to decide what is the best interest of the child after weighing all the pros and cons of the both respective parents who claim custody of the child. Obviously any such order of custody can not give a perfect environment to the child because that perfect environment would only be available if both the parent put the interest of the child above their own differences. Even if parent separate they may reach an arrangement where the child can live in an environment which is reasonably conducive on her/his development. As for the age of child nothing is in favour of the mother she herself approached the jurisdiction court Norfolk. She enter into an agreement on the basis of which a consent order was passed. She has violated the order with impunity and come back to India and this is a factor which we have to hold against her.

In view of the above discussion we are clearly of the view that it is the best interest of the child to have parental care of both the parents. We are clearly of the view that if the wife is willingly go back to USA then all order regard to the custody, maintenance etc. must be looked into by the jurisdiction court of USA. A writ court in India can not in proceedings like this direct that an adult spouse should go to America.

Q. 5 *What are the practical difficulties in execution of an order for grant of maintenance under section 125 Cr.P.C.? Discuss the available options in law before a family judge for the realization of the maintenance amount awarded under section 125 Cr.P.C. with special reference to the case laws.*

Ans. Section 128 Cr.P.C. deals with the enforcement of order of maintenance. According to the section the following are the condition for the enforcement of the maintenance :-

1. Copy of order U/s 125 Cr.P.C. is given to that person free of cost for whose favour it is made in case the order is in favour of the children then the copy of the order given to the guardian of the children.

2. If any Magistrate has made an order U/s 125 Cr.P.C. then the Magistrate of India can enforce this order where that person lives who have to give maintenance.

3. The Magistrate has satisfy two conditions before enforcement of order :

(a) Identity of parties and (b) Proof of non payment of allowances.

Chapter 9 of the Cr.P.C. is essential for the protection of the divorced wife, children and parents. It is made to protect them for unusual livelihood. Maintenance of the duty of the everyone who has sufficient means for the same. In this chapter of Cr.P.C. there are various provisions given related to maintenance like who is entitle to maintenance, essential condition for granting maintenance, procedure of maintenance, alteration of the various order enforcement of order of maintenance.

Q. 6 *What are the principles for computation of maintenance in a case under section 125 Cr.P.C.? How will the quantum of maintenance vary in case the competent court has awarded maintenance under Domestic Violence Act and/or under section 24 of the Hindu Marriage Act.*

Ans. The following guidelines would be let down to be followed by the trial courts dealing with the application filed under the Domestic Violence Acts. Notice of the applications filed U/s 12 of the Act shall be served as provided in section 13 complying the procedure leading in Rule 12 of Protection of Women from Domestic Violence Rules.

The Notice is to be sent in form 7 as prescribe under the rules. Notice to be served on the respondent shall be accompanied by copy of application filed U/s 12 & 23 if any. The Magistrate can pass interim order U/s 23(1) ex-party, but that ex-party order could be passed only after the service of notice as provided under Rule 12(3) of the rules.

The Magistrate can pass an ex-party ad-interim order under without notice to the respondent as provided U/s 23(2) of the Act. The Magistrate shall bestow care and caution in granting ad-interim ex-party order U/s 23(2) of the Act.

Such relief is to be granted only if urgent order are warranted on the fact and circumstances of the case and delay would defeat the purpose or were ad-interim orders is absolutely necessary either to protect the aggrieved persons or to prevent any domestic violence.

Q. 7 What is the difference in jurisdiction of the courts under the Courts and Wards Acts and Minority and Guardianship Acts in appointment of Guardians of a minor ?

Ans. In Ruchi Majoo Vrs. Sanjeev Majoo (2011) the Hon'ble Supreme Court of India pronounced an interesting and significant decision which comes as hope for Indian women deserted by their NRI Oversees spouse fighting a legal battle in India. Section 9 of the Guardian and Ward Act, 1890 makes a specific provision as regards the jurisdiction of the courts to entertain a claim for grant of custody of a minor. It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under section 9 of the Act is the ordinary residence of the minor. The expression used where the minor ordinary resides. Now whether minor is ordinary residing at a given place is primarily a question of intention which is in turn is a question of a fact. It may be at the best be mixed question of law and fact but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an inquiry into the factual aspects of the controversy.

Q. 8 What are the major differences in procedure for adoption by Indian prospective adoptive parents living in India and inter country adoption? What are the eligibility criterion for prospective adoptive parents ? Discuss with relevant provisions of law and latest case laws.

Ans. International adoption also refer to as inter country adoption and transitional adoption is a type of adoption in which an individual or couple becomes the legal and permanent parents of a child who is national of a different country. In general, prospective adoptive parents must meet the legal adoption requirements of their country of residence and those of the national of a different country. In general prospective adoptive parents must meet the legal adoption requirement of their country of residence and those of the country whose nationality the child holds. The law of countries vary in their willingness to allow international adoptions. Some country such as China and South Korea have relatively well establish rules and procedure for international adoptions while other countries expressly forbid it. Some countries notably many African nations have extended residency requirements for adoptive parents that in effect rule out most international adoptions.

At the international level India has ratified the convention on the rights of child and the Hague conventions on inter country adoption of children. The Principal Law relation to adoption in India under the Hindu system is contained in the Hindu Adoption and Maintenance Act, 1956 (HAMA). The Juvenile Justice Act, 2000 and the Amendment Act, 2006 guaranties rights to an adopted child as recognize under international obligations by all Hague member countries. An express the following terms :- Adoption means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all right, privileges and responsibilities that are attached to the relationship.

The Supreme Court of India in a public interest litigation petition, Laxmi Kant Pandey Vrs. Union of India had framed the guidelines governing inter country adoptions for the benefit of the government of India. Bombay High Court in a recent judgment, Varsha Sanjay Sindey Vrs. Society of Friends of the Sassoon Hospital and others [xii] held that once a child is approved by a Oversees couple after the due procedure is followed, the same child cannot be shown to other parents and that such Indian parents then cannot claim any right or priority to get the child merely because they are Indian parents and preference should be given to them.

Reply to the questions regarding Adoption.

From: Vishnu Kant Sahay (sahayvk@gmail.com)

To: judicialacademyjharkhand@yahoo.co.in

Date: Wednesday, 13 May, 2020, 09:08 pm IST

From:-

Vishnu Kant Sahay

Pr. Distt. & Sess. Judge

Cum

Pr. Judge Family Court, A/c

Latehar.

To,

The Director Judicial Academy

Ranchi.

Sub:- Reply to the questions regarding Adoption.

Sir,

In reference to the questions transmitted regarding adoption I am herewith submitting my reply to the questions in brief for proper consideration.

Question no.1:- Elaborate the tools and techniques for speedy disposal of matrimonial and other matters pending in the family court. Discuss the impediments and possible remedies.

Ans.:- The Family Court established under the Family Court Act, 1984 from its very preamble is designed for speedy disposal of matrimonial and other matters. Section 10 of the Act deals with the general procedure for hearing the matters brought before the family court. Sub-section 1 and 2 will show that the provisions of the Code of Civil and Criminal Procedure will be applicable to the suits and the proceedings but Sub-section 3 empowers that the family court can lay down its own procedure with a view to arrive at a settlement in respect of the subject matter. If it can be properly adhered to and the matters pending in the family court can be disposed quickly.

Section 14 of the Act will show that although the Evidence Act 1872 is applicable but liberty has been given to the court to receive any report, document, statement, information on matter that may, in its opinion, assist it to deal effectually their disputes whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872.

Section 15 of the Act mandates that the suit of proceedings ought to be tried summarily. It shall not be necessary to record the evidence of the witness at length, rather it can be by way of memorandum of the substance of what the witness deposes.

Section 16 of the Act mandates that the evidence of formal character may be given by the affidavit. But it is not done in that manner to safeguard the interest of either party. The act is designed that there will be least interference by the Lawyers but under the circumstances that the party generally are not well versed with the laws and procedure have to depend them upon the Lawyers and once there is such entry all legal battles starts and there is dilution of the procedures.

Even the Judgment, as mandated u/s 17, shall contain concise statement of case and point for determination and the reason for such decision.

Generally, the major impediment in the speedy disposal of the suit or other proceedings pending before the family court remains the illiteracy of the parties and because of it they have to remain dependent upon their legal representative which generally creates a distance between the court and the parties. In cases, as it has been seen, the stand taken by the counsel of the parties are generally to complex the issue. Although the remedy is there that no party will be permitted to appear through the counsel, but in such circumstance because of the lower literacy ratio the parties can't be able to communicate properly and to deal his plea independently.

The another impediment is appearance of the parties. It is a general trend of the parties to keep silent in spite of the receipt of the notice or knowledge of the case only with a view to frustrate the cause of the petitioner. Although the remedy is available for hearing ex-parte and deciding accordingly, but it again causes delay in the actual decision of the case since the parties tries to appear at a subsequent stage or even after the pronouncement of the orders and again the matter has to be heard and decided. But there can not be remedy for it and if the parties appears at a later stage to be heard have to be given a hearing else it will violate the principle of *audi altrem partem*.

Q.No.2. In what manner and to what extent the procedure in family court can be evolve for speedy disposals of cases ? Explain with reference to the relevant provisions of the family court Act and rules.

Ans:- A bare look to the provisions of Family Court Act, 1984, the dominant purpose behind the enactment and its object and reason one can not but miss that the clear intention of the legislature is to be provide a form for speedy settlement of the disputes which are covered under the Act. Some of the silent feature of the act shows that its proceeding are less formal in nature and more or less and in the nature of a conciliation proceedings. The provision for associating with social welfare group and counselors in working out the purposes of the act referred to in section 5 & 6. Sec. 12 enables also to secure the services of a medical expert or the services of persons who are engaged professionally in promoting the welfare of the family. Section 14 suitably modifies the rigours of the Evidence Act and its application to family court proceeding relating to admissibility of evidence. All these features unmistakably point out that the family court proceedings have an element of openness and informalities about them.

Q.No.3 :- In a matrimonial suit for divorce filed by the husband on the ground of cruelty and desertion the wife appears and admits desertion but makes counter allegation of cruelty. Can the

divorce suit be decreed on the ground of desertion on admission ? Will the situation be different if there is no allegation of cruelty by the husband ? Whether the limitation of cooling of period apply in such cases.

Ans: A suit for divorce being a suit with the consequences of civil wrong will be guided under Code of Civil Procedure. Order VIII of the C.P.C prescribes for written statement set-off and counter claim. Rule 6A permits a defendant to set-up by way of counter claim of the plaintiff, any right or claim in respect of cause of action accruing to the defendant against the plaintiff. Rules 6C mandates that the plaintiff in such a situation of a counter claim can contend that the claim thereby raised ought not be disposed of by way of counter claim but in an independent suit. Then the plaintiff before settlement of issues in relation to counter claim apply to the court for an order that such counter claim may be excluded. Order XIV Rule 2 mandates the court to pronounce Judgment on all issue. Order XV rule 3 mandates that if the parties are at issue on some question of law or facts then it will direct the parties to adduce evidence on such issue. Order XV rule 1 mandates that at the first hearing of a suit if it appears that the parties are not at issue on any question of law or on facts, the court may at once pronounce Judgment.

In the given case when the suit is filed on the ground of cruelty and desertion, the wife admits desertion but makes counter allegation of cruelty. In view of the referred rule Order XV rule 1 the court may pronounce Judgment on the ground of desertion on admission. But since the allegation of cruelty has been challenged the parties are at issue on that point of fact then considering the mandate of order XIV rule 2 it becomes obligatory on the part of the court not to pronounce Judgment at that occasion but only after adducing of evidence for the limited purpose of cruelty. If there will be no allegation of cruelty by husband then the suit may be decreed as already stated above.

Under the provisions of the Hindu Marriage Act, Section 13 r/w S.14 no petition for dissolution of marriage can be presented unless on the date of presentation of the petition one year has elapsed since the date of marriage. Thus in such a suit the cooling off period must be considered.

Q.No.4 :- Due to strained relations between the parents, a child who idally needs the company of both the parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective considerations to be kept in mind in awarding “shared parenting” orders. Discuss in the light of latest case on the point.

Ans:- The custody of child remains one of the major issue in a case filed for divorce. The law as mandated prescribes that the child should be given in care and custody of such person with whom the best interest of the child remains under consideration. It also needs consideration for the court in any given circumstance where there is bitter relation between the spouses but at the same time the child idally needs company of both the parents.

The law commission in its report no.257 on reforms in guardianship and custody laws in India dt. 22 May, 2015 emphasized of the welfare of the child as the paramount consideration in adjudicating custody and guardianship matters and has decided to study the issues adopting a shared parenting system in India. The matter was considered inviting comments of the public and others involved in the fields and has formulated some guide lines. However, I do not want to discuss much on this aspect except that it has been considered joint custody:-

- (i) Share physical custody of the child, which may be equally shared, or in such proportion as the court may determine for the welfare of the child,;
- (ii) They equally share joint responsibilities for the care and control of the child and the joint authorities to take decision concerning the child.

In Habeas Corpus petition No. 1696/2011 and M.P. No. 01/2012 decided on 09.05.12 by the Hon'ble High Court of Madras between Jayanthi v. The commissioner of Police and others, wherein the petitioner, who happens to be the mother of the detenu, has filed application under article 226 for his custody.

In that case the dispute cropped up between the parents of the detenu that there was a case of violence instituted by the petitioner against her husband, the third respondent in the given case, however he was relieved from the charge. Thereafter, the third respondent initiated a proceeding in the court of Perth for shared parental responsibilities and a compromise was arrived in which final orders was passed on 07.07.11 granting shared parenting. The detenu was granted permanent custody with his mother with visitation rights to the third respondent and as per the order, either parent can take the detenu out side Australia for a period of three weeks for the purpose of a holiday after giving the other parent 21 days written notice. The travelling parent also has to provide a written itinerary and proof of return tickets to the other parent within 14 days of the departure and also deposit a sum of Aus \$ 5000/- into the trust account of the solicitors of the non-traveling parents within 14 days of the departure. The traveling parents must also provide a mobile telephone number to the other parents to facilitate reasonable telephone communication with the detenu during overseas.

Though in that case the third respondent has obtained custody under the terms of the order but was refusing to send him back to his mother and for that the petition was filed which was allowed. In the present question we are not much concerned with the order under which the petition was allowed. To confine myself to the answer it can be seen that in any given case the court must consider the best interest of the child. It also needs consideration while granting joint custody.

(1) In making an order for joint custody under Chapter IIA, the court shall have regard to the following, namely:--

- a. whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child;
- b. whether each of the parents is willing and able to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
- c. whether the parents are able to jointly design and implement a day-to-day care plan that fosters stability;
- d. the maturity, lifestyle and background (including culture and traditions) of the child and parents, and any other characteristics that the court thinks are relevant;
- e. the extent to which each parent has fulfilled, or failed to fulfil, his responsibilities as a parent;

- f. the extent to which the parents are able or unable to find a reasonable way of working together;
- g. the extent to which the higher income parent is willing to support in creating similar standards of living in each parental home;
- h. the child's existing relationship with each parent, siblings, and other persons who may significantly affect the child's welfare;
- i. the needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
- j. any family violence involving the child or a member of the child's family;
- k. whether the child is capable of forming an intelligent preference; and l. any other fact or circumstance that the court thinks is relevant.

(2) The court shall direct the parents to conduct an annual review of the welfare of the child and the income of each parent, and to file the same before the court.

Thus it can be said that while deciding the matter of shared parenting the above guidelines needs consideration by the court.

Q.No.5: What are the practical difficulties in execution of an orders for grant of maintenance u/s 125 Cr.P.C? Discuss the available options in law before a family Judge for the realization of the maintenance amount awarded u/s 125 Cr.P.C. with special reference to case laws.

Ans:- An order passed for grant of maintenance u/s 125 of the Cr.P.C is to be executed under the promulgation of warrant as prescribed under form no.19 of the Code of Criminal Procedure, 1973. The warrant mandates the officer-in-charge to bring the defaulting person who has means to maintain his wife but has neglected and has not paid the due amount as ordered. If such person either before the Officer-in-charge or if brought before the court agrees or pays the amount ordered then he can be set free. But if he fails to satisfy the order then the Officer-in-charge may sell the movable property attached under the said promulgation to satisfy the order of maintenance.

The basic difficulty in execution of such an order remains that, so far it relates to the general condition of Jharkhand, the persons so ordered are generally poor agriculturist or labourers having no such specific movable property known to the court. Even the party, the petitioner (s), generally do not disclose the movable property in possession of such defaulting person. It cause hardship to the court as well as the Officer-in-charge whom the warrant has been sent to get it executed in accordance with the mandate of law.

Q.No.6 :- What are the principles of computation of maintenance in a case u/s 125 Cr.P.C. ? How will the quantum of maintenance vary in case the competent court has awarded maintenance under the Domestic Violence Act and/ or u/s 24 of the Hindu Marriage Act.

Ans:- The maintenance u/s 125 of the Cr.P.C is to be based according to the income or the earning capacity of the husband in a case where the wife is unable to maintain herself. The amount of such maintenance can be altered under the conditions disclosed U/s 127 of the Cr.P.C and it can be enhanced or lowered in case the income of the husband is enhanced or lowered. Thus, the computation of

maintenance in a case u/s 125 is fully based upon the income of such husband. The maintenance granted under this act become final if not challenged or if it is upheld before the superior court.

But so far the maintenance, as stated under the Protection of Women from the Domestic Violence Act, sub-section (k) of Section 2 defines 'monitory relief' means the compensation which the Magistrate may order the respondent to pay to the aggrieved person, at any stage during the hearing of an application seeking any relief under this Act, to meet the expenses incurred and the losses suffered by the aggrieved person as a result of the Domestic Violence. S. 20 mandates that such relief may include the loss of earning, the medical expenses, the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and the maintenance for the aggrieved person as well as her children, if any, including an order or in addition to an order of maintenance u/s 125 of the Cr.P.C. or any other law for the time being in force.

While Section 24 of the Hindu Marriage Act prescribes-

Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable:

The direction by the Civil Court is not a final determination under section 24 of the Hindu Marriage Act to pay the expenses of the proceeding, and monthly during the proceeding such sum. It is an order pendente lite having regard to the petitioners own income and the income of the respondent, it may seem to the Court to be reasonable.

If all these provisions are considered harmoniously and in tandem, there appears some basic difference in the language and intention for which the sections have been mandated. It is the basic reason that there always will be difference in maintenance granted to the parties under either of the Acts read with their respective provisions.

Q.No.7:- What is the difference in the jurisdiction of the court under the courts and Wards Act and Minority and Guardianship Act in appointment of guardians of a minor?

Ans:- Under the Courts of Wards Act, 1879 (Bengal Act IX of 1879) the definition of 'ward' means any person who is under the charge of the Court of Wards, or whose properties is under such charge.

The Board of Revenue shall be the court of Wards for the territories to which this act extends.

In the event the sole proprietor of a estate, or all the joint proprietors of an estate are disqualified in pursuance to section 6 of this Act, the court (the Court of Wards) shall have the power to take charge of all the properties of every such proprietor or joint proprietor within its jurisdiction.

The Court of Wards was a legal body created by the East India Company on a model similar to as existed in England from 1540 to 1660. Its purpose was to protect heirs and their estates when the heir was deemed to be a minor and therefore incapable to acting independently.

To the contrary the District Court have general original jurisdiction to appoint a guardian of a minor. Under the Court of Wards Act the ward has been appointed under statute as was prevalent at the relevant time.

Even if the property may vest in the Court of wards under the act above but still the civil court has power to appoint competent person to be the guardian of such minor and after such appointment the said appointed guardian can take back the properties vested to the court of wards.

Q.No.8:- What are major differences in procedure for adoption by Indian Prospective adoptive parents living in India and inter country adoption? What are the eligibility criterion for prospective adopting parents ? Discuss with relevant provisions of law and case laws ?

Ans:- Section 6 of The Hindu Adoptions and Maintenance Act, 1956 prescribes:-

Requisites of a valid adoption. —No adoption shall be valid unless- (i) the person adopting has the capacity, and also the right, to take in adoption;

(ii) the person giving in adoption has the capacity to do so;

(iii) the person adopted is capable of being taken in adoption; and

(iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

In country and Inter-country Adoption:-

As per the guidelines for adoption issued by the Ministry of Welfare through its resolution dated 29-5-1995, the procedure indicated therein has to be followed and in the event of violation of the procedure prescribed under the guidelines, cases for inter-country adoption cannot be cleared. In the process of inter-country adoption and in-country adoption, there is an active role for the placement agency, **VACA** and **CARA** and it has to be tested whether they follow the procedure prescribed under the guidelines.

Guidelines to be followed;

According to the guidelines issued by the Government of India, the procedure for inter-country adoption is as follows:

(1) CARA has to act as a clearing house of information in regard to children available for in-country and inter-country adoption to regulate, monitor and develop programme for the rehabilitation of the children through adoption. (Guideline 2.7)

(2) CARA has to receive the names and particulars of the children available for adoption who are under the care of Indian, social or child welfare agencies recognized by it and to maintain the register containing the names and other particulars of such children. (Guideline 2.13)

(3) No recognized placement agency can process the application in the competent Court for inter-country adoption without obtaining NOC from CARA. (Guideline No. 2.14) (4) Before issuing NOC, CARA shall have to ensure that the recognized placement agency has put in adequate efforts for finding an Indian family for the said child and the clearance by VACA to that effect has also to be enclosed.

Based on the judgment in the case of *Lakshmi Kant Pandey* and section 41 (3) of the J.J. Act, the Central Adoption Resources Agency (in short, 'the **CARA**'), has framed a set of guidelines. As per the said guidelines, in Clause 23 (2) thereof, the Specialized Adoption Agency shall file a petition in the competent court of jurisdiction for obtaining necessary adoption order under the Act, within ten days of acceptance of referral by the prospective adoptive parents and shall pursue the same regularly with the court so that the provision of legal adoption is completed at the earliest. The said clause also envisages that the competent court is required to dispose of the case within a maximum period of two months from the date of filing in accordance with the direction of the Supreme Court in the case of *Lakshmi Kant Pandey*. Rule 33 (5) of the Rules framed under the J.J. Act envisages that for the purpose of section 41 "court implies a civil court" which has jurisdiction in matters of adoption and guardianship and may include the court of District Judge, Family Courts and City Civil Courts.

A conjoint reading of section 41 (5) and Rules 25 (m) and Rule 33(3)(b) makes it crystal clear that when an abandoned child is offered for adoption, the Child Welfare Committee, which is a quasi judicial authority has to declare the child free for adoption, where-after the competent court has to pass necessary orders under section 41 allowing a child to be given in adoption.

It is, therefore, seen that it is only the Child Welfare Committee under the J.J. Act, who is authorized to declare a child free for adoption and law does not require any other agency, be it the State Council for Child Welfare or any other body, to have any say in regard to adoption.

Section 41 (6) (b) of the J.J. Act, specifically provides that the court may allow a child to be given in adoption to a person irrespective of marital status.

Clause 44 (5) of the CARA Guidelines prescribes that siblings of different ages shall, as far as possible, be placed in adoption in the same family and such children shall also be categorized as special need children. The CARA guidelines are notified in a notification issued by the Ministry of Women and Children Development, Government of India for the purpose mentioned therein.

Central Adoption Resource Authority (CARA) is a statutory body of Ministry of Women & Child Development, Government of India. It functions as the nodal body for adoption of Indian children and is mandated to monitor and regulate in-country and inter-country adoptions. CARA is designated as the Central Authority to deal with inter-country adoptions in accordance with the provisions of the Hague Convention on Inter-country Adoption, 1993, ratified by Government of India in 2003. CARA primarily deals with adoption of orphan, abandoned and surrendered children through its associated /recognised adoption agencies.

The inter-country adoption shall be done as per the provision of the Act and the adoption regulation framed by the authority. Adoption of a child by another relative irrespective of their religion can be made as per the provision of this Act and the adoption regulation framed by the authority.

The fundamental principles that govern adoption of children from India-

(A) The child's best interest shall be of paramount consideration while processing any adoption placement.

(B).- Preference shall be given to place the child in adoption with Indian Citizens and with due regard to the principle of the placement of the child in his own socio-cultural environment as far as possible.

(C). All adoption shall be registered on child adoption resource information and guidance system and the confidentiality of the same shall be maintained by the authority.

In country relative adoption is registration by PATs on CARINGS and uploading of documents then verification by BCPU and approval by SAR and after its compliance the allegation will be filed for obtaining court order by PATs. The PAT shall file an application in the competent court in case of in country relative adoption along with consent letter of the biological parents and all other document as prescribed in law. But in case of inter country adoption there will be counseling and preparation of HSR of PATs by the social worker of AFAA or CA for Hague signatory countries and Indian missions for others. Registration of PATs in CARINGS by AFAA/CA/INDIAN MISSION. Uploading of documents by AFAA/CA/INDIAN MISSION. Initial approval by CARA. Child referral and reservation through CARINGS. Child matching by SAAR and acceptance by PATs. NOC by CARA. Re-adoption faster care. Court order, conformance certificate, Passport and exit Visa for the child. Child arrival, citizenship, courts -adoption follow-up till two years.

Eligibility Criteria for PAP :-

Under the J.J. Act sec.57 prescribes the eligibility criteria for PAP, it can be summarised - that they must be physically fit, financially sound, mentally alert and motivated for the upbringing of the child; If a couple intend to adopt then consent of the couple is required; A single or divorced person can also adopt subject to the fulfilment of the regulations for such adoption; A single male cannot adopt a girl child; A couple must have two years of suitable marital relationship before they can adopt a child; There is also guideline regarding the single PAP or Couple PAP vis a vis the age of the child.

These are some of the procedures regarding adoption be it adoption under Hindu law, In country Adoption or Inter-country adoption.

With these words I have tried to give a broad outlook on the questions formulated for the reply for consideration.

With Regards

Vishnu Kant Sahay

Pr. Distt. & Sess. Judge

Cum

Pr. Judge Family Court, A/c

Latehar.