LAW COMMISSION OF INDIA

ONE HUNDRED THIRTY-SIXTH REPORT

ON

CONFLICTS IN HIGH COURT DECISIONS ON CENTRAL LAWS—HOW TO FORECLOSE AND HOW TO RESOLVE

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LAW COMMISSION
भारत सरकार
GOVERNMENT OF INDIA
शास्त्री भवन,
SHASTRI BHAWAN,
नई दिल्ली
NEW DELHI

M. P. THAKKAR
Chairman

D.O. No. 6(2)/90-LC(LS) Feb. 21, 1990

To

Shri Dinesh Goswami,
Minister of Law and Justice,
Government of India,
Shastri Bhavan,
New Delhi.

Dear Minister,

Re. Presentation of 136th Report

Forwarded herewith please find the 136th Report of the Law Commission of India bearing the caption which conveys its contents, viz. : —

CONFLICTS IN HIGH COURT DECISIONS ON CENTRAL LAWS—HOW TO FORECLOSE AND HOW TO RESOLVE

This report is the outcome of a *suo motu* initiative on the part of the Commission which felt exercised by the frustrating situation stemming from the identical Central law being interpreted, applied, and administered in different and inconsistent fashion in different parts of India as a result of conflicting judgements of the concerned High Courts. The resultant legal chaos has created a situation where similarly situated citizens governed by the same Central law '*have*' a right in one part of the country and '*do not have*' such a right in another part of the country. This situation would continue to obtain indefinitely if the concerned matter was not carried to the Supreme Court or would continue for decades till the law was eventually settled by the Supreme Court even if the matter was carried to the Supreme Court. For instance, the law as to whether a widow would be entitled to become a full or a limited owner of a property in a particular situation came to be settled in favour of the widow after about 25 years. And the law as to whether the widow of a victim of a motor vehicle accident could claim compensation in a given situation came to be settled in favour of the widow after nearly 20 years (*vide* paras 2.14 and 2.15 of Chapter II of the Report). The need for a solution, therefore, is more than evident. Hence the Commission has endeavoured (1) to evolve a mechanism to nip such conflicts in the bud and (2) to resolve existing conflicts in a phased manner by recommending legislative clarifications. This report is accordingly being presented with the hope that the gravity and the urgency, of the situation will be appreciated and the needful will be done as soon as practicable.

With warm regards.

Yours faithfully,

Sd/-
(M. P. THAKKAR)

Encl : 136th Report.

CONTENTS

CHAPTER I
INTRODUCTION

1.1. **Problem under examination.**—The constitutional guarantee of "Equality before law" notwithstanding, under the identical provisions of the identical Central law, can a citizen 'have' a legal right in one State and 'not have' such a right in another part of the country? For instance, can a spouse '*have*' a right to seek maintenance under section 25(1) of the Hindu Marriage Act, 1955 in Andhra Pradesh but '*not to have*' such a right in West Bengal?[1] And if identical provisions of identical Central Acts are interpreted, administered, and applied, in different and inconsistent manner in different parts of the country, the problem certainly calls for urgent and immediate attention with the end in view to (1) remove the existing anomalies in the laws arising by reason of conflicting judgments of the different Hign Courts and (2) to evolve a mechanism to ensure that such anomalies do not come into existence in future. Hence the present *suo motu* exercise.

1.2 **Want of uniformity an evil.**—It is needless to point out that want of uniformity in law not only impairs the quality of the substantive or procedural law but also causes serious inconvenience to citizens in general. Those whose business is to advise persons who consult them on questions of law, find it difficult to give such advice with confidence where the decisions are conflicting. Those who are entrusted with the function of adjudicating on questions of law must spend considerable time in choosing between two or more possible views on a subject which falls to be considered before them, In this process, there is bound to result considerable waste of time and energy. That apart, it is not a satisfactory situation that on a given topic, the rule of law prevailing in one part of the country should be different from the rule prevailing in another part of the country when the disparity arises from conflicting judicial interpretations.

1.3. **Scheme of the report.**—It is against this background that the Commission has in this report made an attempt to examine the problem and to make certain recommendations on the subject. In the first few chapters of the report, the Commission deals with the approach that lies at the foundation of the Indian legal system and considers adequacy of the present machinery to deal with the aforesaid problem. Towards the end of the report, a recommendation calculated to resolve the issue has been made. Besides, the Commission has also considered it proper existing conflict of significant decisions in the sphere of one important area of law to bring out the namely, the major enactments that deal with Hindu Family law and to make appropriate recommendations in order to achieve uniformity in law. The Commission hopes to undertake a similar exercise in other areas of law in a phased manner at an appropriate time in future.

CHAPTER II

UNIFORMITY AND THE INDIAN LEGAL SYSTEM

2.1. **Uniformity.**—It is an elementary, but basic propositon in the Indian legal system that, as far as possible, the law on important topics forming part of the legal system should be uniform. A reasonably deep study of the various provisions on the subject would show that it is an anxiety of our system to maintain and secure and, wherever necessary, to restore, uniformity on important points of law. The manner in which this uniformity is maintained will be presently dealt with.

2.2 **Source of uniformity.**—Our Constitution and legal system have given primacy to uniformity of interpretation. Sources of such uniformity are more than one. These have their origin in a variety of instruments, such as the Constitution, some statutory provisions, the doctrines of the legal system relating to the operation of case law, certain historical developments relevant to the subject, the reasons which led to the appointment of Law Commision and some aspects of administrative law.

2.3 **Article 141 of the Constitution.**—Article 141 of the Constitution declares that the law declared by the Supreme Court shall be binding on all courts and authorities within India. This article, in one of its aepects, is intended to reinforce the supremacy of the Supreme Court as an institution having its sway all over India, and as putting beyond doubt the proposition that its pronouncements are paramount for all courts and authorities. But, in another of its aspects, it is also intended to promote uniformity. Judicial interpretation, whether it be on a constitutional question or an ordinary question of law, including a judicial pronouncement on a question of uncodified law, once it comes from the Supreme Court, will ensure uniformity for the future all over India. This may appear to be elementary, but is of basic importance when one is concerned with the desire of the Constitution-makers to ensure uniform interpretation.

2.4 **Appellate Jurisdiction in constitutional matters and other matters.**—The scheme of appellate jurisdiction of the higher judiciary, as envisaged in the Constitution, reveals how anxious the Constitution-makers have been to ensure that within the country or within a State, there shall be uniformity of interpretation, as far as possible. For example, the right of appeal to the Supreme Court in every matter which involves an interpretation of the Constitution, shows that the makers of the Contsitution desired that such questions must be ultimately decided by the highes court in the land. Coming to questions of ordinary civil law, the provision in article 133 of the Constitution, which gives a right of an appeal if there is involved a substantial question of law which needs to be decided by the Superme Court, is an indication of the basic premise that if there has been a controversy on a question of law and the controversy needs to be decided by the Supreme Court, then that Court must have jurisdiction to hear and decide the matter. It is thus evident that the Constitution accords prime consideration to the need for uniformity.

2.5. **Appeal by special leave.**—It is well known that the jurisdiction of the Supreme Court to grant special leave to appeal under article 136 of the Constitution is wide engough to permit interference by the Supreme Court when there is need for such interference, because otherwise the law would remain in an unsatisfactory condition or would be lacking in uniformity within the country. [1],[2],[3].

2.6. **Access to the Supreme Court.**—Before the Supreme Court is called upon to make a pronouncement on a particular subject, there is the question of access to the Supreme Court. The need for givng the citizens such access to the highest court of the land where a question of law is involved was very much before the Constitution-makers and supplies the principal rational for those provisions. The Constitution envisages a right of appeal to the Supreme Court when there is involved a substantial question of law that needs to be decided by the Supreme Court.[4] This right of appeal is not merely for the benefit of the litigant involved in the immediate controversy. It is also intended to enable the obtaining of pronouncements of law by the highest court. In this sense, such a right of appeal is intended to benefit the legal system itself, by advancing and promoting the cause of uniform interpretation.

2.7. **Binding effect of High Court judgement.**—It is true that a provision mandating that the pronouncement of a High Court on questions of law shall bind courts and authorities within the State is not found in the Constitution. But it is settled beyond doubt that the pronouncements of a High Court have the same authority within the State as those of the Supreme Court have throughout India. This follows from a number of judicial decisions that have affirmed and reaffirmed the principle mentioned above.

In fact, it is because of the existence of such a principle and it is against the background of such a principle that section 100 of the Code of Civil Procedure, 1908 formulates the right of second appeal to the High Court in terms of phraseology which focuses itself upon the involvement of a question of law. But for this emphasis on a question of law, an emphasis which the Law Commission of India had an opportunity of dealing with in its report on the Code[5] this aspect could have escaped attention. But today, it cannot escape attention.[6]

This emphasis, as found in section 100 of the Code of Civil Procedure, was more specifically formulated in the recommendation of the Law Commission which has ultimately found its place in the section as amended in 1976. The Law Commission made the following observations as to the rationale underlying the right of second appeal :

> "I-J. 58. The rationale behind allowing a second appeal on a question of law is, that there ought to be some tribunal having a jurisdiction that will enable it to maintain, and, where necessary, re-establish uniformity throughout the State on important legal issues, so that within the area of the State, the law, in so far as it is not enacted law, should be laid down, or capable of being laid down, by one court whose rulings will be binding on all courts, tribunals and authorities within the area over which it has jurisdiction. This is implicit in any legal system where the higher courts have authority to make binding decisions on question of law".
>
> "I-J. 59, When a case involves a substantial point of law, the general interest of society in the predictability of the law clearly necessitates a system of appeals from courts of first instance to a central appeal court".
>
> "As has been observed. "The real justification for appeals on questions of this sort is not so much that the law laid down by the appeal court is likely to be superior to that laid down by a lower court, as that there should be 'a final rule laid down which binds all future courts and so facilitates the prediction of the law. In such a case the individual litigants are sacrificed, with some justification, on the altar of law-making-, and must find such consolation as they can in the monument of a leading case".

2.8. **Second appeal to High Court.**—One can view section 100 of the Code of Civil Procedure from another angle. The section is based on the principle that *within the State*, there should be uniformity on questions of law. It is on this basis that section 100 gives a right of second appeal to an aggrieved party if a question of law is involved and if certain other conditions are satisfied. The basic objective of this provision of the Civil Procedure Code was considered at some length in the Law Commission's Report on the Code of Civil Procedure. The Commission took the opportunity of analysing the type of questions which should appropriately reach the High Court by way of second appeal. Dealing with this aspect. the Law Commission had an occasion to observe[7] :—

> "*Nature of the question of law regarded as appropriate for* second appeal."
>
> "I-J. 77. We shall indicate very broadly the nature of the questions of law which we regard as appropriate for submission to the High Court under section 100 as we propose to revise.
>
> First- and the most important of all is the consideration of uniformity throughout the State. It is obvious that on questions of law uniformity must be maintained. In so far as interpretation of enacted laws having Statewise importance is concerned, it is the task of the judiciary to maintain the unity and the High Court, as the highest tribunal at the State level, should continue to have the ultimate authority to establish unity by resolving or avoiding the possibility of different views in lower courts.".

2.9. The above passages show that in conferring a *right of second appeal*, the legal system is as much concerned with the *quality of the law*, as it is with the grievance of the particular litigant. Unfortunately, this aspect of the scheme of appeal is not visible on the surface. Therefore, it often escapes notice. But, it is an aspect of vital importance. The objective of maintaining certainty in the law, and of avoiding (or *removing*) want of uniformity is implicit in the provision of the code as to second appeal, as already stated.[8]

2.10. **"Present position".**—The unsatisfactory position that can result from want of uniformity, does not require to be set out *in detail*. Even a *cursory* look at the condition of the case law on any matter arising by way of construction of statute or by way of exposition of uncodified law would be enough. Reports of the Law Commission of India on various subjects in the past have drawn attention to conflict of decisions, wherever necessary.[9] One can also take at random, many more instances from the case law relating to any Central Act of general application and importance, and discover how there exists a want of uniformity on the interpretation of so many provisions of that Act. The position is the same, even when one comes to rules of law not derived from statute, but based on precedent.

2.11. **Doctrine of precedent.**—The consideration of uniformity is, in fact, one of the philosophical justifications for the doctrine of precedent. We are not, at the moment, concerned with any theoretical exposition of this doctrine. But it seems necessary to draw attention to some aspects of the doctrine. *Stare decisis* has become an integral part of our law and the doctrines of precedent and *stare decisis* seems to have at least three purposes in mind :—

(1) they provide a basis from which lawyers can advise clients;

(2) they avoid additional costs of appeals and unnecessary litigation; and

(3) there is a danger that in the absence of these doctrines, different courts in different areas would apply different principles of law in the adjudication of controversies.

The last mentioned object is of direct relevance for the healthy functioning of the legal system.

2.12. **Law Commission in 19th Century.**—It is not merely in the constitutional or statutory provisions or uncodified rules relating to precedent that the aspect of uniform interpretation finds a reflection. One can discern its role as having been visualised by those who had occasion to deal with the shaping of the Indian Legal System in the course of the last two centuries or so. One of the considerations which supplied the inspiration for the setting up of the Law Commissions in the 19th Century was the desire to secure uniformity of law. It is true that this was at a time when the stress was more on removing local variations in the law as enacted or as followed by custom, rather than on avoiding divergences in judicial decisions. But the latter consideration was also within the mind of the authorities. For example, one of the measures of judicial reform achieved in the latter half of the 19th century was the fusion of the parallel jurisdictions earlier possessed by two sets of courts which were functioning within and outside the Presidency towns. The great inconvenience of conflicting pronouncements of law by the erstwhile Supreme Courts (for the Presidency Towns) and by the erstwhile Sudder Diwani Adalats (for areas outside the Presidency Town) was perceived by those who were entrusted with the task of advising in such matters. That is how the High Courts Act, 1861 was born, whereunder these pre-existing jurisdictions were combined into one forum which would lay down the law autoritatively for its own area.

2.13. **Present Law Commission.**—Even in the present century, the creation of the Law Commission of India in 1955 was, in part, the result of a realisation that wherever a conflict of decisions has impaired the uniformity of law, that uniformity should be re-introduced into the legal system. It is needless to state[10] that whenever the Law Commission has entered into an examination of a particular Central Act, it has, in making recommendations with reference to amendment, repeal or revision of that Central Act, borne in mind the need for reintroducing uniformity, if found to have been damaged by a conflict of decisions or other sources of ambiguity in the law.

2.14. **Section 14(1), Hindu Succession Act.**—An instance of conflict of decision which fortunately came to be resolved by the Supreme Court (after a time lag of nearly 25 years) may be referred to at this stage. The case related to section 14(1) of the Hindu Succession Act, 1956 and interpretation of the words "full owner" occuring in that section. Section 14(1) of the Act reads as under:—

> "(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
>
> *Explanation.*—In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act."

The probelem that had arisen before the High Courts can be best narrated from the opening paragraph of the judgment of the Supreme Court [11].

> "Under the same law (a) in an identical fact-situation, a Hindu widow who has inherited property in Orissa or Andhra Preadesh would be a 'limited owner' and would not become an 'absolute owner' thereof, whereas, if she has inherited property in Madras, Punjab, Bombay or Gujarat, she would become an 'absolute owner'. That is to say, in a situation where a Hindu widow regains possession of a property (in which she had a limited ownership) subsequent to the commencement of the Act (b) upon the retransfer of the very same property to her by the transferee in whose favour she had transferred it prior to the commencement of the Act. This incongruous situation has arisen because of an interpretation and application of section 14(1) of the Hindu Succession Act (Act). In the context of the aforesaid fact-situation the High Courts of Orissa (c) and Andhra Pradesh (d) have proclaimed that she would be only a 'limited owner' of such property on such retransfer whereas the High Courts of Madras (e), Punjab (f), Bombay (g) and Gujarat (h) have taken a contrary view and have pronounced that she would become an 'absolute owner' of such a property in the aforesaid situation. We have therefore to undertake this exercise to remove the unaesthetic wrinkles from the face of law to ensure that a Hindu widow has the same rights under the same law regardless of the fact as to whether her property is situated within the jurisdiction of one High Court or the other."

Ultimately, the Supreme Court held that the widow would be entitled as full owner in the above circumstances.

2.15. Another illustration of a controvesy which ultimately was resolved by the Supreme Court (after a time lag of nearly 20 years) may be referred to in this context.[12].

Insurer's Liability under Motor Vehicles Act.—Section 96(2) (b) (ii), Motor Vehicles Act, 1939 was the provision to be considered. While section 96 of the Motor Vehicles Act imposes on insurers of motor vehicles the duty to satisfy a judgment obtained against persons insured in respect of third party risks, it was permissible under section 96(2) for the insurer to raise certain defences to the action on specified grounds. Thus, a defence could be based on section 96(2)(b)(ii) which related to—

> "a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification".

(a) Section 14(1) of Hindu Succession Act of 1956.

(b) The Act came into force on June 17, 1956.

(c) Ganesh Mahanta v. Sukria Bewa, AIR 1963 Ori 167 : 39 Cut LT 474.

(d) Venkatarathnam v. Palamma, (1970) 2 Andh WR 264.

(e) Chinnakolandai Gourdan v. Thanji Gounder, ILR (1966) I Mad 326 : AIR 1965 Mad 497: (1965) 2 MLJ 247.

(f) Teja Singh v. Jagat Singh, AIR 1964 Punj 403.

(g) Ramgowda Aunagowda v. Bhausaheb, ILR 52 Bom I: AIR 1927 PC 227.

(h) Bai Champa v. Chandrakanta Hiralal Dahyabhai Sodagar, AIR 1973 Guj 227.

The question that troubled the High Courts, until it was resolved by the Supreme Court, can be best stated by quoting from the judgment of the Supreme Court:—

> "While in some States a widow of a victim of a motor vehicle accident can recover the amount of compensation awarded to her from the insurance company, in a precisely similar fact-situation she would be unable to do so, in other States, conflicting views having been taken by the respective High Courts. The unaesthetic wrinkles from the face of law require to be removed by settling the law, so *that the same law does not operate on citizens differently, depending on the situs of the accident.* The qustion is, whether the insurer is entitled to claim immunity from a decree obtained by the dependants of the victim of a fatal accident on the ground that the insurance policy provided 'a condition excluding driving by a named person or persons or by any person who is not duly licensed or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification', and that such exclusion was permissible in the context of section 96(2)(b)(ii) for claiming immunity against the obligation to satisfy the judgments against the insured in respect of third party risks".

On the question of the insurer's liability, the Supreme Court held that the absolute exclusionary clause had to be read down so as to bring it in conformity with the substantive provisions of the Act. What emerges from the aforesaid illustration is that it took about 25 years before uniformity in the law as contained in Section 14 of the Hindu Succession Act could be brought about by the Supreme Court. Till then the law was being administered differently in different parts of the country in terms of the interpretation made by the respective High Courts of concerned States. Similarly, in the second illustration under the Motor Vehicles Act it took nearly 20 years before the law could be uniformly laid down by the Supreme Court. In the result, a Hindu widow acquired a right to property in one State but not under another under the identical All-India-Law. The widow of a victim became entitled to compensation in one State but not in another under the same law in an identical situation. Experience, thus, establishes that inordinate delay of nearly 20 years is likely to be caused if the task of bringing in uniformity is left only to be settled and laid down by the Supreme Court in appeals as and when the matter is taken up to the Supreme Court as also establishes the need for uniformity in law for application throughout the country.

2.16. **Question to be considered the—machinery.**—This excursus has been considered necessary in order to enable us to proceed to the next question. If, as is the theme of the preceding paragraphs, uniformity of decisions and remedying of the inconvenience caused by conflicting decisions is a desideratum, then what should be the machinery for maintaining such uniformity? Is the existing machinery on the subject adequate and if not, what new measures should be devised for the purpose? We shall, at the proper place, give some samples of important points of law on which there appears to exist conflict of decisions. In that connection, we may also mention that there are several questions of law on which such a conflict existed in the past for a fairly long period, though the same has been subsequently removed, either by judicial pronouncements of the court, or by legislative clarification made as a result of the recommendations of the Law Commission of India or otherwise. At the end of this report, we shall make appropriate recommendations as to the mechanism to be introduced for the purpose of maintaining uniformity.

CHAPTER III

PRESENT MACHINERY, IF ADEQUATE

3.1. **Present machinery: appeal to Supreme Court.**—As regards the machinery at present existing for the purpose of settling a conflict of views, it primarily consists of access to the Supreme Court or legislative intervention. Access to the Supreme Court by way of appeal is, in the very nature of things, sporadic and depends on the accidents of litigation. A litigant may or may not appeal to the Supreme Court on a question of law. Even if he has appealed on a question of law, the appeal may be withdrawn by him for his own reasons, or the matter may be compromised or otherwise disposed of, without a decision. Again, even if the matter comes to be heard and decided on the merits before the Supreme Court, the particular question of law might not be gone into by the Supreme Court. Other grounds would have supplied the material for the final decision. Thus, clarification by the Supreme Court—which would be a very good step—is not actually achieved in every case, because the process is not designed systematically for the purpose.

3.2. **Legislative intervention.**—Legislative intervention designed to clarify the law which might have become obscure by a conflict of decisions, is also not a very systematic process. The point of conflict may not be brought to the notice of the Legislature at all. Even if it is brought to the notice of the legislature, the legislature may not have the time or the inclination to look into it, because of what are regarded as more pressing demands. Sometimes, even after the Legislature has looked into the matter and a legislative proposal has been introduced on the subject, the proposal may not culminate in actual legislation, because the proposal may not be passed or the Bill, as passed by the House finally, may not contain the needed clarification. No doubt, the functioning of a body like the Law Commission brings to the notice of the Legislature the difficulty caused by conflict of decisions on a particular point. But the question of legislative time, inclination and other matters mentioned above, still remains.

3.3. **Need for amendment.**—It seems, therefore, that there is need to supplement the existing machinery by creating some apparatus that will be designed directly to seek and achieve uniformity of law temporarily marred by conflict of views. The cause of uniformity has to be improved by removing the defect in the system, whereunder matters in the nature of conflict of decisions do not *systematically* reach the courts (the Supreme Court by way of appeal) or the Legislature (for statutory clarification), or do not reach either of these agencies promptly and effectively. In order to deal with the subject in a concrete manner, we are making a recommendation in this report[1] as to the machinery that can be devised to achieve uniformity of law.

3.4. **Certain specific enactments concerning Hindu Law covered.**—It is appropriate to draw attention to the conflict of decisions that seems to exist on various significant points concerning certain specific enactments. The present report deals with enactments which constitute an important part of codified Hindu Law, viz., the Acts of Parliament relating to (i) Marriage; and (ii) Succession,— that is to say, the major statutes relating to Hindu Family Law. In due course, the Commission hopes to take up certain other important enactments also, from the point of view of settling the conflict of decisions that might have arisen on the subject.

CHAPTER IV

IDENTIFICATION OF SOME PROBLEMS ARISING OUT OF CONFLICTING DECISIONS OF DIFFERENT HIGH COURTS AND SUGGESTION OF REMEDIAL MEASURES

4.1. The same law cannot be continued to be allowed to be interpreted, applied or administered, in different parts of the country in an inconsistent and conflicting fashion by different High Courts of the cocerned States. The conflict 'may' in course of time be resolved by the Supreme Court *provided however that it is carried to the Supreme Court.* (The litigant may not have the will or the resources to approach the Supreme Court). Even if the conflict ultimately gets resolved, it may be after a decade or two. Existing conflicts must, therefore, be removed by remedial legislative measures. The stupendous and arduous task can be undertaken only in a phased manner. In the present chapter the Commission has dealt with problems arising out of the Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956 respectively.

4.2. **Can or cannot a respondent in a restitution of conjugal rights petition plead by way of defence that the marriage does not subsist? should he or she be driven to a separate suit?** Section 9 of the Hindu Marriage Act, 1955 provides that when either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition, to the District Court for restitution of conjugal rights and the court, on being satisfied of the truth of the statement made in such petition and on being satisfied that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. There is an *Exaplanation* to the section, dealing with the burden of proof of reasonable excuse. There is a conflict of decisions on one question, namely, whether the respondent in the petition for restitution can raise a plea in defence, that the respondent had already obtained dissolution of the marriage according to custom. *The High Court of Rajasthan has held*[1] *that such a plea cannot be raised.* The reason proffered is that the Act makes no express provision for the adjudication of a claim or defence that the marriage between the contending parties stands dissolved by a decision by a private forum like the Panchayat of the tribe. According to that High Court, such adjudication can be obtained only from the civil court and not from the matrimonial court.

But the High Court of Jammu and Kashmir[2] *has taken a contrary view.* In its opinion, a petition under section 9 (for restitution) or under section 13 (for divorce) presupposes an existing valid marriage. The plea that no such marriage exists, either because it never took place or because it was dissolved under a custom or a special enactment, is a defence open to the opposite party to non-suit the petitioner, even if such a defence has not been specifically provided in section 9. According to this view, a matrimonial court can, and indeed is bound to, entertain a defence raising a plea as to non-existence of a marriage or its non-performance or any other legal ground. The matrimonial court must mould its decree or order in accordance with its adjudication on it. *It would appear that the latter view is correct.* It is worth noting that section 29(2) of the Hindu Marriage Act, 1955 expressely provides that the Act is not to affect any right recognised by custom or conferred by any special enactment to obtain dissolution of a Hindu Marriage. Thus, a custom is not abrogated by the Hindu Marriage Act, 1955. Incidentally, the Delhi High Court has held that the custom prevailing amongst Sikh Jats of the Amritsar District to dissolve the marrige otherwise than under the Hindu Marriage Act, 1955 is recognised by law, and where such a dissolution has been made out of court, a subsequent marriage cannot be declared null and void.[3] *The Commission is of the view that,—*

(1) in order to immunize the unfortunate spouse involved in a matrimonial litigation from the evil of multiplicity of proceedings and

(2) in order to ensure that all the controversies between the parties are resolved by the very court before which their matrimonial dispute is initially brought.

instead of driving the parties to a fresh litigation involving incurring of fresh costs, the court must be expressly empowered to resolve all the relevant issues so that 'lis' between parties ends once and for all times.

To resolve the conflict of views and in view of the considerations streesed earlier, *it is recommended that an 'Explanation' broadly on the lines indicated hereunder be added to section* 9:—

"*Explanation* 2. The Court before which a petition for restitution of conjugal rights is presented under this section shall have jurisdiction to decide whether the marriage has been dissolved in exercise of any right recognised by any custom or conferred by any special enactment to obtain the dissolution of a Hindu Marriage, being a right saved by sub-section (2) of section 29."

4.3 **Can one of the spouses who has signed a joint petition for divorce by consent not withdraw his or her consent before the court passes an order granting the prayer** ?

Section 13B of the Hindu Marriage Act, 1955 provides for divorce by consent:—

"13B. Divorce by mutual consent.—(1) 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 by both the parties to a marriage together, whether such marriage was solemanized before or after the commencement of the Marriage Laws (Amendment) Act, 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.

(2) *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.".

[Emphasis added]

After the initial petition for divorce is made jointly by the spouses, the court must wait for the period specified in the section. It is implicit that the consent to divorce as recorded in the initial petition, can be withdrawn by the consenting spouses before a final order is passed by the court granting the request for consent decree for divorce. But can the consent be withdrawn by only one of the spouses? According to one view, it can be so withdrawn, [4], [5], [6] However, according to another view,[7] the withdrawal application made by only one of the two spouses is incompetent and having once appended the signature as a joint petitioner, he or she cannot resile from the consent even though no final order has been passed by the court acting on the joint request. Once the signature is made and petition is presented, such is the view, he or she is tied down to the consent and cannot be allowed to withdraw from the contant unilaterally provided the signautre made in token of the consent is voluntary and not tainted with fraud.

The Delhi as well as the Bombay High Court subscribe to this view. [8]

4.3.1. In the result, *in one part of India a spouse who has second thoughts on the wisdom of consenting to a decree for divorce can retrieve the situation before the court passes the final order, in another part of India he or she cannot do so, though both are governed by the same statutory provision of law.* Such a situation cannot be countenanced by the community, particularly in a matter relating to marital status, and the conflict on the point cannot be tolerated. The statute, therefore, deserves to be amended so that the same law has the same consequences everywhere in the country.

4.3.2. **Which view deserves to prevail and how to amend the law** ?.—Before forming an opinion on the issue, the reasoning which has commended itself to the respective High Courts in support of the two divergent views needs to be examined. *The High Court of Delhi which holds the view that consent 'cannot' be withdrawn by only one of the spouses unilaterally* reasons :—[9]

"9. Sub-section (2) provides that if the petitions is not withdrawn in the meantime, on a joint motion made by the parties not earlier than six months after the date of the presentation of the first petition referred to in sub-sec. (1) and not later than 18 months after the said date, if the Court is satisfied after hearing the parties and after making inquiries that a marriage has been solemnized and the averments in the petition are true, it can pass a decree of divorce. *Though sub-sec.* (2) *of section* 13*B envisages withdrawal of the joint petition, it does not*

prescribe the procedure for withdrawal of the joint petition. I also do not find any other provision in the Act or the Rules dealing with withdrawal of a joint petition presented under section 13*B*(1). However, section 21 of the Act provides that subject to the other provisions contained in the Act and to such Rules as the High Court may make in this behalf, all proceedings under the Act shall be regulated, as far as may be, by the Code. Thus, it is necessary to refer to the provisions dealing with withdrawal and abandonment of plaint in the Code. Order 23, Rule 1 prescribes the procedure for withdrawal and abandonment of a suit. Sub-rule 5 of Rule 1 of Order 23 specifically deals with the power of the Court to permit withdrawal or abandonment of a suit or part of a claim presented jointly by one or more plaintiffs. Sub-r. (5) of R. 1. of 0.23 reads thus :

> "(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under *sub-rule (3), any* suit or part of a claim, without the consent of the other plaintiffs."

Thus, when the suit is filed by two or more plaintiffs, the Court cannot permit one of the several paintiffs to abandon a suit or part of a claim without the consent of the other plaintiffs.

10. Section 13B(1) of the Act also contemplates joint presentation of a petition. It is similar to a suit filed jointly by one or more plaintiffs. *Thus just as a suit or part of a claim cannot be abandoned or withdrawn by one plaintiff, one of the parties to the petition cannot be permitted to withdraw the petition or abandon the prayer without the consent of the other party.* In other words a petition presented under section 13B(1) of the Act cannot be also withdrawn by one party unilaterally. Of course, if the Court is satisfied that the consent was not a free consent and it was the result of *force, fraud or undue influence* then it is a different matter because in such a case the court is empowered specifically to refuse to grant the decree. The Legislature introduced section 13B in the Act by Marriage Law (Amendment) Act, 1976 to provide for a speedy dissolution of marriage when it is found that the marriage is irretrievable. The Legislature provided for an interval of a period of six months between the first motion and the second motion in order to afford the parties further opportunity for reconciliation. If one party is allowed to withdraw the consent even when other grounds, namely that the parties continue to live separately and have not been able to live together still subsist and reconciliation is not possible then it will frustrate the very purpose of the enactment. Very precious time of one of the parties who has waited for over six months for filing the second motion will be wasted and a party who wants to harass and is guilty of abuse of the process of the Court will benefit. This position is made further clear by insertion of sub-sec. (bb) to section 23(1) of the Act. *Under this section, the Court is* empowered to grant the decree even in an undefended case if it is satisfied that the averments in the petition are true and the consent for mutual divorce has not been obtained by force, fraud or undue influence. In my opinion, since the second motion as contemplated in section 13B(2) has to be a joint motion, section 23 would come into operation in a case like the present one when one of the parties refuses to join in the second motion and the other party has no alternative but to make an application to the court for orders on the petition already presented under section 13B(1) of the Act before the specified time of 18 months expires. *If unilateral withdrawal of consent is permitted the Court will not be able to pass a decree in an undefended case under section 23(bb) of the Act.* I am thus unable to accept the contention of the learned counsel for the respondent that he could unilaterally withdraw the consent without proving that the consent was obtained by force, fraud or undue influence.'

[Emphasis supplied]

4.3.3. The same view is held by the High Court of Bombay [10] as reflected in the passage extracted from para 11:—

> "11. ... The above-mentioned circumstances would definitely show that the husband has filed the petition along with his wife for a divorce by mutual consent and that while doing so, he acted voluntarily. There was no question of any confused state of mind. Thus, here is a case where there is abundant evidence to show that at the time when the application was made the husband and the wife had mutually agreed that the marriage should be dissolved.

Similarly, the various circumstances do indicate that the parties have been residing separately for more than one year and that there was no possibility of their living together. These are all the requirements under section 13-B for making a joint application for divorce. Once these requirements are proved, it would be necessary for the court to grant a decree for divorce. *The fact that at a later stage either party does not want a divorce would be irrelevant. What is material is as to whether the above mentioned requirements were existing when the petition was filed.*"

[Emphasis added]

4.3.4. *The contrary view that consent can be withdrawn by one of the two spouses unilaterally is supported by the reasoning unfolded in this passage :*[11]

"9. With great respect to the learned Judge of the Punjab and Haryana High Court we are unable to agree, that after a petition is signed and filed in Court by both the parties under section 13-B(1) it cannot be withdrawn by one of them. *The very condition prescribed in section 13-B (2) of the Act namely that the petitition has to be considered on the motion of both the parties, means, if one of the parties declines to join the other to make a motion for consideration of the petition on merits, after six months after the date of presentation of the petition, consideration of the petition on its merits becomes impossible.* **Therefore, it is clear that while** it is open for both the parties to withdraw the petition jointly, *it is also open to one of the parteis at her or his option, not to join the other to make a motion for consideration of the petition*, in which event, the Court has no power to consider the petition on its merits. That is what happened in this case. Therefore, the learned Judge had no option than to dismiss the petition. In fact as shown earlier the appellant himself in his objection to the application for maintenance, has stated so, though he has contended to the contrary in this appeal.

10. Our view receives support from a Division Bench judgment of this Court in Krishnamurthy Rao v. Kamalakshi, AIR 1983 Kant 235. In that case Jagannatha Shetty J., (as he then was) held that the *consent, in the context of passing a decree for divorce, must subsist on the date of hearing. Therefore, consent given on the date of petition is not final and irrevocable.* If so, there was no necessity for the Legislature to impose the two conditions in section 13-B(2) viz., (1) *bar for consideration of the petition for a period of six months and* (2) *the consideration of the petition could be only on the motion of both the parties.* Therfore, we are of the view that the respondent was entitled to withdraw the cosent for divorce given in the petition and when she did so the Court was right in dismissing the petition, indeed it had no other option.".

[Emphasis added]

4.3.5. **Fallacy in the Delhi view.**—The Delhi High Court has erroneously drawn upon the analogy of a civil suit by two plaintiffs which cannot be withdrawn by only one of the plaintiffs. It has been overlooked that both plaintiffs have a joint and common interest in seeking a relief against a defendant and one of the paintiffs cannot abandon the interest of the other. As against this in a joint petition for divorce by consent presented by two spouses, but for their consent at the stage of presentation, the interest of the two spouses is in conflict. There is no common defendant against whom they have a joint common interest to seek which cannot be abandoned by one of them at the cost of the other. This vital distinction has been overlooked. What is more, the Delhi High Court has not shown awareness of the insurmountable hurdle presented by section 13B(2) which envisions a joint motion by both the sides (at least six months after the presentation of the petition) being made for a decree. Certainly the spouse having second thoughts cannot be compelled to make a joint motion for decree. There is no answer to this hurdle. And the High Court has attempted none. The Delhi and Bombay view is therefore altogether untenable.

4.3.6. **Why the Commission commends the view that consent can be withdrawn by any one of the spouses unilaterally.**—There are five good reasons which induce the Commission to conclude that the view that the consent can be withdrawn even unilaterally at any time before the final order is passed by the Court as held by the High Court of Punjab, Karnataka and Kerala (differing from the High Courts of Bombay and Delhi) :—

(1) *Consent of both the spouses must subsist till the passing of the final order by the Court granting a decree for divorce by consent.* No decree by consent can be passed on the basis of a one-time consent accorded in the past at the point of time when the petition was signed and lodged. It would be unfair

and incongruous for the court to pass a decree in the face of the clear assertion by one of the spouses that there was no "consent on his or her part at the point of time of passing the so-called consent decree" in a matrimonial matter having serious repercussions on the life and future status of the spouse who, on further reflection after appending the signature, has doubts abut the wisdom of doing so.

(2) *There is no basis in logic or law for freezing the option of the consenting spouse as on the date of presentation of the petition seeking a divorce by consent.*

(3) The legislative mandate embodied in section 13B(2) compelling the two spouses *to wait for six months before moving the court, by necessary implication, provides the clue to the discernible purpose of the provision, viz., to grant time for 'reflection'* as also for possible reconciliation pursuant thereto, viz., precondition enjoined.

(4) *The 'motion' for decree for divorce by consent being required to be made by "both" of the spouses* cannot be complied with in case one of the spouses is not prepared to join in making the motion. *Surely the spouse who no longer consents cannot be 'compelled' to join in moving a motion for a decree* as enjoined by section 13B(2).

(5) To pass a decree by consent in the face of the express assertion by one of the two spouses that there was no consent at the really crucial point of time of passing the final order would be in total negation of the letter and spirit of the law.

The Commission accordingly has no hesitation in recommending that an Explanation be added to section 13 B to the effect that the consent of both the spouses reflected in the joint petition must subsist at the point of time when the court passes the final order granting the decree as prayed.

4.4. **Should the objectionable or cruel conduct of one of the spouses subsequent to the institution of a petition under the Hindu Marriage Act, 1955 be open to examination or should it be shut out of consideration.** There is a conflict of decisions on the question whether the conduct of a person after the filing of a matrimonial petition can be taken into account in granting relief under the Act, particularly where the alleged conduct amounts to cruelty.

Can be examined.

4.5 In a Delhi case,[12] in the cross-examination of the petitioner husband, it was suggested that he was having illicit relationship with one B. Subsequently, the respondent-wife in her statement improved her allegation and said that she herself had seen the husband closeted with B and sleeping with B in a compromising position. This imputation was not a ground pleaded by the husband in the petition. It was contended that as this particular episode of cruelty was not taken in the pleadings, either initially or by way of amendment, it could not be taken into consideration by the court. The learned Single Judge took note of the relevant authorities and, disagreeing with the contention, observed :—

"I have considered these cases, but they only state the general rule while it is equally well settled that there are exceptions to this rule and it is open to a court in exceptional cases to take into consideration events which may have taken place subsequent to the filing of the suit and grant relief on their basis where the relief as claimed orginally in the suit may have become inappropriate by reason of altered circumstances and where this may appear to be necessary in order to shorten unnecessary litigation or to subserve the substantial interest of justice. *Ram Dayal* v. *Maji Devdiji*, AIR 1956 Raj 12, which I followed in *Parihar* v. *parihar*, AIR 1978 Raj 140. Exceptions must be applied in matrimonial cases, in order to subserve the interest of justice and not to compel the parties to begin another round of litigation on the basis of subsequent events and allow the precious period of their life to go waste. It must be so done depending, of course, on the nature of the case, because it is not only the parties which are concerned in the case, but the court has a certain amount of duty and discretion to exercise. The relief entirely depends upon its satisfaction. That is why, in *Chand Narain* v. *Smt. Saroj*, 1975 HLR 494 (Raj): AIR 1975 Raj 88, a fact elicited in cross examination, *though not pleaded*, was considered as to constitute cruelty. In *Kundan Lal* v.

Kanta Rani, 1979 Mat LR 352 (P&H), the husband in his suit for nullity and desertion, pleaded an unjustified impotence against the wife, the wife in her written statement did not say that the false charge of impotence amounted to cruelty and further *did not plead* that a report of theft was lodged against her with the police, but all this was proved on record. It was held that the wife was justified in her withdrawal from the society of her husband. I am, therefore, of the view that the learned trial judge was justified in holding that he could take into consideration the allegation of adultery made by the wife at the time of cross-examination and in her deposition".

This view was reaffirmed [13], [14] by the Delhi High Court in 1987.

4.6. In a Himachal Pradesh case, a subsequent allegation was taken into account in a case of maintenance. [15]

Cannot be examined

4.7. **According to the view propounded by the Allahabad high Court an allegation in the written statement cannot be examined to afford any cause of action.** [16]

The pertinent observations are :—

"Having heard learned counsel for the parties on the merits of the appeal, I find that it has none. I have already recited in some detail the allegations made by the husband in his original petition and even indicated that even if all the facts, stated by the petitioner in his original petition were accepted on their face, no case whether of cruelty or desertion, for judicial separation or divorce could be said to be made out against the respondent. The lower appellate court has recited certain statements, made by the respondent wife in her written statement, while discussing the point wehether the allegations made by the wife regarding the husband's intimacy with his Bhabhi are false and whether they amount to cruelty in law. Now, I must observe, at the very outset, that a fact in order to afford a cause of action for any relief, must precede the initiation of the action. Consequently any allegation made by the wife in her written statement could afford no cause of action for any relief on the husband's petition. Therefore, I do not think that the statements made by the wife in her written statement, could afford any ground for granting relief to the husband in the present case and need not have been discussed by the lower appellate court. With regard to the facts preceding the presentation of the petition, I agree with the finding reached on assessment of the evidence by the lower appellate court that none of them could amount to cruelty and at any rate, the allegation of illicit relations between the husband and his Bhabhi, which is said to have been hurled by the wife at him, must be deemed to have been condoned by the cohabitation between the husband and the wife in the year 1969, which resulted in the birth of a child on or about 12-5-1970, after which the parties did not live together.".

4.8. **The Punjab High Court has also sustained the proposition that such subsequent statements cannot be taken into account.**[17]

4.9. **Why the Commission supports the view that the conduct of a spouse even subsequent to the institution of a matrimonial petition should be permitted to be examined.**

In the considered opinion of the Commission, the conflict on this vital issue deserves to be resolved by a clarificatory amendment of the relevant provisions of law so as to adopt the view propounded by the High Courts which have formed the opinion that conduct of a spouse should not be excluded from consideration merely on the ground that the conduct complained of is subsequent to the institution of the petition in point of time subject, of course to the rider that the court may insist on the concerned pleading being amended to bring the issue in focus. *If the subsequent conduct attributed to the concerned spouse is such that it has a bearing on the matrimonial problems brought before the court, there is no valid reason for refusing to examine the matter* pertaining to such conduct. The court would naturally be expected to be anxious to do complete justice between the parties and would not be expected to shut out or exclude matters, otherwise relevant, from examination. *For, refusing to look into such matters is likely to result in being disabled to sort out the problems in a satisfactory manner or refusing to sort out some problems on hypertechnical considerations.* The court cannot refuse to face facts by closing the door to the scrutiny of subsequent conduct. A few illustrations will be useful for

proper comprehension of the issue. Take the case of a husband seeking a decree for restitution of conjugal rights. *If subsequent to the institution of the petition, he assaults the respondent wife or levels accusations of adulterous conduct or starts living with a girl friend, can such subsequent conduct be excluded from consideration except at the peril of denying justice to the wife*? Would the court consider it fair to proceed to pass a decree for restitution of conjugal rights in favour of the errant husband by adopting the 'hands-off- the-subsequent conduct' stance?

4.10. **The law on the subject is, therefore, in need of legislative clarification empowering the Court to take into account subsequent conduct and subsequent events.**—The best course, in the opinion of the Commission, would be to insert at section, say section 21B (1a), in the Hindu Marriage Act to the following effect to be inserted between 21B (1) and 21B (2).

> "21B(1a). **Subsequent events.**—In granting relief under this Act, the court shall have power to take into account events subsequent to the filing of the petition, including statements made by a party in the pleadings or in the course of evidence before the court or in affidavits or otherwise, but the court may, in a particular case, refuse to do so in the interests of justice until a plea based on such events is specifically taken in the petition or in the reply thereto, as filed originally or as amended later with the leave of the court, as the case may be."

4.11.1. **Whether order granting maintenance to a respondent can be passed even whilst refusing relief claimed by the petitioner and dismissing his/her petition.**—Section 25 of the Hindu Marrige Act, 1955, confers jurisdiction on the court to pass orders for maintenance (on an application made by the spouse), at the time of *passing any decree* under that Act, or at any subsequent time. It provides:

> "25. **Permanent alimony and maintenance.**—(1) Any Court exercising jurisdiction under this Act may, *at the time of passing any decree or at any time subsequent thereto*, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.
>
> (2) If the Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just.
>
> (3) If the Court is satisfied that the party in whose favour an order has been made under this section, has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the court may deem just.".
>
> [Emphasis added]

Many High Courts have taken the view that this power cannot be exercised where the petition for divorce is *dismissed*, because, according to these High Courts, the expression "decree is passed" is referable only to cases where a decree granting one of the reliefs under the Act is passed by the court. In other words, *in the opinion of these High Courts, no order granting maintenance can be passed by a court whilst refusing any substantive relief under the Act and whilst dismissing the main petition* as a result thereof.

The High Courts which have propounded this view are:

(1) Calcutta,[18]

(2) Gujarat,[19]

(3) Orissa,[20]

(4) Punjab & Haryana,[21] and

(5) Rajasthan.[22]

4.11.2. **Maintenance can be granted—the contrary view.**—In the High Court of Bombay itself, there is a conflict on this point. One learned Single Judge of the High Court has in 1962 subscribed to the view held by the aforesaid High Courts. *But another learned Single Judge has taken a contrary view in* 1987 *and held that an order for maintenance can be passed in favour of a respondent even in a matter where substantive relief is refused and the main petition is dismissed.* [23] Later on, another learned Single Judge has fallen in line with this view in 1989. [24]

4.11.3. **The Andhra Pradesh High Court, in its recent judgement, has held that the power to grant maintenance under section 25 of the Act can be exercised even where the suit or petition is dismissed.**—The view is expressed that the section does not suffer from any such limitation as is assumed by the other High Courts, whose decisions are referred to hereinbefore. A "decree", in its opinion, means an expression of adjudication. Regardless of whether the suit or petition is allowed or dismissed, the order of the Court constitutes a decree and the expression "*at the time of passing any decree*" in section 25 only means "*at the time of disposal of the case*". And, according to the Andhra Pradesh view, the power to grant maintenance is ancillary to the main power of the disposal of the petition.[25]

4.11.4. **How to resolve the conflict?**—It would be anomalous and unjust to interpret the identical provision of the aforesaid Central Act as conferring jurisdiction on the matrimonial court to grant maintenance at the time of passing a decree refusing the substantive relief claimed by the petitioner in one State and to so interpret it that the court has no such power in another State. A statutory clarification is, therefore, necessary in order to bring about uniformity in the administration of law in this area throughout the territory of India to which the Act is applicable. *In the considered opinion of the Commission, the conflict requires to be resolved by accepting the view propounded by the Andhra Pradesh High Court and by the Bombay High Court in its two decisions of* 1987 *and* 1989, *namely, the view that the court exercising jurisdiction under the Act is empowered to grant maintenance even whilst refusing the substantive relief claimed by the petitioner and dismissing his or her petition.* The Commission has formed this opinion for the reasons articulated hereinafter.

4.11.5. **Reasons.**—The five High Courts which have formed the opinion that the court has no power to grant maintenane in a case where the main petition of the petitioner is dismissed have been impressed by the argument that when the main petition is dismissed, it cannot be said that a decree has been passed within the meaning of section 25 of the Act. Says the Gujarat High Court in *Harilal* v. *Lilavati*[26] :

> "*In our view, the passing of an order of dismissal of a petition could not be regarded as the passing of a decree within the meaning of this section. The word "any" which precedes the word "decree" has been used having regard to the various kinds of decrees which may be passed under the provisions of the Act.* A decree may be a decree for restitution of conjugal rights. It may be a decree for judicial separation. It may be a decree of nullity of marriage. It may be a decree of divorce. At the time of passing any such decree or at any time subsequent thereto, orders can be made as provided in the section.
>
> * * *
>
> In our view, the language used by the legislature in section 25 is such that the power thereby conferred could only be exercised at the time of passing of any of the decrees referred to in the earlier provisions of the Act or any time subsequent thereto. We are supported in this conclusion by an unreported decision of Chief Justice S.T. Desai and Justice Bakshi given on 28th November 1960 in First Appeal No. 178 of 1960 (Guj). In that case, it has been laid down that *Sec.* 25 *relates only to an ancillary relief which is incidental to the substantive relief* that may be granted by the Court, though the incidental relief may be given to other party".
>
> [Emphasis added]

It is this reasoning which has found favour with all the aforesaid five High Courts and with the learned Single Judge of the Bombay High Court in *Shantaram's case*.[27] The contrary view, however, is founded on the following reasoning which appealed to the Andhra Pradesh High Court,[28] viz.:

> "The intention of the legislature is clear that inasmuch as the matrimonial Court has been seized of the matter and has gone into the merits of the controversy between the parties and knows who had committed the wrong and where the justice lay should be empowered to make an order of permanent alimony. *The passing of any decree includes passing of dismissal of the petition*

and the decree may be a decree allowing the petition or dismissing the same. The words "any decree" take in both kinds of decrees. Otherwise, the words will not be "any decree" but merely "a decree". Besides there is no meaning in allowing the parties to go to some other Court and start back once again after they have done it before the matrimonial Court which knows their respective strength and can be expected to do justice especially when the Court is one of the Superior Courts in the Country being a District Court or its equivalent".

[Emphasis added]

In the opinion of the Commission, the Andhra Pradesh High Court has rightly stressed the aspect that an order passed by a court dismissing the main petition constitutes a decree and the expression "any decree" employed by the Legislature in section 25 is wide enough to cover a decree granting the relief as well as a decree refusing the relief, for a decree refusing the relief is also a "*decree passed by the court*". The expression "*at the time of passing the decree*" employed by the Legislature in section 25 of the Act cannot be equated with the expression "*any decree granting one of the reliefs under the Act.*" If the Legislature intended to confer the power on the court only whilst granting a relief, the Legislature would have used the expression "*any decree granting a relief*" instead of employing the expression "*at the time of passing any decree*". The contrary view is an extremely narrow view which would prove counter-productive and would defeat the very purpose of conferring the power on the court to grant maintenance. *Because, if the court was passing a decree giving relief to one of the spouses, say, of "restitution of conjugal rights", the court would be doing so on the ground that the other spouse has no lawful excuse for staying separate.* In the event of reaching such a conclusion, there would possibly be no occasion for awarding maintenance in favour of the spouse found to be at fault whilst granting a decree for restitution of conjugal rights in favour of the petitioner. So also if the court was granting a decree for "*judicial separation*" in favour of the petitioner, the court would be doing so on the promise that the petitioner had lawful ground for staying separate from the respondent. In that event also, while passing a decree for restitution in favour of the petitioner, there would possibly be no occasion for awarding maintenance to the respondent spouse who was found to be at fault. The same would be the position in a matter where the court upholds the claim of the petitioner for a decree of nullity. There would be no occasion to award maintenance whilst upholding the claim of the petitioner that the marriage was a nullity, say, on the ground that a fraud had been practised. *Thus there would hardly be an occasion to award maintenance whilst granting relief to the petitioner and allowing his or her petition.* Surely, the Legislature was not conferring this power for ornamental purposes when in most of the cases there would be no occasion to exercise the power. Regardless of whether the petitioner was granted, the relief of a decree for "*restitution of conjugal rights*" or "*judicial separation*" or "*nullity*" or whether he was refused such a relief, the respondent could not pray for award of maintenance. *In case the petitioner succeeded and the decree was passed in his or her favour, the respondent, being a spouse at fault who had no right to stay separate and claim maintenance, could not possibly claim maintenance. In the event that the petitioner failed, since the court was not passing a decree granting relief, the respondent would not be entitled to pray for maintenance. In either event, therefore, the respondent would not be entitled to claim maintenance. It would mean that such a power could perhaps be exercised only whilst granting a decree for divorce and in no other case. Such an interpretation of the expression "at the time of passing a decree" would, therefore, be virtually tantamount to rendering the matrimonial court powerless to do justice by awarding maintenance even in a case where the respondent spouse was the wronged party and was entitled to stay separate and claim maintenance.* As pointed out by the Andhra Pradesh High Court, the respondent spouse would have to initiate proceedings under section 125 of the Code of Criminal Procedure or under section 18 of the Hindu Women's Adoptions and Maintenance Act. *The result would be that a wronged spouse would be driven to another court, involving expenditure of considerable time and money and resulting in considerable misery to the said spouse. It would also be counter-productive to create a situation which results in multiplicity of proceedings besides distress to the wronged spouse and divests the court of the power to do justice* between the parties in the very proceeding before the very court. In any view of the matter, therefore, it is appropriate to resolve the conflict by adding an *Explanation* to sub-section (1) of section 25 providing that the power may be exercised regardless of whether the court granted the relief claimed by the petitioner or whether the court refused any substantive relief under the Act to the petitioner and dismissed his or her petition either on merits or by reason of the petitioner withdrawing the petition or the same being dismissed for non-prosecution.

4.12.1. **Whether an application claiming maintenance can be entertained only by the very court which has passed a decree or also by any other court exercising jurisdiction under section 19 of the Act?**—Another significant question arising under section 25 of the Hindu Marriage Act, 1955, and in respect of which there are conflicting decisions, is regarding the court to which an application for permanent alimony under the said section can be made. *The Punjab & Haryana High Court*[29] *has taken the view that even if in a petition seeking divorce or any other relief under the Act, a decree is passed by 'one' particular court having jurisdiction under section 19 of the Act, the opposite party can move 'any' court having jurisdiction under section 19 of the Act* in order to seek permanent alimony or maintenance, as the case may be. The High Court has supported the conclusion by the reasoning reflected in the following passage:—

> "It is not disputed that the marriage of the parties was solemnised within the jurisdiction of District Court, Jullundur, both the parties are residing within the jurisdiction of District Court, Jullundur, although it is not clear as to where they last resided together. Therefore, it is clear that even for a petition under section 25 of the Act, the Jullundur Court will have jurisdiction in this matter. Adverting to the phraseology of S. 25, stress is being laid on the words "on application made to it for the purpose". From these words, it is sought to be inferred that 'it' is the Court which passed the decree, and that court alone, is entitled to entertain such application. If this interpretation were to be placed on these words, it will lead to anomalous results as would be clear from the following example. Suppose, a divorce petition is dismissed by the first Court and the dismissal is confirmed by the High Court and the matter goes to the Supreme Court and the Supreme Court grants a decree of divorce. The interpretation sought to be placed on S. 25 of the Act and on the word 'it' would mean that a petition for grant of permanent alimony under Sec. 25 of the Act will have to be filed before the Supreme Court. Similarly, if the divorce petition was declined by the first Court, but was granted by this Court, the application for the grant of permanent alimony will lie to this Court. This is not the scope of either S. 25, or conveyed by S. 19 of the Act. Moreover, the opening part of S. 25 shows that the proceedings may be taken before 'any' Court exercising jurisdiction under this Act and the jurisdiction under this Act is exercised in view of Sec. 19 of the Act on matters arising under the Act. Therefore, the reasonable interpretation to be placed, would be that S. 25 or for that matter any other section, should be read subject to S. 19 so far as the jurisdiction of the Court is concerned unless there is a specific provision to the contrary in any particular section. Therefore, on a plain reading of S. 19 and reading it harmoniously with S. 25 of the Act, the only conclusion to be drawn would be that even if a petition for divorce or any other decree, is granted by one of the Courts having jurisdiction under S. 19 of the Act, it may give cause to the opposite party to move for the grant of permanent alimony or any other relief under S. 26 or 27 of the Act, again the jurisdiction will be governed by S. 19 of the Act and not merely by the passing of a decree by a particular Court".

4.12.2. *A contrary view has been taken by the Bombay High Court*[30] which is of the view that section 19 will not apply to an application made under section 25, Hindu Marriage Act, 1955, and that no other court except the court passing the decree will have the jurisdiction to grant permanent alimony. Says the High Court :—

> "The substantive matrimonial reliefs under the scheme of the Hindu Marriage Act are governed by Sections 9 to 13B of the Act i.e. for restitution of conjugal rights, for judicial separation, for declaration of a void or voidable marriage, for divorce on one of the several contingencies or for divorce by mutual consent. All these substantive reliefs under the Hindu Marriage Act are to be secured by presenting a petition before the Court of original jurisdiction as defined under Section 19 of the Act. On the other hand, the applications which we have discussed above under Sections 24, 25 and 26 are to be presented during the pendency of the main substantive proceeding. The application for interim maintenance under Section 24 has to be presented during the pendency of the petition for substantial matrimonial relief. So also application for custody of the child or for maintenance or education, is to be presented when the substantive petition for matrimonial relief is pending. The wordings of the opening sentences of Sections 24 and 26 clearly show that the applications are to be presented in any proceeding under this Act. The wordings of Section 25 are however slightly different. Section 25 reads in so far as it is relevant for purposes of this revision as follows:—
>
> "25. (1) *Any court exercising jurisdiction* under this Act may, at the time of passing any decree or at any time subsequent thereto, *on application made to*

it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum.....".

Thus, the application under section 25 has to be presented to the Court exercising jurisdiction under this Act between the parties in respect of a substantial relief under the Act. The phraseology further shows that it is that Court which can pass an order either at the time of passing any decree for substantial relief or at any time subsequent thereto. It is further clear when the section says that such application has to be made to it i.e. referring to the Court exercising jurisdiction under this Act at the time of passing any decree or at any time subsequent thereto.

Even viewing the case from another angle, it would be seen that the proceedings under Sections 24, 25 and 26 of the Hindu Marriage Act are consequential reliefs to the main or substantial reliefs arising out of the marriage petition. As far as Sections 24 and 26 are concerned, there can be no dispute that they are to be filed during the pendency of the main proceedings for substantial relief. In so far as S. 25 is concerned, permanent alimony is a consequential relief to the substantial relief of the determination of matrimonial rights between the parties. The phrase clearly shows that the Court exercising jurisdiction at the time of passing of the decree or subsequent thereto on an application presented before it may pass an order granting relief of permanent alimony and maintenance. The object of the framers appears to be that the Court having session of the matter relating to substantial relief is also given the jurisdiction to deal with the consequential relief of permanent alimony.".

The contrary view of the Punjab and Haryana High Court[31] *has been countered in the following manner:—*

"A contrary view has been taken by the learned single Judge of Punjab and Haryana High Court in the matter of Smt. Darshan Kaur *V.* Malook Singh (AIR 1983 Punj. & Har. 28). According to the learned Judge, Section 19 of the Hindu Marriage Act is applicable to all proceedings including the application under Section 25 of the Act as well. He disagreed with the argument that the phraseology of S. 25, and in particular the words 'on application made to it for the purpose' referred to the court which passed the decree. According to him, this interpretation would lead to anomalous results. I respectfully disagree with the said view, inasmuch as firstly the word "petition" in the Hindu Marriage Act is referred, only to those which are presented to the Court for substantial reliefs in respect of matrimonial relations *inter se* while the word "application" is used only for consequential reliefs of interim maintenance, permanent maintenance or for custody and maintenance of children. Section 19 of the Act also refers to "petition" and, in my opinion, obviously to the petition of substantive reliefs covered by Ss. 9 to 13B of the Act. Further Ss. 24 and 26 from the very nature of the reliefs to be granted refer to the pending proceedings for the main relief and as such have to be filed and presented where the petition for substantive relief is pending. So also S. 25, which, in my opinion, is a consequential relief to be granted at the time of passing of any decree of substantive relief or at any time subsequent thereto, the application thereunder will have to be filed before the Court exercising the jurisdiction at the time of passing of any decree or subsequent thereto.

* * *

Even the plain reading of the opening sentence of S. 25 shows that the section itself fixes the forum for the relief of permanent alimony and maintenance to be the same Court which is exercising jurisdiction between the husband and wife at the time of passing of a decree for substantive matrimonial relief or any time subsequent thereto on an application made to it for the purpose."

4.12.3. **Which of the two conflicting views deserves to be adopted?**—The Law Commission is of the opinion that *while both the views are plausible, the Punjab view that an application claiming maintenance or permanent alimony under section 25 of the Act can be made to 'any' court within the meaning of section 19 to which the main petition could have been made, is preferable.* It gains strength from the fact that the Legislature has employed the expression "*any* Court" instead of employing the expression "*the* Court". *In any case, the Punjab view is more conducive to justice in the sense that it results in alleviating the hardship of a spouse entitled to claim maintenance or permanent*

alimony. The contrary view is likely to occasion great misery and hardship to such a spouse. An illustration may be useful to buttress this proposition. Say a husband obtains an *ex parte* divorce decree at Bombay. The wife residing at Madras where the marriage was solemnized will be obliged to go to Bombay to seek alimony involving time-cost, travel-cost and money-cost which she cannot possibly afford. She may find it practically impossible to do so. Such would not be the position if she can move the Madras Court where the marriage was solemnized. *Accordingly, the view that an application for maintenance, etc., under section 25 of the Act can be made to 'any' court in which the main petition could have been instituted having regard to section 19 of the Act deserves to be adopted.*

4.12.4. **Recommendation.**—In order to resolve the conflict on the question, in the opinion of the Law Commission, it would be appropriate to amend section 19, Hindu Marriage Act, by inserting the words "including an application under section 25" after the words "every petition" and before the words "under the Act" in the opening line thereof.

4.13.1. **Whether the court passing an *ex parte* decree can itself set it aside under Order 9, rule 11, CPC, or whether the litigant should be obliged to prefer an appeal?**— There is a conflict of decisions on the question whether or not an *ex parte* decree passed under the Hindu Marriage Act can be set aside on an application made by the respondent under the provisions of Order 9, rule 13, Code of Civil Procedure, 1973. The view of Delhi [32], Karnataka [33] and Madras [34] High Courts is that the court passing the decree has the power to set aside but the Gauhati High Court holds otherwise. *The Madras High Court in its latest judgment, concurring with the views of the Delhi and Karnataka High Courts that an* ex parte *decree can be set aside by that very Court, holds:—*

> "Under S. 21 of the Act, it has been provided that subject to the other provisions of the Act and also to the rules framed thereunder, all proceedings under this Act shall be regulated as far as may be, by the Code of Civil Procedure. S. 28(1) of the Act states that all decrees made by the Court in any proceeding under this Act shall be appeallable as decrees of the Court made in the exercise of its original civil jurisdiction and every such appeal shall lie to the Court to which appeal ordinarily lies from the decisions of the Court given in the exercise its original civil jurisdiction. Encouraged by the provision so made under S. 28(1) of the Act, learned counsel for the petitioner was emboldened to contend that the remedy of the respondent was only to appeal and not an application to set aside the *ex parte* decree. There is no provision either in the Act or in the Rules framed thereunder as to the setting aside of an *ex parte* decree passed under its provisions. It is also not disputed that the Rules framed by this Court do not provide for it. In the absence, therefore, of provisions in the Act and also the Rules framed thereunder under S. 21 of the Act, the proceedings under the Act stand regulated by the provisions of the Civil Procedure Code. *In S. 21 of the Act, there is no indication that procedural part of the Civil Procedure Code alone would be applicable* and not the substantive part of it. *Prima facie*, it would appear that in the absence of any restriction to the applicability of the substantive provisions of the Civil Procedure Code an application for setting aside the *ex parte* decree passed under the Act would lie under O. 9 R. 13, C.P.C."
>
> [Emphasis added]

4.13.2. *The contrary view taken by Gauhati High Court [35] to the effect that an application under order 9, rule 13, Code of Civil Procedure, for setting aside an 'ex parte' decree passed under the Hindu Marriage Act, 1955, is not maintainnable is expressed thus :—*

> "It is made clear that subject to the other provisions contained in the Hindu Marriage Act, all proceedings under the said Act shall be regulated, as far as may be, by the Civil P.C. Therefore, the mandatory provisions of S. 28 (1) of the Hindu Marriage Act cannot be regulated by O. 9 R. 13 of the C. P. C. for setting aside an *ex parte* decree. All decrees made by the Court in any proceeding under the Hindu Marriage Act also include an *ex parte* decree. *Therefore, only appeal will lie against an ex parte decree as laid down under the mandatory provisions of S. 28(1) of the Hindu Marriage Act.* An application under O.9 R.13 C. P.C. for setting aside such *ex parte* decree, is not maintainable. The learned Additional District Judge committed error in law. The order dated 7-2-83 is liable to be set aside".

4.13.3. **How to resolve the conflict.**—The consensus view held by Delhi, Karnataka and Madras High Courts is supported by sound reasons. The Gauhati High Court has taken a very narrow view without examining the reasoning of all the other High Courts. There is no reason why the litigants in Assam should suffer hardship and injustice by being obliged to approach the appellate court incurring further time cost and money-cost instead of seeking the setting aside of the '*ex parte*' decree in the very court. A statutory clarification is, therefore, required to be made in order to bring about uniformity of law in the areas to which the Act is applicable. *It is, therefore, recommended that a new section, say section 28A, should be inserted in Hindu Marriage Act, 1955, on the following lines. :—*

"28A.(1) In any case in which a decree is passed *ex parte* against the respondent, he may apply to the Court by which the decree was passed for an order to set it aside, and if he satisfies the Court that summons was not duly served or that he was prevented by sufficient cause from appearing when the case was called on for hearing the Court shall make an Order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the case.

(2) No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party."

4.14.1 **Whether an appeal against a decree of divorce abates on the death of the spouse obtaining the decree?**—There is a conflict in the decisions on the question whether an appeal against a decree of divorce or an application made under Order 9, rule 13, Code of Civil Procedure, 1973, for setting aside an *ex parte* decree of divorce would abate on the death of the spouse in whose favour decree of divorce has been passed. *The Bombay High Court* [36] *is of the view that an appeal against a decree of divorce will not abate on the death of the respondent pending appeal. The Karnataka High Court* [37] *has concurred with this view.* The following reasons prevailed with the Bombay High Court [38] in arriving at its conclusions:—

"It may be conceded that the position is not free from doubt, but where this is so, equitable considerations must prevail and bearing in mind the nature of the conclusion, the far-reaching effect of the findings of the Court, both on personal status and property rights, it is desirable that the party aggrieved by the decree of the trial Court must have the opportunity to have the findings reversed and this opportunity must be assured irrespective of the death of the respondent."

4.14.2. *A Contrary view that such an appeal would abate has been taken by the Madras High Court* [39] *on the following reasoning* :—

"On the passing of the *ex parte* decree of divorce the marriage between the respondent and deceased Ramanathan stood dissolved and on the death of Ramanathan, even on the footing that there had been no prior dissolution of marriage the matrimonial knot was once and for all irrevocably united on 3-6-1984. It is doubtful whether even in cases where the marriage has been dissolved by death there is a power in the Court to declare that it continued for some other reasons. It is necessary to remember that a man after the death can no more be divorced or secure a decree of divorce than he can be considered to be married or even condemned to death. On the death of the husband, in this case, the matrimonial knot did not any longer subsist and thereafter there cannot be a decree of divorce dissolving the marriage. The so-called question of status on the basis of which the lower appellate Court was inclined to implead the petitioner as a legal representative does not carry any conviction. In this case, on the obtaining of the decree of divorce *ex parte*, the respondent became a divorcee and that status was unalterably fixed to her by the subsequent demise of Ramnathan. It is difficult to understand how and by what process the respondent who was a divorcee on 24-10-1983, when the *ex parte* decree of divorce was passed and on 3-6-1984, when Ramanathan died, could claim the status of a widow. This would assume that despite the decree of divorce dissolving the marriage, the marriage had continued to subsist till the date of death of Ramanathan, for which there is no basis whatever in law. Further, when the marital knot had been untied by the decree of divorce, there is no basis whatever for assuming that the marriage had subsisted even thereafter in order to confer the status of a widow on the respondent herein on the death of Ramanathan. On the facts of this case, it is seen that the respondent was only a divorcee from the date of passing of the decree and also on the

date of death of her husband and she cannot lay any claim as the widow of Ramanathan unless she can resort to some statutory provisions enabling her to do so. The Court below was, therefore, in error in holding that the question of the status of the respondent would make some difference to the factual situation obtaining in this case."

4.14.3. **Why in the opinion of the Law Commission the view subscribed to by the Bombay and Karnataka High Courts is correct and how to salvage the situation arising out of the conflict.**— A decree for divorce involves declaration and adjudication of the status of a spouse. But its relevance does not disappear when the other spouse, say husband, dies. If the decree is untenable in law, the status of the wife will subsist. In that case she would be entitled to succeed to the estate of her deceased husband in her capacity as his widow. *If an appeal is allowed to abate on the death of, say, the husband, then even an untenable decree of divorce passed against the wife will remain in full force and she will be deprived of her right to succeed to the estate of her deceased husband in her capacity as his widow.* The view that the proceeding does not abate is plausible and there is no compulsion in law or logic to hold otherwise. *It, therefore, stands to reason, and also promotes the ends of justice, to adopt the Bombay-Karnataka view that the proceeding does not abate.*

4.14.4. **Recommendation.**—In order to resolve the conflict on this vital issue, it is desirable to specifically provide in the Hindu Marriage Act by way of amendment that no appeal against the decree for divorce or nullity of marriage and no application made for setting aside an *ex parte* decree for divorce or nullity of marriage shall abate on the death of the respondent's spouse. This amendment can be carried out by way of the insertion of a new sub-section as sub-section (5) to section 28 of the Hindu Marriage Act, 1955.

4.15.1. **Can a Matrimonial Court pass an order in respect of the personal property presented at or about the time of marriage to one of the spouses which is lying at the matrimonial home.**—The conflict of decisions on this point centres on the precise scope of section 27 of the Hindu Marriage Act, 1955 quoted hereunder:—

> "27. Disposal of property.— In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.".

A question has arisen under this provision whether the Matrimonial Court can pass an order regarding the disposal of property received by a spouse individually as a present at or about the time of marriage whilst disposing of a substantive proceeding under the Act. *According to Allahabad High Court*[40], *section 27 does not exclude the jurisdiction or the power of the Court to pass an appropriate decree in regard to the property which may belong either solely to the husband or solely to the wife.* This power, in the nature of things, is inherent in the legal proceedings which appropriately arise under the Hindu Marriage Act. It has been held that since section 21 of the Act confers on the Matrimonial Court all the powers of the civil court, by recourse to section 151 of the Code of Civil Procedure which pertains to inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, the court can grant general or other relief which it may think just and proper under the circumstances established in a given case. *Of course, another learned Single Judge of the same High Court has subsequently taken a contrary view evidently unaware of the earlier view* [41]. Since the earlier view could not have been reversed except by a larger Bench, in the Allahabad High Court itself, there is a conflict on this point.

4.15.2. **The High Courts of Jammu & Kashmir**[42], [43], **Delhi** [44], **Orissa** [45] **and Punjab & Haryana** [46], [47], [48], [49] **have dissented from the decision of the Allahabad High Court and have taken the view that section 27 excludes, by necessary intendment, its application to the property, which the party seeking a direction from the Court claims that it exclusively belongs to it.**— It has further held that the court cannot make provision in respect of the individual property of a spouse in the decree in exercise of its inherent powers under section 151 of the Code of Civil Procedure.

4.15.3. **How to resolve the conflict?**—The real controversy centres round the debate as to whether the inherent powers under section 151 of the Code of Civil Procedure can be invoked in a petition under the Hindu Marriage Act in order to do complete justice between the facilities having regard to the fact that section 27 of the Act is not happily worded so as to cover within its sweep incidental disputes

of this nature. *The Allahabad view that inherent powers can be invoked to pass incidental orders on related matters of this nature deserves to be adopted in order to once and for all put an end to all the legal disputes arising out of their marital tie.* Otherwise the spouse, say, the wife, who complains that the property gifted to her, being her separate and exclusive property kept at the matrimonial house, is being held back by the husband will have to file a separate suit. *Taking of such a view will result in multiplicity of proceedings, more investment of time, costs, and running to lawyers and courts and another round of litigation increasing avoidable work load in the courts. The Allahabad view, therefore, deserves to be adopted. Section 27 accordingly needs to be amended and words 'or exclusively' should be added after the words 'which may belong jointly' and before the words 'to both the husband and wife', and the Law Commission recommends accordingly.*

4.16.1. **Whether section 23 of the Hindu Succession Act, 1956 is applicable where there is only one male heir of the intestate?**—There is a conflict of judicial opinion among the various High Courts about the precise scope and applicability of section 23 of Hindu Succession Act, 1956 in the context of the situation where a Hindu male or female, dies intestate leaving behind a family comprised of one male heir and one or more female heirs. The question is whether section 23 will be attracted in such a situation and whether a female heir will be denied the right of partition of the dwelling house until the male heir chooses to claim partition of his share therein. The said provision runs thus: —

> "23. **Special provision respecting dwelling houses.**—Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein :
>
> Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."[1]

4.16.2. **The Calcutta[50],[51] Gujarat[52], Kerala[53] and Madras[54], High Courts have held that Section 23 of the Act will be attracted even in such a situation and a female heir cannot claim partition of the dwelling-house until the male heir chooses to claim partition of his share therein.**—The reasoning of the Madras High Court [55], which concurs with the Calcutta High Court, is unfolded in the passage extracted from its judgment:—

> "...we are of the opinion that the Parliament, while enacting this section should have felt that the dwelling-house of a Hindu joint family should be regarded as an impartible asset treasured by the ancient Hindu tenants and as such the dwelling-house should be allowed to be preserved by the family until the male heir or male heirs, as the case may be, mentioned in Class I of the Schedule, opted for dividing the same and to that extent the Parliament wanted to recognise the traditions and sentiments so cherished by the ancient Hindu families from time immemorial. If the male members choose to divide the family house among themselves, or if a single male member chooses to divide it among the respective shares or alienates his share to a stranger, then it would mean that the contingency has arisen whereby the male members are no longer capable of preserving the dwelling house. That is why the Parliament has, under the section, allowed the female members to claim partition in case the male members choose to divide their respective shares in the house. At this juncture, we may point out that the Parliament has not in any way restricted the right of the female member to claim partition in the other properties left by the intestate. In our opinion, so long as the male members do not choose to divide their respective shares in the dwelling house, the dwelling house is in a way excluded from division, subject to the right of the female members to a share therein and the right of residence of the unmarried female members, etc. While doing so, the Parliament should have taken into account the fact that the female members after their marriage naturally live with their husbands in their houses. If at the instance of any such female members, the dwelling house is allowed to be partitioned against the wishes of the male heir, he may be put to great hardship and be compelled to alienate the house if it is incapable of division,

Therefore it was but just that the family dwelling house should be allowed to be kept by the male members till they chose to divide it, and the female members should not be the persons responsible for the disintegration and fragmentation of the dwelling house. In fact, section 23 has been introduced as a special provision respecting dwelling houses, as clearly seen from the heading of the section itself, thereby laying emphasis on the preservation of the dwelling house. It was for these reasons, in our opinion, the Parliament has given the male members an edge over the female members in the matter of the option for partition of the dwelling house. But, at the same time, it is significant to note that the proviso to S. 23 preserves the right of residence of a female heir who is unmarried or is deserted by or has separated from her husband, or is a widow.

The Madras High Court realised that great hardship would enure to the female heirs but argued that it was a lesser evil than the resultant injustice to the male heir:

"We are conscious of the fact that there are certain hard cases where for instance, the intestate has left only a big mansion in the form of a dwelling house and no other property, (and is) survived by a single male heir and one or more female heirs. In such cases even though the female heirs are entitled to a share in the property of the intestate under the Act, such right would practically be defeated and frustrated since there is no possibility of the single male heir choosing to divide the shares in the property of the intestate, and thus the right of the female co-heirs to have a partition of their shares is likely to be successfully obstructed for ever. In such cases, the right to demand partition, vested in the female heir, will be permanently postponed and ultimately, frustrated. Such hard contingencies would cause great hardship to the female heirs; but that cannot be avoided. In our opinion, if the view of the Orissa High Court, followed by Padmanabhan, J. is to be accepted, then, in our opinion, gross injustice would be done to the single male heir and the very object with which the section has been enacted would be completely nullified. In our view, the hardship that would be caused to the female heirs in not being able to cialm partition is certainly relatively less than the injustice that could be done to the single male member. Despite the above opinion held by us, we cannot help observing that it is very unfortunate that section 23 is not very carefully and lucidly worded in a particularity of language, avoiding the scope of different interpretations. In our view, section 23 deserves modification so as to avoid difficulties of interpretation leading to divergent views and consequent anomaly.".

4.16.3. *A contrary view has been taken by the Bombay*[56], *Karnataka*[57] *and Orissa*[58] *High Courts. Says Bombay High Court*[59].—

"Now, it is true that the object of section 23 is to prevent fragmentation and disintegration of a family dwelling-house at the instance of a female heir or heirs to the prejudice of the male heirs. True it is that it is in tended to repeat one of the ancient Hindu tenets to preserve a family dwelling house as an impartible asset. It is a special provision meant to preserve and safeguard a family dwelling-house, when it devolves in accordance with provisions of this Act. It cannot be gainsaid that the female heirs specified in class-I inherit the share even in the dwelling-house absolutely. The course of devolution of property under section 8 of the Act, however, is restricted, so far as female heirs are cocerned, and this restriction is to operate only till the happening of an event envisaged under section 23 of the Act. Their right is only kept in abeyance until the male heirs choose to divide their respective shares in the family house. When there are more than one heir of the intestate residing jointly together and forming a joint Hindu family, it is in the fitness of things and as intended by the the legislature that at the instance of female heirs who are strangers, their joint abode should not be disrupted and their joint status impaired. But this object no longer survives when there is no joint Hindu family with male members residing together in a family house on one hand, and female heir on the other. With a sole surviving coparcener or a lone male heir with other female heir or heirs on whom the property (including the dwellinghouse) devolves as per the provisions of section 8 of the Act and who all take simultaneously, they are all tenants-in-common. To restrict their rights in such situation also is not merely to postpone that restriction till the happening of any event (as that event can never occur) but practically destroy and deny that right for ever.".

4.16.4. **Why the Bombay-Karnataka-Orissa view that the female heirs should in such a situation be entitled to claim partition deserves to prevail.**—There is no good answer to the vital point made by the Bombay High Court to the effect that if the rights of the female co-owner who inherits the property along with the male co-owners is curtailed to this extent that even if there is no joint family comprising of male heirs in existance, the female heir cannot claim partition, it will virtually tentamount to taking away from the female heir by another hand what is given to her by the Parliament by one hand. *The Madras High Court view that the female co-owner must suffer this injustice lest the male co-owner will have to suffer is in dishormony and out of tune with the constitutional philosophy of equality between both the sexes and smacks of a pro-male and anti-female bias. Surely a female co-owner cannot be denied the essence of the right merely because of her gender even when the reason for the rule has virtually disappeared in the situation where there is only one male co-owner and the argument of preserving the joint family is no longer available.* The anachronism, therefore, deserves to be removed by a suitable amendment on the lines indicated hereinafter.

4.16.5. **How to resolve the conflict**?—In order to resolve the existing conflict and anomaly centering on the interpretation and the scope of applicability of section 23 of the Act, the Law Commission recommends that section 23 be amended by incorporating a further proviso to the existing proviso to section 23 of the Act in the following terms :

> "Provided further that the provisions of this section shall not apply where there is only one male heir."

CHAPTER V

CONCLUSIONS & RECOMMENDATIONS

5.1. **Conclusion.**—The Commission is of the considered opinion that the anomaly and incongruity arising on account of the identical provisions of the identical Central laws being construed as having one meaning in some parts of India and the same having different meaning in other parts of India, by reason of the conflict of views of the different High Courts, needs to be straightened out for the sake of achieving uniformity in the interpretation and application of Central laws throughout India, and for the sake of ensuring equality before law in this area, two steps deserve to be taken :—

(1) *Removal of existing conflicts* by legislative measures calculated to clarify the law by appropriate amendments in a phased manner, and

(2) *To devise a mechanism to ensure that no such conflicts come into existence* or remain unresolved in future so as to obviate the need for legislative amendments in future.

To this end we make two recommendations:

FIRST RECOMMENDATIONS

5.2. **Removal of existing conflicts.**—In this context we recommened that existing anomalies in the area of Hindu Marriage Act and Hindu Succession Act are removed by legislative measures on the indicated lines as suggested in Chapter IV. As a result thereof, throughout the country in all the States to which the concerned Central Act applies, uniformity of law will be secured in the relevant area, and in all such States instead of only in some States:

1. The matrimonial court, in a petition for restitution of conjugal rights, will have jurisdiction to entertain a defence raising the plea to the effect that the marriage had already been dissolved as per custom prior to the institution of the petition.

(See Chapter IV, para 4.2)

2. One of the two spouses who have presented a joint petition for divorce by consent can withdraw his or her consent before the Court passes the final order.

(See Chapter IV, para 4.3)

3. The objectionable or cruel conduct of the other spouse 'subsequent' to the institution of a matrimonial petition will be open to examination in the same proceeding.

(See Chapter IV, paras 4.4 to 4.10)

4. An order granting maintenance can be passed by any matrimonial court under section 25(1) of Hindu Marriage Act at the time of passing a decree regardless of whether the petitioner's prayer for relief is granted or not and regardless of whether the petition is allowed or dismissed.

(See Chapter IV, para 4.11)

5. An application claiming maintenance or permanent alimony can be entertained by any of the courts having jurisdiction in the context of section 19 of the Hindu Marriage Act instead of only the court passing the decree.

(See Chapter IV, para 4.12)

6. A litigant against whom an *ex parte* decree is passed under the Hindu Marriage Act can apply to the same court for setting aside the decree on sufficient cause being shown instead of being driven to an appellate court.

(See Chapter IV, para 4.13)

7. An appeal against a decree for divorce or a proceeding to set aside an *ex parte* divorce decree is not considered as having abated on the death of the spouse obtaining the decree.

(See Chapter IV, para 4.14)

8. Whilst disposing of a substantive proceeding under the Hindu Marriage Act, the concerned matrimonial court will be empowered to pass appropriate orders also regarding the individual property belonging to one spouse lying with the other spouse instead of obliging such a spouse to undergo another round of litigation, and incur further time-cost, money-cost and effort-cost.

(See Chapter IV, para 4.15)

9. The bar against a female co-owner claiming partition of her share in a dwelling house inherited along with other male heirs will not operate even in a situation where there is one male co-owner so that her right is not rendered virtually unexercisable and valueless.

(See Chapter IV, para 4.16)

SECOND RECOMMENDATION

The need for evolving a mechanism for nipping in the bud the conflicting interpretation at the High Court level and the suggested solution.

5.3.1. The question that requires to be addressed to is as regards the need for evolving suitable machinery so as to maintain, strengthen and restore uniformity on questions of law. For, the present constitutional and statutory provisions that are designed to maintain such uniformity[1] operate only when the matter reaches the highest judiciary by way of appeal by the aggrieved party or the Legislature finds time to attend to the conflict of decisions. If one keeps aside certain special provisions, such as the advisory jurisdiction of the Supreme Court, one finds that a point on which there is want of uniformity can come up for decision only when a litigant invokes the jurisdiction of the Supreme Court. In other words, if a litigant who has failed in the High Court on a question of law cannot afford to go to the Supreme Court, or does not, for any reason, propose to approach the Supreme Court, then the ruling of the High Court stands. The conflict of decisions on a particular point of law will then remain as it is. This is not a satisfactory position.

5.3.2. To allow a conflict of views between High Courts to arise and languish in comfort for many years, even decades, before resolving it 'if' the conflict is carried to the Supreme Court and ironed out in due course 'when' the matter happens to come up for hearing there, is less than an exemplary solution. A much better, much speedier, and much more satisfactory solution which will systematically address this problem deserves to be evolved. And such is the present endeavour of the Commission.

5.3.3. **The contours of the suggested solution are :**

(1) When High Court "A" is faced with a problem pertaining to an all-India law (excluding the Constitution of India) on which High Court "B" has already made a pronouncement, if High Court "A" holds a view different or inconsistent from the view already pronounced by High Court "B", High Court "A", instead of making its own pronouncement, shall make a reference to the Supreme Court. The order of reference shall be accompanied by a reasoned opinion propounding its own view with particular specification of reasons for differing from the view pronounced by High Court "B".

(2) (a) The party supporting the reference may arrange for appearance in the Supreme Court but will not be obliged to do so.

(b) The said party will have the option of submitting written submissions supplementing the reasoning embodied in the order of reference.

(c) The party opposing the reference shall also have a similar option for engaging an advocate in the Supreme Court and submitting written submissions, *inter alia* to counter the written submissions, if any, submitted by the other side.

(3) The Supreme Court may require the Government of the State in which the High Courts "A" and "B" are situated to appoint at the State's cost any advocate from the State panel of lawyers of the concerned States to support by oral arguments the view points of the respective High Courts.

(4) All such references may be assigned to a Special Bench which may endeavour to dispose of all such references within six months of the receipt of the references in the Supreme Court in view of the inherent urgency to ensure uniformity.

(5) If any SLP or appeal is already pending on the same point from judgment of High Court "B" or any other High Court, the said matter may be clubbed alongwith the reference. Any interested party may be permitted to appear as interveners.

(6) The Supreme Court may return the reference if it appears that the parties are acting in collusion.

(7) The Attorney General may be served with a copy of the referene and he shall be entitled to urge the point of view of the Central Government in regard to the relevant provision of the concerned Central Statute, if so desired.

(8) The referring High Court shall finally dispose of the appeal on all points in the light of the decision of the Supreme Court in regard to the referred point.

(9) The decision of the Supreme Court in the reference will have no impact or effect on the decision of High Court "B" in the event of the Supreme Court upholding the reference in case it has become final between the parties by reason of the matter not having been carried to the Supreme Court and the said decision shall remain undisturbed as between the parties in High Court "B".

5.3.4. In order to give effect to the aforesaid recommendation, a suitable legislation may have to be enacted. A draft of the suggested legislation has been *appended* for the sake of facilitating the task.

5.3.5. The *First Recommendation*, if and when accepted, will result in removal of the existing conflict and disharmony in some areas of law forthwith, and in other areas of law, in course of time, in a phased manner. In the result, the evident injustice occasioned to citizens by denial of equal treatment under the identical provision of an identical all-India law, will be remedied.

The *Second Recommendation*, if and when implemented, it is hoped, will result in nipping in the very bud such conflicts in the future. And the citizens will be protected from deprival of equality of treatment under the very same law.

5.3.6. The Commission, therefore, recommends accordingly.

Sd./-
(M. P. THAKKAR)
Chairman

Sd./-
(Y. V. ANJANEYULU)
Member

Sd./-
(P. M. BAKSHI)
Member

Sd/.-
(G. V. G. KRISHNAMURTY)
Member Secretary

NEW DELHI, DATED THE 21ST FEB., 1990.

NOTES AND REFERENCES

CHAPTER I

1. See Chapter IV, para 4.11 in regard to existing conflict on this point in the context of section 25(1) of the Hindu Marriage Act, 1955.

CHAPTER II

1. **Gurunath v. Kamlabai,** AIR 1955 SC 206, 207, 208.
2. **Ganga Saran v. Ram Charan,** (1952) SCR 36.
3. **Balakrishna v. Ramaswami,** AIR 1965 SC 195, 197.
4. Paragraph 2.4 *supra.*
5. Law Commission of India, *54th Report* (Code of Civil Procedure, 1908), Pages 71—93, Chapter I-J particularly para I-J 58 and I-J 59.
6. cf para 2.9 *infra.*
7. Law Commission of India, *54th Report* (Code of Civil Procedure, 1908), pages 88, 89.
8. Paragraph 2.7 *supra.*
9. See also para 2.13 *infra.*
10. See para 2.10 *supra.*
11. **Jagannathan Pillai v. Kunjithapadam Pillai,** (1987) 2 SCC 572, 575.
12. **Skandia Insurance Co. v. Kokilaben Chandravadain,** (1987) 2 SCC 654, 657.

CHAPTER III

1. Chapter IV, *infra.*

CHAPTER IV

1. **Damodar v. Urmila,** AIR 1980 Rajasthan 57.
2. **Rano Devi v. Rishi Kumar,** (1981) Hindu Law Reporter 324 (J & K).
3. **Balwinder Singh v. Gurpal Kaur,** AIR 1985 Delhi 14.
4. **N. G. Rama Prasad v. B. C. Vanamala,** AIR 1988 Karn 162.
5. **K. Krishnamurthy Rao v. Kamalakshi,** AIR 1983 Karn 235.
6. **Harcharan Kaur v. Nachhattar Singh,** AIR 1988 Punj 27.
7. **K. I. Mohan v. Jeejabai,** AIR 1988 Ker 28.
8. Bombay and Delhi, see *infra.*
9. **Smt. Chander Kanta v. Hans Kumar and another,** AIR 1989 Delhi 73.
10. **Smt. Jayeshree Ramesh Londhe v. Ramesh Bhikaji Londhe,** AIR 1984 Bom. 302.
11. **N. G. Rama Prasad v. B. C. Vanamala,** AIR 1988 Kant. 162.
12. **Smt. Pushpa Rani v. Krishan Lal,** AIR 1982 Del 107.
13. **Ashok Sharma v. Smt. Santosh Sharma,** AIR 1987, Del 63.
14. **Smt. Savitri v. Mulchand,** AIR 1987 Del 52.
15. **Smt. Shakuntala v. Rattan Lal,** (1981) HLR 542 (H.P.).
16. **Sadan Singh v. Smt. Reshma.** AIR 1982 All 52.
17. **Smt. Jarnail Kaur v. Sarwan Singh,** (1979) Hindu LR 415 (P&H).
18. **Minarani v. Dasarath,** AIR 1963 Cal 428.
19. **Kadia Harilal v. Kadia Lilavati,** AIR 1961 Guj 202.
20. **Akasam Chinna Babu v. Akasam Parbati,** AIR 1967 Orissa 163.
21. **Gurcharan Kaur v. Ram Chand,** AIR 1979 P & H 206.
22. **Purshotam v. Smt. Devakai,** AIR 1973 Raj 3.
23. **Manilal v. Smt. Bhanumati,** 1987(1) HLR 229.
24. **Sadanand v. Sulochana,** AIR 1989 Bom 220.
25. **S. Jagannadha Prasad v. Smt. S. Lalitha Kumari,** AIR 1989 AP 8.
26. See note 19 *supra.*
27. **Shantaram Narkar v. Hira Bai,** AIR (1962) Bom. 27.
28. Note 25 *supra.*
29. **Smt. Darhsan Kaur v. Malook Singh,** AIR (1983) P& H 28.
30. **Jagdish v. Bhanumati,** AIR (1983) Bombay 297.
31. Note 29 *supra.*
32. **Jang Bahadur v. Smt. Mukta Syal,** AIR 1986 Del 422.

33. **Iravva** v. **Shivappa Shiddalingappa,** AIR 1987 Karn. 241.
34. **Saraswathi Ammal** v. **Lakshmi,** AIR 1989 Madras 216.
35. **Anjan Kumar** v. **Smt. Minakshi Sarma,** AIR 1985 Guahati 44.
36. **Kamalabai** v. **Ramdas,** AIR 1981 Bombay 187.
37. **Iravva** v. **Shivappa Shiddalingappa,** AIR 1987 Karnataka 241.
38. Note 36 *supra*.
39. Note 34 *supra*.
40. **Kamta Prasad** v. Smt. Omvati, AIR 1972 Alld. 153.
41. **Santosh Anand** v. **Anand Prakash,** 1980 All WC 157.
42. **Surinder Singh** v. **Manjit Kaur,** AIR 1983 J & K 86.
43. **Anil Kumar** v. **Smt. Aruna Duggal,** AIR 1989 NOC (J&K) 63.
44. **Smt. Shukla** v. **Brij Bhushan,** AIR 1982 Delhi 223.
45. **P. Moharajan** v. **Chakalayil Kunj,** AIR 1988 Orissa 175.
46. **Surinder Kaur** v. **Madan Gopal Singh,** AIR 1980 Punjab & Haryana 334.
47. **Vinod Kumar** v. **State of Punjab,** AIR 1982 Punjab & Haryana 372.
48. **Suresh Kumar** v. **Smt. Saroj Bala,** AIR 1988 Punjab & Haryana 217.
49. **Dr. Suraj Prakash** v. **Mohinder Pal Sharma,** AIR 1988 Punjab & Haryana 218.
50. **Arun Kumar** v. **Jnanendra Nath,** AIR 1975 Calcutta 232.
51. **Surjya Kumar** v. **Smt. Maya Dutta,** AIR 1982 Calcutta 223.
52. **Vidyaben** v. **J. N. Bhatt,** AIR 1974 Gujarat 23.
53. **Madhavan Ezhuthassan** v. **Vellayyappan,** (1981) HLR 594 (Ker).
54. **Janabai Ammal** v. **T A. S. Palani Muduliar,** AIR 1981 Madras 62.
55. Note 54 *supra*.
56. **Anant Gopalrao** v. **Jankibai Gopalrao,** AIR 1984 Bombay 319.
57. **B. Bangarappa** v. **I.K.T. Pattanshetti,** AIR 1988 Karnataka 174.
58. **Hemalata Dei** v. **Umashankari Maharana,** AIR 1975 Orissa 208.
59. Note 56 *supra*.

CHAPTER V

1. See Chapters I, II and III *supra*.

DRAFT BILL

THE CONFLICT OF DECISIONS (RESTORATION OF UNIFORMITY) BILL, 1990

A Bill to promote the uniformity of law, by providing a machinery for settling conflicts of decisions amongst High Courts.

1. **Short title.**—This Act may be called the Conflict of Decisions (Restoration of Uniformity) Act, 1990.

2. **Definitions.**—In this Act, unless the context otherwise requires.—

(a) "reference" means a reference made by the High Court under section 3, and

(b) "statutory instrument" means a rule, notification, byelaw, order, scheme or form made under any enactment.

(c) "Special Bench" means a Bench to which references are specifically assigned.

3.(1) **Conflict of decisions and reference by the High Court.**—Where, on a question of law involved in a case pending before a High Court being a question to which this section applies, the High Court takes a view which is in disagreement with the view taken on that question in a judgment of another High Court (not being a judgment which has been subsequently overruled or superseded by law), then the High Court shall, before finally disposing of the case, make a reference of the question to the Supreme Court, in order that the law on the subject may be settled for the whole of India.

(2) The provisions of this section apply to a question of law—

(a) relating to the interpretation of a Central Act or of a statutory instrument issued thereunder, or

(b) relating to a subject forming part of the uncodified law of India.

but they do not apply to a question relating to the interpretation of the Constitution or any order issued thereunder.

4. **Contents of order of reference.**—The High Court shall, in the order of reference under section 3.—

(a) formulate the question of law referred by it to the Supreme Court, and

(b) state its own view on that question along with its reason for differing with the view of the other High Court.

5. **Proceedings in the Supreme Court.**—Where a reference relating to a question of law is made to the Supreme Court by the High Court under section 3, the Supreme Court may proceed to hear the reference and determine such question in accordance with the provisions of this Act.

6. **Notice to parties and other persons.**—Notice of the date fixed for hearing of the reference shall be given—

(a) to the parties to the proceeding pending in the High Court out of which the reference arose;

(b) to the Attorney General of India;

(c) if the Supreme Court so directs, to the Governments of the States in relation to which the High Court making the reference and the other High Court with whose view the first mentioned High Court is in disagreement, exercise jurisdiction; and

(d) such other State Government, person or bodies, if any, as the Supreme Court may think proper in the circumstance of the case.

7. **Arguments and submissions by parties.**—(1) A party to whom notice is issued under clause (a) of section 6 may, if it so chooses, appear in the reference and address oral arguments or make written submissions to the Court on the question at issue, including (if so permitted by the Court), arguments or submissions in reply to those of any party appearing in the reference.

(2) The Attorney General of India to whom notice is issued under clause (b) of section 6, shall be entitled to apper in the reference and to address oral arguments or make written submission to the court, on the question at issue, including arguments or submissions intended to place before the Court the views of the Central Government on that question.

(3) Where notice is issued to the State Government under clause (c) of section 6, the State Government, through its advocate,—

(a) shall appear in the reference and address oral arguments (unless dispensed with by the court) and make written submissions to the Court on the question at issue; and

(b) shall, if so required by the Court, place before the Court all such material as may possibly support the view taken on the question at issue by the High Court exercising jurisdiction in relation to the State.

(4) The State Government, person or body to which or to whom notice may have been issued under clause (d) of section 6 may appear in the reference and address oral arguments or make written submissions to the Court on the question at issue.

8.(1) **Hearing by Special Bench and consolidation of cases.**—A reference may be heard by a Special Bench of the Supreme Court, for disposal within six months of its receipt in the Supreme Court in view of the inherent urgency to ensure uniformity.

(2) Where the question involved in a reference is also involved in any proceeding including a petition for special leave to appeal pending before the Supreme Court (whether on appeal from a High Court or otherwise), the Supreme Court may consolidate the reference and the proceedings and hear them together in the interests of justice.

9. **Collusive references.**—Where the Supreme Court is of opinion that a reference is the result of a collusion between the parties, it may decline to hear it and may return it to the High Court.

10. (1) **Decision of the Supreme Court.**—The decision of the Supreme Court on a reference under this Act shall be communicated to the High Court which had made the reference and to all High Courts whose views on the question at issue might have been convassed before the Supreme Court.

(2) The High Court making the reference shall thereafter proceed further with the case pending before it, for disposal in conformity with the decision of the Supreme Court.

11. **Effect on judgment of High Courts.**—The decision of the Supreme Court on a question of law under this Act shall not affect the finality of any judgment of a High Court in any case as between the parties to that particular case if no appeal has been carried against such judgment of the High Court, notwithstanding the fact that the proposition of law laid down in the judgment may have been overruled or modified by the Supreme Court in its decision.

12. **Rules by the Supreme Court.**—The Supreme Court may make rules to regulate the procedure to be followed in regard to references under section 3 and proceedings thereon.

GMGIPN—S 3—191 Min. of Law & Justice/ND/90—Dt. 23-4-91—1,200.