CHAPTER-VIII

SETTLEMENT OF SPOUSAL PROPERTY : CULMINATION OF SPOUSAL CONFLICT PROBLEMS

(a) Introductory

In England under common law a married woman lost her legal existence by the fact of marriage. In the words of Blackstone, "(b)y marriage, the husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated in that of the husband...." "Upon this principle, of an union of person in husband and wife", he further adds, "depend almost all the legal rights, duties and disabilities that either of them acquire by marriage."¹

This principle very pointedly brings out the effect of the merger of the wife's legal status into that of her husband on her property rights. Much of her personal property whether possessed by her at the time of marriage or coming to her after marriage, either became absolutely his own, or during coverture might, if he chose, be made absolutely his own, so that even if the wife survived him it went to his representatives. On the other hand, the wife's freehold estates of which she was seised, vested in husband and wife both, but the husband acquired sole management and control during marriage.² Though he could not sell it, but the birth of a

2. For a succinct summary of law on this point, see Dicey, Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century, 2nd ed., (1902) at pp.372,n.2.
child entitled him an interest for life by the 'Courtesy of England'.

Under this common law scheme of property, which lasted up to 1870, "it is surely substantially true to say that marriage transferred the property of the wife to her husband." In sum, the husband could say, "'what is yours is mine; what is mine is my own'."

The courts of equity mitigated to some extent the hardship of married women which they encountered at the common law. Equity courts were not bound by the rules of common law and were free to "consider all the circumstances of those cases that came before them and to adapt the means to the end." The goal was achieved by a systematic and ingenious development of the principle that "even though a person might not be able to hold property of his own, it might be held for his benefit by a trustee whose sole duty was to carry out the terms of the trust." This principle created a 'separate property' for the married woman for her 'separate use', on the basis of the declaration of the settlor. With regard to this 'separate property', the married woman was "released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is sui juris."

4. Dicey, op.cit., at p.375.
However, even if the courts of equity were able to improve the lot of women, yet, it could not make a married woman, in respect of her separate property, a \textit{feme sole}.\textsuperscript{10}

Thus, to some extent, equity provided protection to those married women whose property was the subject of a marriage settlement, on the other hand, women who married without a marriage settlement, or broadly speaking, woman belonging to poorer classes, were still governed by the medieval common law. So far as this system affected a small class of women, it engaged little attention. But in the nineteenth century, more and more women earned income of their own, either in trade, or on the stage, or by writing or pursuing other gainful professions, the earnings acquired by their labour were not their own and a number of scandalous cases of husbands' impounding their wives' earning for the benefit of their own creditors or even mistresses came to fore.\textsuperscript{11} Therefore, the intervention of the Legislature became imperative and a series of Acts were passed to mitigate the hardship which arose from the time lag between social and legal developments.

Starting from 1870, the Parliament changed the whole conspectus of married women's property by Married Women's Property Act of that year. Certain property of the married woman, for instance, her wages and earnings, were deemed to be her separate property.\textsuperscript{12} Section 9 gave the court discretion

\textsuperscript{10} Dicey, \textit{op.cit.}, at pp.379-80.
\textsuperscript{12} Section 1, Married Women's Property Act, 1870.
to decide questions between husband and wife in this regard. Since the change introduced by the Act was of a limited nature, therefore, a radical step in this respect because desirable, and the Married Women's Property Act, 1882, was passed repealing the Act of 1870.

Historically, Married Women’s Property Act, 1882, is the most important. Section 1 of the Act empowered a married woman to hold and dispose of her property as a feme sole. She was also made capable to enter into a contract and of suing and being sued. The further Married Women’s Property Acts, 1884–1908, effected no change in principle but were enacted to clear up difficulties and ambiguities in the Act of 1882.

In contrast, under the Matrimonial Causes Act, 1857, a wife was considered a feme sole in respect of her property that she might acquire after a decree for judicial separation was passed. Moreover, on the resumption of cohabitation, all the property so acquired, she could hold for her separate use. Similarly, in case of desertion she could seek protection order and retain her property as a feme sole.

Comparing the provisions of the Act of 1882 and that of Matrimonial Causes Act, 1857, it is clear that whereas the

13. 45 & 46 Vic., c. 75.
14. Section 1(1) of the Act of 1882 provided: "A married woman shall...be capable of acquiring holding, and disposing by will or otherwise, any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee..."
15. Id., Section 1(2).
17. Ibid.
18. Id., section 21.
latter followed the simple mode of placing the married women on the same footing as an unmarried woman, the former Act did not more than extend the existing principles of equity. For instance, a married woman's contract bound only her estate and she was not made personally liable under the Act of 1882. Consequently, she could not still be committed under a judgement summons or be made bankrupt if she failed to satisfy a judgement debt. Secondly, the Act of 1882 extended only the principle which the courts of equity applied to those women whose property was subject to a married settlement, but, the Matrimonial Causes Act, put her on the same footing as that of an unmarried woman.

In the light of these two types of approaches, the natural question arises: What factors were responsible for the half-hearted move of the Parliament, that it could not lay down the simple rule on the same lines as that of the Act of 1857? One obvious reason seems to be the conservativeness of the English people, and second, their zeal to protect the married women from the rapacity of their husbands.

Dicey, giving out these two reasons, defends this half-hearted effort mainly on two grounds:

"The one was that, while many members of Parliament dreaded a revolution in the law affecting family life, their fears

were dispelled by the assertion that the proposed change did no more than give to every married women nearly the same rights as every English gentleman had for generations past secured under a marriage settlement for his daughter on her marriage. The other was that members of Parliament belonging as they did to the wealthier classes of the community were, though ready to save hard-working women from injustice, determined not to sacrifice the defence by which the court of Chancery had protected the fortunes of well-to-do women against the attacks of their husbands. Now to enact off-hand that a married women should, as regards her property, stand in the position of a feme sole might shake the validity of that restraint on anticipation which most English gentlemen thought and still think necessary for the protection of a married women against her own weakness or the moral authority of her husband." (Emphasis in original)

Thus, the new legislation did no more than extending the rules of equity, framed for the daughter's of the rich, to the daughters of the poor; putting old wine in new bottles, free-for-sale to all and sundry.

With the passage of time, this traditional method of dealing with married women's property by extending the equitable concept of "separate property", became a cliche. Therefore, Law Reform (Married Women and Tortfeasors) Act, 1935, was

22. Section 1(a) of the Law Reform (Married Women and Tortfeasors) Act, 1935, provided:
"...a married woman shall be capable of acquiring, holding and disposing of, any property...as if she were a feme sole."

It further provided:
"...all property which -
(a) immediately before the passing of this Act was the separate property of a married woman or held for her separate use in equity; or
(b) belongs at the time of her marriage to a woman married after the passing of this Act; or
(contd.)
passed which for the first time gave effect to three basic principles: equality of status and capacity of separation of property, and of separation of liabilities. 23

The aim before the English Parliament was to confer on the married women a full power to hold or dispose of their property, which it achieved by the year 1935. This principle of separation of property worked well till the husband remained the bread-winner and the wife's role was confined to the household. Still it could be argued that the husband retained the ownership of property which was purchased out of his earnings. But during the Second World War and thereafter, most married women were wage earners, thus, were contributing towards the purchase of 'family assets' 24 directly when they made a down payment towards the purchase price or paying the instalments. In case they contributed in the household expenses, thus, relieving the husband to save more for the purchase of such 'family assets', they made the contribution indirectly. The courts in an overall effort to protect the interests of such married women, tried to do justice between the spouses by extending the meaning of section 17 of the Married Women's Property Act, 1882. 25

24. For the meaning of the concept of 'family assets' see our discussion in Part B, infra.
25. See ibid.
The courts, at any rate, succeeded in doing justice to a wife, who directly or indirectly contributed towards the acquisition of family assets, however, they never succeeded in getting a wife a share in the property by reason of her other contributions, i.e., other than financial contributions. For instance, a wife who looked after the home and family could not get anything from what they acquired during marriage except that she could claim maintenance from the husband. So much so, that a wife could not claim any interest in the balance or any property bought with what she saved through her skill, economy, thrift and hard work from housekeeping money. The common situation was stated by Sir Jocelyn Simon, P., in an extrajudicial address in 1965 by a telling metaphor: "The Cock can feather the nest because he does not have to spend most of his time sitting on it."

Injustice caused to the wife was taken notice of by the Royal Commission which said that "if on marriage, she gives up her paid work in order to devote herself to caring for her husband and children, it is an unwarrantable hardship when in consequence she finds herself in end with noting she can call her own." Therefore, another Law Commission

recommended to recognise the contributions by the wife in looking after the home and family. 31

Following the recommendations of the Law Commission, Matrimonial Proceedings and Property Act, 1970 was passed. Section 4 of the Act empowered the court to pass three types of property adjustment orders; namely, transfer of property for the benefit of the other spouse or for the benefit of any child of the family; settlement of property for the benefit of the other spouse or any child of the family; and, variation of anti-nuptial or post-nuptial settlements. Section 5 provided the matters which the court was to take into account while making any such order under section 4. Sub-section (1)(f) of section 5 recognised the wife's "contribution made by looking after the home or caring for the family" as a matter relevant

31. The Commission recommended, id., para 69, p. 34:

"We recommend that in the exercise of the court's armoury of powers to order financial provision it should be directed to have regard to various criteria. Among these there is one of outstanding importance in regard to the adjustment of property rights as between the spouses. This is the extent to which each has contributed to the welfare of the family, including not only contributions in money or money's worth (as in the determination of rights to particular items of property) but also the contribution made (normally by the wife) in looking after the home and family. This should meet the strongest complaint made by married women, and recognised as legitimate by the Morton Commission in 1955, namely that the contribution which wives make towards the acquisition of the family assets by performing their domestic chores, thereby releasing their husbands for gainful employment, is at present wholly ignored in determining their rights. Under our proposal this contribution would be a factor which the court would be specifically directed to take into account."
in deciding property adjustment order. The court was given a general power to exercise the powers, having regard to their conduct, in such a manner so as to place the parties in the same financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other. Now these provisions are replaced and reenacted in the Matrimonial Causes Act, 1973.

Thus, a radically new approach to family property was introduced by readjusting spousal property cutting across existing interests. Before the Act of 1970, the courts could exercise these powers to a limited extent. For instance, it could order settlement of the wife's property, only where divorce was granted on ground of wife's adultery, for the benefit of the innocent party and children of the parties. Similarly, it could vary ante-nuptial or post-nuptial settlements. The power to award a lump sum was only introduced in 1963. But sucha power it was said, was likely to be used

33. Sections 24(1) and 25(1) respectively.
34. The provision first originated in section 45 of the Matrimonial Causes Act, 1857, and was carried in subsequent enactments till it was repealed by section 42(2) of the Matrimonial Proceedings and Property Act, 1970.
35. The provision first originated in section 192 of the Judicature (Consolidation) Act, 1925, and carried in subsequent statutes, now section 24(1)(C), Matrimonial Causes Act, 1973.
in relatively rare cases where the party had sufficient assets to justify it. Therefore, new power of adjustment of property is important as the court may, as an alternative to the payment of a lump sum, order one spouse to transfer investments than to compel him to sell them to raise the necessary capital.

In contrast to English law, the Hindu married women, from antiquity enjoyed those rights in property which English married women were granted after a struggle of about a century. Sir, Gooroodas Banerjee has remarked: "nowhere were proprietary rights of women recognised so early as India; and in very few ancient system of law have these rights been so largely conceded as in our own."

In the ancient times, before the concept of women's property fully developed, perhaps, the concept of co-ownership of property existed between the husband and wife. But

37. See Davis v. Davis, (1967), F. 185, at p. 192 per Willmer, L.J.
39. See, J.D.M. Derrett, "The Legal Status of Women in India From Most Ancient Times to the Present Day", A.I.R. 1956 (Jour.) 73, at pp. 80 et seq.; P. Sen, General Principles of Jurisprudence, T.L.L., at p. 288; Gopal Chandra Sarkar Sastri, Hindu Law, 8th ed., pp. 271 et seq. quoted in Muthalammal v. Veeraraghavulu, A.I.R. 1953 Mad. 202. As to cases see ibid., per G. Menon, J.; Kamalabala Bose v. Jiban Krishna Bose, A.I.R. 1946 Cal. 151, per Das J.; Janna v. Machul Sahu, I.L.R. 2 All. 315. The concept of co-ownership is based on the following text: "There is no partition (or separation) between husband and wife because from the 'taking of hand' (i.e., marriage) companionship (or jointness; of husband and wife) (in religious) act (is ordained); likewise in the fruits (acts of) spiritual merit; and also in the ownership of wealth; since (Manu and other sages) (contd...)"
the husband had the sole right to manage this community.\textsuperscript{40} Since old Hindu law did not allow divorce, therefore, the question of the division of this community between the husband and the wife did not arise. But nonetheless, the existence of such a community was significant in various ways. It was for reason of this concept, says G.C.S. Sastri, "that the wife enjoys the husband's property, and is entitled to get maintenance out of it; and it is also by virtue of this right that she gets a share equal to that of a son, when partition takes place at the instance of the male members."\textsuperscript{41} Another significance is offered by Apastamba (on whose text the concept is based), who says that it is by virtue of this principle that the wife is not guilty of theft, if she expends her husband's property.\textsuperscript{42} But with the passage of time, with the development of the concept of woman's property, this concept of the community paled into insignificance.\textsuperscript{43}

A Hindu wife was entitled to own property from the ancient times.\textsuperscript{44} Wife's peculium was called \textit{stridhana}. The

\begin{quote}
\textsuperscript{40} P. Sen, \textit{supra} note 39, \textit{ibid}; G.C.S. Sastri, \textit{supra} note 39, at p. 278. Even in modern times, the law of certain countries gives the husband alone the right to manage the community regime, see O. Kahn-Freund, "Matrimonial Property - Some Recent Developments", (1959) 22 M.L.R. 241. See also Part D, infra.
\textsuperscript{41} G.C.S. Sastri, \textit{Hindu Law}, \textit{supra} note 39, at p. 278.
\textsuperscript{42} See the text of Apastamba cited in fn. 39, \textit{supra}.
\textsuperscript{43} Derrett, note 39, \textit{supra}.
\end{quote}
word stridhana is derived from 'stri' (woman) and 'dhana' (property), therefore, it literally means woman's property. The term stridhana was not used in its simple etymological sense, but had a technical meaning. The Smritikaras differ from each other as to what items of property constitute stridhana. Reconciling the various texts, Myne has enumerated the following kinds of properties as stridhana:

1. What is given before the nuptial fire, adhvagni.
2. What a woman receives while she is conducted from her father's house to her husband's dwelling, adhavahanika.
3. What is bestowed in token of love, pritidatta or bhartrudaya.
4. Pritidatta or affectionate present, as defined by Katyayana, is whatever has been given to a woman through affection by her mother-in-law or her father-in-law as also wealth termed padavandanika, that is, which is received by a woman at the time of bowing at the feet of elders.
5. Gifts made by father, mother or brother, (according to Manu, these are counted as three kinds of stridham)
6. Gift subsequent, that is, that which is received from her husband's family or her father's family subsequent to marriage, anvadheysaka.
7. Gift on supersession, adhivedanika, A present made to a woman on her husband's marriage to another wife is gift on supersession.
8. Gift by bandhus bandhudatta, that is, what is given to the bride by the relations of her mother or of her father.

9. Sulka or the fee which is variously described as (i) the gratuity for the receipt of which a girl is given in marriage; (ii) as being a special present to the bride to induce her to go cheerfully to the mansion of her lord; and (iii) as what is received as the price of household furniture, conveyance, milch-cattle and ornaments.\(^{45}\)

There was a cross-classification of property for the purposes of power of a married woman to dispose of her stridhana. One type of stridhana was called saudayika. Literally the term means a gift made through affection.\(^{46}\) Over this type of stridhana the wife had absolute control. Stridhana, other than saudayika was called non-saudayika over which the wife had no power to dispose of during coverture without the consent of her husband.\(^{47}\) But a progressive view

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46. It is derived from Sudaya and means, according to Dayabhaga IV, 1.22, "received from affectionate kinsmen," See Kane, op. cit., at p.778. It is a term "applied to gifts made to a woman at, before, or after marriage, by her parents and their relations, or by her husband and his relations in other words it means gifts from relations as distinguished from gifts from strangers", see Mulla, Principles of Hindu Law, 15th ed., (1982), at p.200.
47. Kane, supra note 44, at p.785.
was taken in Bhagwan Lal v. Bai Divali, where the wife was living separate from her husband for nearly 30 or 40 years, it was held that the wife was not under the control of her husband.

Now under the Hindu Succession Act, 1956, all this distinction of saudavika v. non-saudavika has been done away with. Section 14 of the Act of 1956 provides that all property held by a woman, acquired from any source or in whatever capacity or from any person is declared to be her separate property as full owner thereof.

(B) Movement From Separate to Spousal Property

(a) Development Under English Law

After the passing of Married Women's Property Act, 1882, which empowered a married woman to hold or dispose of her separate property, and until the passing of Matrimonial Proceedings and Property Act, 1970, under which a radically new approach to family property by readjusting spousal property cutting across existing interests was introduced, it was through the common law lawyer's subtle technique of interpretation that the English Courts were able to do justice to the married women. The most coveted principle of separation of property worked well till wife's role was confined to the four-walls of the house. But the increased participation of the married women, especially after the World War II, this principle proved a boomerang to them.

Husband and wife normally enjoy and use much of their property together and very frequently their money and goods are mingled so inextricably that an appropriation of assets to one spouse or the other becomes a game in which the element of hazard exceeds the arithmetical skill. When two married people arrange their home, they do not make their arrangements in the contemplation of future discord or separation. In view of the peculiar nature of the conjugal relationship and the incidents of matrimonial home, it is not strange when a married couple purchases a house or when the contents of a house are being acquired that they should contemplate that a time might come when decision would have to be made as to who owned what. Nay, the very idea of having precise statement or understanding as to where ownership rested, seems absurd and militates against the conjugal union. In fact, there is no discussion, no agreement and no understanding as to sharing in the ownership in the eventuality of the breakdown of marriage culminating in divorce.

It was in this backdrop that the English courts faced this problem as to how to take account of these facts without encroaching on the rule of separation of property. The primary question was: How to find a compromise between the principles of separation and of community while at the same time preserving the equality of the spouses in matters of property and contract?
The earlier cases followed the general rule that property purchased by one spouse with his or her own money presumptively belonged to that spouse to the exclusion of the other. For instance, if the house was bought by the husband with his earnings, the whole beneficial interest vested in him. But if he had conveyed it into his wife's name, the "presumption of advancement" operated to give whole interest to her. However, now, in view of the principle of equality between both the spouses, the strength of the presumption has been much diminished. The reason for this is that this presumption found its place in the law of Victorian days when a wife was utterly subordinate to her husband, therefore, it has a very little place in the law today.

49. Re Sims' Question, (1946) 2 All E.R.138. Consequently, rent received from a lodger was held to belong exclusively to the husband: Montgomery v. Blows, (1916) 1 K.B.899, (C.A.).

50. This doctrine of "presumption of advancement" has existed in equity which implies that where a husband purchased property in his wife's name he intended a gift of that property to her. The earliest reported case appears to be Kindon v. Bridges, (1688) 2 Vern.67. See also T.K. Samshaw, Presumption of Advancement, (1971) 121 N.L.J., 96-97 and 121-121.


52. Pettitt v. Pettitt, (1969) 2 All.E.R.385, per Lord Reid, at p.389; per Lord Hodson, at p.404; per Lord Upjohn, at p.406; per Lord Diplock, at p.414. See also Lord Denning, M.R., in Falconer v. Falconer, (1970) 3 All.E.R.449, at p. 452. But now as a general rule the proper presumption in such a case is that the beneficial interest belongs to them jointly, see Silver v. Silver, supra. Moreover, in case of family assets the presumption is easily rebuttable, see Fish v. Fish, (1966) 110 Sol Jo 51; Mansfield v. Mansfield, (1966), 110 Sol Jo 831.

This simple principle of separation of property could not stave the courts off from being involved in the cases where it proved harsh to the wife when marriages broke down. Various factors contributed to this. Firstly, in the later first half of this century and especially, after World War II, more and more wives were engaged in gainful employment, thereby, contributing to the family pool. Secondly, with the emergence of a market for the provision of goods and services on credit coupled with the augmentation of income with the help of the wife, it became easy for the couple to acquire matrimonial home and its contents by way of instalment purchases and instalment mortgages. Kahn-Freund, while pointing out the time-lag which had taken place after the passing of the Married Women's Property Acts, observes: 54

"The Married Women's Property legislation of a century ago was response to a revolution in production, the crisis of today is and the legislation which will have to emerge from it will be a response to a no less revolutionary transformation in consumption. It is the change in the distribution of durable assets intended for use and enjoyment and the corresponding change in modes of consumption which has led to a new time-lag between social and legal development."

Thirdly, due to the escalation in the divorce rate, the courts found themselves caught more frequently than earlier. 55


55. In England in 1871 the ratio of new marriages to divorce was 1150:1; whereas in 1952 it was 10:1, see R.M. Graveson, "The Future of Family Law", in A Century of Family Law, Graveson and Crane, Eds., at p. 412 n. 4.
Starting from Re Roger's Question, the Court of Appeal established the rule that, if a wife contributed directly or indirectly, in money or money’s worth, to the initial deposit or to the mortgage instalment, she gets an interest proportionate to her contribution. This could be made possible, notably under the tutelage of Lord Denning, by the discretion vested in the court in respect of property between the husband and the wife under section 17 of the Married Women’s Property Act, 1882.

Looking to the special nature of the relationship between the husband and the wife, the argument of the court was that when the parties are about to be married or when they are happily married, the transactions between them can not be evidenced in the same way as an ordinary commercial transaction. The reason for this, given by Lord Evershed, M.R., was:

"When two people are about to be married and are negotiating for a matrimonial home it does not naturally enter the head of either to enquire carefully, still less agree, what should happen to the house if the marriage comes to grief."

56. (1948) 1 All E.R.328.
57. (1972) 1 W.L.R.301.
58. The relevant part of section 17 provided:
"In any question between husband and wife as to the title to or possession of property...the judge...may make such order with respect to the property in dispute,...as he thinks fit..."

Hence in such cases the court must try to find out the intention of the parties, and in many cases, the court is bound to attribute to them an intention that they clearly never had. The court's function was summed up thus:

"What the judge must try to do...is to conclude what at the time was in the parties' minds and then to make an order which, in the changed conditions, now fairly gives effect in law to what the parties, in the judge's finding, must be taken to have intended at the time of the transaction itself."60

In this case, the wife had provided $100 before signing the contract and there was a "tiff" between husband and wife on the discovery that the conveyance is in the name of the husband. The court found that the so called "tiff" was support, or, at least, not to contradict the conclusion that the question of ownership was not absent from the mind of the parties. What should be the position if at the time of purchase the question of title was not discussed between the parties at all? The answer of Lord Denning, L.J., (as he then was) to this question was that:

"...when the parties by their joint efforts, save money to buy a house which is intended as a continuing provision for them both, the proper presumption is that the beneficial interest belongs to them both jointly. The property may be bought in the name of the husband alone or in the name of


the wife alone, but, nevertheless, if it is brought with money saved by their joint efforts and it is possible fairly to distinguish between the efforts of one and the other, the beneficial interest should be presumed to belong to them both joint. 62

Thus, Lord Denning spelt out the concept of "family assets", a concept which was later used to decide disputes of property between husband and wife. For instance, in Hine v. Hine, 63 Lord Denning, L.J. (as he then was), defined the expression "family assets" as:

"something acquired by the spouses for their joint use, with no thought of what is to happen should the marriage breakdown." 64

Thus, in case of "family assets", the cases between husband and wife should not be governed by the same strict considerations as commonly applied to the ascertainment of the respective right of strangers. 66 Lord Denning did not stop here, he went to the length of saying that section 17

62. The opinion of Romer, L.J., was that cases between husband and wife were not to be governed by the same considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of the strangers, id., at p.670.

63. (1962) 1 W.L.R.1124(C.A.).
64. Id., at p.1127. For the meaning and development of the expression 'family assets', see Miller, "Family Assets", (1970) 86 L.Q.R.98.
65. See also Priance v. Priance, (1957) 1 All.E.R.357, at p.359, where Lord Denning meant by this expression as the things intended to be a continuing provision for them during their joint lives such as matrimonial home or the furniture init. See also Diplock, L.J., in Ulrich v. Ulrich and Felton, (1968), All E.R.67, at p.72; per Lord Denning M.R. in Gissing v. Gissing, (1969), 1 All E.R.1043, at p. 1046(C.A.).
of the Married Women’s Property Act, 1882, is entirely discretionary and the discretion is that of the court which: 67

"... transcends all rights, legal or equitable, and enables the court to make such order as it thinks fit. This means, as I understand it, that the court is entitled to make such order as appears to fair and just in all the circumstances of the case." (Emphasis added).

The underlined words appeared to give the court unfettered discretion in disputes between husband and wife by altering existing rights by attributing a fictional intention or agreement at the time of transaction which the parties never had.

These were the cases where the wife had made direct contribution towards the purchase price or the payment of mortgage instalments. But if it was the other way round, i.e., the wife paid the household bills and the husband paid the mortgage instalments, nevertheless, the "whole of their resources were expended for their joint benefit" and therefore the "product should belong to them jointly...in equal shares." 68

The question of indirect contributions was also agitated where one spouse enhanced the value of the property by making improvements in it. Except that where a spouse does only "do-it-yourself" jobs, 69 like mere painting or white washing, if a spouse does a substantial work of renovation, that spouse would be entitled to that much of the enhanced value of the property as was due to his work. 70

68. Frubance v. Frubance, (1957) 1 All E.R.357, at p.360, per Lord Denning, M.R.
70. Appleton v. Appleton, (1965) 1 W.L.R.25, per Lord Denning, (contd...)
Barring one digression, the Court of Appeal followed Lord Denning's lead in the subsequent cases.

Thus, on the whole, by adjusting the law to modern social conditions, the effort of the Court of Appeal was to narrow the gulf created by the time-lag. However, it should be observed that assuring unlimited powers under section 17 of the Act of 1882 to change the existing rights of ownership, made out a clear case of judicial legislation. But this 'chosen instrument' in section 17 was made blunt by two successive decisions of the House of Lords in Pettitt v. Pettitt and Gissing v. Gissing.

In Pettitt, the house belonged to the wife and on breakdown of marriage the husband claimed beneficial interest in the house by virtue of a number of improvements made in the garden and the house. He was awarded £300 and the court of Appeal reluctantly upheld the decision holding that they were bound by the decision in Appleton v. Appleton. The wife appealed to the House of Lords.

Accepting the appeal unanimously, it was held that section 17 of the Act of 1882 is merely a procedural one and the "procedure was devised as a means of resolving a dispute or a

question as to title rather than as a means of giving some title not previously existing. 77 "I do not think", said Lord Reid, "that a Judge has any more rights to disregard property rights in section 17 proceedings than he has in any form of proceedings." 78 Whenever there is the existence of a clear agreement between husband and wife in regard to ownership, that must be given effect to, however, in absence of such a contract the court has no power to make an order which withdraws title from the party to whom it belongs. 79 However, in cases where both parties claim ownership, and sufficient evidence is not forthcoming, however difficult may be the task of the court "(t)he search must still be to find an answer to the question as to where ownership lies." 80 Therefore, the real question before the court is "Whose is this?", and not - "To whom shall this be given?" 81

The house of lords deprecated the use of the term "family assets" as being devoid of legal meaning and conducive to the error of supposing that the legal principles applicable to the determination of the interests of spouses

78. Id., at p.388. See also per Lord Upjohn, id., at p.405 and per Lord Diplock, id., at p.412.
79. Id., per Lord Morris, at p.393, 397.
80. Id., per Lord Morris, at pp.393-94.
81. Per Lord Morris, id., at p.393.
in property are different from those of general application in determining claims by one person to a beneficial interest in property in which the legal estate is vested in another.\textsuperscript{82}

It was said that there is no doctrine of community of goods between husband and wife existing in the country and the use of this expression can define no legal rights and obligations.\textsuperscript{83}

Overruling the decision of \textit{Hine v. Hine}\textsuperscript{84} and \textit{Appleton v. Appleton},\textsuperscript{85} it was observed that such a notion of "family assets" smacks of a change in the law of property between husband and wife, a matter which is in the exclusive province of Parliament and "outside the field of judicial interpretation."\textsuperscript{86}

There may, however, be some borderline cases where both the parties have a beneficial interest but in which it is not possible to be entirely precise in calculating their respective shares, the judge in his discretion may apply principle of equality.\textsuperscript{87}

The decision in Pettitt, however, did not deter Lord Denning from using the expression "family assets". In the case of \textit{Chapman v. Chapman},\textsuperscript{88} while referring to the criticism of the expression by Lord Hodson\textsuperscript{89} and Lord Upjohn,\textsuperscript{90} he preferred

\begin{itemize}
  \item \textsuperscript{82} \textit{Id.}, \textit{per} Lord Hodson, at p.403, \textit{per} Lord Upjohn at p.409, \textit{per} Lord Diplock, at pp.412 et. seq.
  \item \textsuperscript{83} \textit{Id.}, \textit{per} Lord Upjohn, at p.409.
  \item \textsuperscript{84} (1962) 1 W.L.R.1124.
  \item \textsuperscript{85} (1965) 1 W.L.R.25.
  \item \textsuperscript{86} \textit{Per} Lord Hodson, in \textit{Pettitt v. Pettitt}, (1964) 2 All E.R. 385, at p.404.
\end{itemize}
to follow the observations of Lord Diplock where his Lordship said: 91

"But it is comparatively rarely that husband and wife enter into any express agreement as to the proprietary rights which are to subsist in "family assets" acquired or improved while they are living or contemplating living happily together. Yet any such acquisition or improvement must have some legal consequences. Family assets are not "res nullius." (Emphasis in original)

After Pettitt, the house of Lords had again opportunity to settle the law in Gissing v. Gissing. 92 The opinion in Gissing was that if one spouse seeks to establish a beneficial interest in property, the legal title to which is vested in the other, he or she can do so only by proving that the legal owner holds the property on trust for the claimant. The issue depends on the common intention of the parties 93 and if there is an express agreement then that will indicate the common intention. 94

at p. 575.
88. (1969) 1 W.L.R. 1367; see also Nixon v. Nixon (1969) 1 W.L.R. 1976, Smith v. Baker (1970) 1 W.L.R. 1160, it was said that the decision in Pettitt has not changed the law to any material extent. Hence, where it was not clear what they agreed, it should be decided, as was done before Pettitt, to give them half and half, per Denning, M.R., at p. 1162.
90. Id., at p. 409.
91. Id., at pp. 412 & 413.
93. Id., per Lord Dilhorne, at p. 785; per Lord Pearson, at p. 788; per Lord Diplock, at p. 790.
94. Id., per Lord Pearson, at p. 788; per Lord Diplock, at p. 790.
However, where there is no express agreement, then the common intention can be inferred from the conduct of the parties.\(^95\) But to infer such an agreement from conduct of the parties at the time of acquisition or thereafter, there may be numerous situations which may tend to prove or negative such an intention. For instance, where a matrimonial home is purchased without the aid of advance on mortgage, the sum contributed by the spouse in whom the title is not vested, gives rise to a rebuttable presumption that he or she intended to have an interest in the property in the same proportion as the sum contributed bore to the total purchase price.\(^96\) Similarly, where one spouse does not pay to the initial deposit, but makes payment to the mortgage instalments, it would be a faire case to infer a fresh agreement reached after the original conveyance that she should acquire a share.\(^97\) However, the difficulty may arise, for instance, say, the wife makes contributions towards the household expenses to enable the husband to pay the mortgage instalments, and there is no evidence that they in fact reached on an express agreement as to what the respective shares of each spouse would be, how the court would infer the intention? The answer of Lord Diplock was:\(^98\)

\[\text{"I take it to be clear that if the court is satisfied that it was the common intention}\]

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\(^95\) Id., per Lord Dilhorne, at p. 786; per Lord Pearson, at p. 788; per Lord Diplock, at p. 790.

\(^96\) Id., per Lord Diplock, at p. 791.

\(^97\) Id., per Lord Diplock, at p. 792.

\(^98\) Ibid.
of both spouses that the contributing wife should have a share in the beneficial interest and that her contribution were made upon this understanding, the court in the exercise of its equitable jurisdiction would not permit the husband in whom the legal estate was vested and who had accepted the benefit of the contributions to take the whole beneficial interest merely because at the time the wife made her contributions there had been no express agreement as to how her share in it was to be quantified.

However, such contribution to other expenses of the household, must be referrable to the acquisition of the house, otherwise in the absence of an express agreement between the parties, the court will not be justified in inferring any common intention merely because she continued to contribute out of her own earnings or private income to other expenses of the household.99 (Emphasis added) But Lord Reid could see no good reason for the distinction between indirect contributions and thought that in many cases it would be unworkable.100 On the other hand Lord Dilhorne said that "proof of expenditure for the benefit of the family by one spouse will not of itself suffice to show any such common intention as to the ownership of the matrimonial home."101

These conflicting statements with reference to indirect contribution by one spouse where the beneficial interest is held by another spouse, left the law in an uncertain state.102 No doubt, the majority of the House were of the opinion that a wife can claim an interest in the house as a result of

99. Id., at p.793, per Lord Diplock.
100. Id., at p.782.
101. Id., at p.786, per Lord Pearson, at p.788.
indirect contributions, but in the circumstances she must show that this was referable to the acquisition of the house in the sense that it freed the husband's own money. In other words, without the wife's help the husband could not have bought the property at all. Still, it seems, the Court of Appeal did not follow such an inference.

In *Falconer v. Falconer*, 103 the first case after *Gissing*, Lord Denning, M.R., was of the opinion that *Gissing v. Gissing* enabled the court to draw the inference of a trust whenever both go out to work, and one pays the housekeeping and the other mortgage instalments. "It does not matter", said Lord Denning, "which way round it is. It does not matter who pays what." 104

It was further emphasised by Lord Denning that it was not necessary that the contribution made by the wife must be referable to the acquisition of the property, but if she made the contribution, it would be her indirect contribution. 105

Thus, at any rate the Court of Appeal, under the leadership of Lord Denning succeeded in doing justice to a wife, who directly or indirectly contributed towards the acquisition of family assets. However, the Court of Appeal never succeeded in getting a wife a share who did not contribute in terms of

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104. Id., at p.452. The other members of the Court did not comment on this point.
105. *Hargrave v. Newton*, (1971) 3 All E.R.866. See also *Hazell v. Hazell*, (1972) 1 All E.R.923, where Lord Denning took the argument to its logical extent that even if the husband did not need her help, but if he did accept her contributions, she would be entitled to a share, id., at p. (cont'd....)
money. A wife who looked after the family and did not go out to work, could not get anything from what they acquired during marriage, except that she could claim maintenance. Meanwhile, the Parliament came to the help of such unfortunate wives by passing Matrimonial Proceedings and Property Act, 1970.

(b) Development Under Hindu Law

It has been observed earlier that a Hindu married woman is entitled to own property independently. Marriage does not affect her interest in the property. Parliament passed the Hindu Marriage Act, 1955, recognising divorce, but the aspect of marital property did not seem to pose the problem to the legislature. Therefore, a simple provision in the form of section 27 was enacted which provided for the adjustment of presents made "at or about the time of marriage" and which may "belong jointly to both the husband and the wife". Perhaps, the reason for confining the concept of spousal property to the property given "at or about the time of marriage", might be that the Indian women in 1950s were hardly engaged in any gainful employment. Even, the giving of higher education to the daughters at that time was considered to be luxury, or was "like another item in the dowry."

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The role of women was confined to the four walls of the household. Thus wife could not contribute directly to the family pool. Hence, on divorce, the question of division of 'family assets', acquired during marriage simply did not arise. At any rate, her contribution towards the welfare of the family and rearing of children was compensated through the award of matrimonial maintenance. Moreover, since matrimonial remedies under the Hindu Marriage Act were modelled on the basis of contemporary English Matrimonial Causes Act, 1950, which itself was wanting in terms of the concept of spousal property, therefore, there did not seem to be much occasion for anticipating the problems of 1980s or 1985s in terms of settlement of property acquired during the subsistence of marriage.

It is against this background that the simple provision of section 27 of the Hindu Marriage Act has to be appraised.

Section 27 empowers the matrimonial court to make suitable provisions in the decree which it may pass in the proceedings under the Act "with respect to any property presented, at or about the time of marriage, (and) which may belong jointly to both the husband and the wife." Since the relief is ancillary to the main proceedings, no order with respect to any such property can be passed under section 27 if the relief in the main proceedings is denied.108 But

108. See generally Chapter II, Part E, entitled "Connotation of Ancillary Relief", supra.
the words "the Court may make such provisions in the decree", occurring in the section do not necessarily indicate that in no case an application under this section can be entertained by the court after the decree in the main petition has been passed. For instance, where in an *ex parte* proceeding, divorce is granted to the husband against the wife, the wife, after the decree of divorce in the main proceeding is passed, should not be allowed to make an application for the disposal of property under section 27. It is submitted that the matrimonial court does not lose its jurisdiction for the allocation of property which falls under the ambit of section 27. Under English law, till the amendment made by section 1 of the Matrimonial Causes (Property and Maintenance) Act, 1958, the court was empowered to make provision for periodical payments to the wife "on any decree", of divorce or nullity. However, all along the English Courts held that the word "on" was not confined to the time of making the decree absolute but might mean even "shortly after". On this analogy we can say that the words "in any decree" occurring in section 27 of the Hindu Marriage Act does not necessarily confine the jurisdiction of 

109. The rules framed by some of the High Courts provide that a prayer for such relief under the section should be made in the petition itself. See for instance, Rule 5(i) of Hindu Marriage and Divorce Rule, 1956 of the Allahabad High Court; Rule 4(h) of the Hindu Marriage and Divorce Rule, 1955 of the Bombay High Court; Rule 4(g), Hindu Marriage and Divorce Rule, 1955 of the Gauhati High Court; Rule 2(8) of Rules made by Madhya Pradesh High Court under the Hindu Marriage Act XXV of 1955; Rule 8(xiii) of Hindu Marriage (Act 25 of 1955) Rules, 1956 of Patna High Court; Rule 801-E(g) of Rajasthan High Court Rules, 1952. 

110. 687 Eliz. 2, c 35. By section 1 of the Act the words "or any time thereafter" were added.

111. See for instance, unamended section 19(2) and (3) of the Matrimonial Causes Act, 1950.

112. See Rayden on Divorce, 8th ed., (1960), at p. 718 n.c. and the cases cited therein.
the court to the time of passing the decree in the main petition. In the circumstances of the case, even after the main proceeding is terminated, the court would still have jurisdiction to entertain an application under section 27.

The expression "at or about the time of marriage" is important. Herein the word 'at' seems to mean the actual time of marriage, and the words "about the time of marriage" mean around the time of marriage which may be either prior to or after it, but it must be near or around the time of marriage. Consequently, presents made subsequent to the marriage as distinguished from 'about' the time of marriage, do not seem to be strictly covered by section 27. However the word "about" is significant, it gives a leeway to the court where the circumstances of the case permit. For instance, if the 'sagai' (betrothal) ceremony was done sometime before the marriage, say, one year before the marriage ceremony took place, the property given at such a time would be covered by the expression "about the time of marriage".

The expression "belong jointly to both the husband and the wife" has been subject of controversy among the High

114. Id., at p. 229. It was stressed that care must be taken not to confuse presents made at or about the time of marriage with presents subsequently made, the "line which divides them may at times be very thin, nevertheless the distinction is real and substantial, and if overlooked will lead to the making of a wrong order." ibid.
Courts. While interpreting the word 'jointly', the Karnataka High Court\(^\text{115}\) reached the conclusion that the property must have been presented jointly to both the parties. Consequently, a present of rupees two thousand to the husband at the time of marriage was said to have been "paid to the husband alone by way of 'Vara Dakshina' and not jointly to husband and wife.\(^\text{116}\) Therefore, the claim of the wife for this amount failed. Faced with a similar situation, the Allahabad High Court on the other hand\(^\text{117}\) has invoked the inherent powers under section 151 of the Code of Civil Procedure.\(^\text{118}\) According to A.K. Kirty, J., section 27 does not exclude the power of the court to pass an appropriate decree in regard to property which may belong solely to the husband and solely to the wife.\(^\text{119}\)

However, the view that the court can invoke inherent powers to decide a matter under section 27 is not followed by other High Courts.\(^\text{120}\) The reason for the restricted approach is that the words 'belonging jointly' have been

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116. Id., per Kalagat, J., at p. 228. The case has been followed in Sai Narayan v. Padmini, 1981 H.L.R. 259 (Knt.).
118. Act V of 1908, Section 151 of the Code reads: "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."
taken to mean 'owning jointly'. Accordingly, if some property, say, some jewellery, was presented to the wife, it became her property, and thus could not be dealt by the court under section 27. Sultan Singh, J., of the Delhi High Court observed:

"Under Section 27 of the Act power is conferred upon the court to make orders for the disposal of the properties which were jointly owned by both the husband and the wife. The section does (not) make any reference to the properties belonging exclusively to either the husband or the wife. It must therefore be held that there is no provision conferring any power on the court under the Act to pass any order with respect to property owned by one of the parties."

The eloquent exposition of the words 'belonging jointly' by M.M. Punchhi, J., of the Punjab and Haryana High Court in *Surinder Kumar v. Madan Gopal Singh* serves the objective of the provision. He did not follow the narrow interpretation which excludes the property presented for the exclusive use to either the husband or the wife. He stressed that the word 'belong' does not, necessarily reflect title to the property in the sense of ownership. According to him

123. *Id.*, at p. 511. The decision of Allahabad High Court in *Kamta Pd. v. Om Wati*, A.I.R. 1972 All 153, was cited.
124. *Id.*, at p. 510.
the word 'belong' denotes the "joint use in their day to day living", whether the property was received "individually or collectively". Therefore, the entire emphasis is on the nature of property and not on the fact that it was 'jointly' presented. It was further expounded:

"Properties and articles presented from any source and to any one of them which by very nature of the present, or by intention of the donor, or by agreement of spouses, has come to be jointly in use by both the husband and the wife, can well be said to belong jointly to both of them." 126

From the perusal of views of the various High Courts it is clear that the majority of courts have construed "jointly" in section 27 in terms of "owning". The word 'belong' in the context of the object of section 27 seems to be term of art. It does not necessarily mean 'title' to the property in the sense of ownership. It bears the connotation of a person's connection with property which he or she happens to be in possession. Understood in this way, a present, say, some jewellery presented to the wife either by the husband's parent's or her own parents, albeit, seemingly for the exclusive use of the wife, belongs to both of them within the ambit of section 27. Likewise, a suit or gold ring presented to the husband by the wife's parents, may be meant for his exclusive use, nevertheless, it could similarly be said, it belongs to both. If this idea is pursued logically, we intend to say that

125. Ibid.
126. Ibid.
properties which are meant for the separate use of the husband or the wife are not 'his' or 'her' belongings, but 'their' belongings.

Let us consider a similar predicament under the law prohibiting dowry. Under the Dowry Prohibition Act, 1961, as amended by the Dowry Prohibition (Amendment) Act, 1984, any property or other valuable security given or agreed to be given in connection with marriage comes under the definition of dowry. This property or valuable security might be given by one party to the marriage to the other party to the marriage or by the parents or any other person to either party or to any other person. Thus, any property presented by any person to any person in connection with marriage would fall within the ambit of this definition. Under the Act, this property or other valuable security although eventually would go to the wife and after her death passes to her heirs, yet, for all other purposes, it belongs to both and may be used for augmenting the common interest. Since all such property ultimately vests in the wife - the vesting becomes evident in case there arises a conflict between the spouses - the husband has been held to hold the property only as a trustee for her.

Thus, the cumulative effect of section 27 of the Hindu Marriage Act read with the connotation of the term 'dowry' under the Dowry Prohibition Act is that the entire property

128. Ibid.
129. Id., section 6.
130. See Moiliakiriath Abbas v. K. Kundimathu, 1976 H.L.R. (Ker.).
irrespective of the fact of being vested in the wife could be said to belonging to both for purposes of section 27. Similarly, the property given by the wife's parents to the husband exclusively in the sense of vesting that property in him, could be retrieved from him under section 6 of the Dowry Prohibition Act the moment its common or joint use was threatened or frustrated. This simply implies that the concept of "belonging jointly to both the husband and the wife" under section 27 is implicit even when such property is owned by any one of the spouses provided only that the same was given "at or about the time of marriage" or in connection with the marriage.

Thus, the whole position boils down as follows. The very nature of conjugal relationship gives the right to one spouse to deal with the property of the other. Accordingly, the whole of the property though owned individually yet 'belong' to both the spouses for purposes of section 27. The relationship of the parties is not an ordinary commercial partnership of "I and you limited", but that of "We limited". Therefore, the proper construction of section 27, in our submission, is that it empowers the court to deal with all the property which is presented to both individually.

131. By virtue of section 14 of the Hindu Succession Act, 1956, all the property which is presented to the wife on marriage becomes her separate property, nevertheless, by virtue of the joint use, during the subsistence of marriage, such property belongs to both.

as well as jointly at and about the time of marriage.\textsuperscript{133}

The underlying purpose of the legislature in enacting section 27 is that when the marriage breaks down and the parties fall apart, the interest of the wife is protected. Such a view of section 27 would save the spouses, especially the wife, to run to different courts for settling property disputes which are essentially integral part of the matrimonial conflict problem.

(C) Spousal Property Trends in Comparative Family Law

Ever since, the English law did not recognise the community principle during marriage.\textsuperscript{134} The courts also, by stretching the meaning of section 17 of the Married Women's Property Act, 1882, could not go far in recognising the wife's contributions other than financial contributions. Even the effort of the Court of Appeal to give relief to the wives by developing the concept of 'family assets' was deprecated by the House of Lord, a concept which smacked of the existence of the principal of community during marriage.\textsuperscript{135}

\textsuperscript{133} At least in two cases the courts have dealt with all times of dowry presented to the either party at the time of marriage, see Ishwar Pal Singh v. Shakuntla Devi, 1979, H.L.R. 753 (Del.), Yudhister v. Sarla Kumari, 1981, H.L.R. 37 (P&H).


\textsuperscript{135} "My Lords, we have in this country no doctrine of community of goods between spouses and yet by judicial decision were this doctrine of family assets accepted some such a doctrine would become part of law of the land", per Lord Upjohn, in Pettitt v. Pettitt, (1970) A.C. 777, at p. 817.
matter was referred to the Royal Commission on Marriage and Divorce which after examining the proposals rejected any idea to introduce community principle as a general principle of matrimonial law. The Royal Commission regarded it as a "vital consideration that so far as possible the law should be kept out of the intimate life of the family law." However, the Commission found themselves impelled by the force of circumstances to make a number of recommendations on the matrimonial home and its contents by which partially they gave effect to the community principle. Later on, the question was widely discussed by the subsequent Reports of the Law Commission. The Law Commission in its Working Paper No. 42 considered how a system of community of property could be adapted for English law. At any rate, in its First Report, the Commission recommended an imposed regime only in

137. Id., para 651, at pp.176-77.
138. Id., para 647, at p.176.
141. Id., Part V,pp.278-315. The Commission suggested the adoption of the West German Zugewinnjemeinschaft (deferred community.).
respect of the matrimonial home. In subsequent Reports of the Law Commission, eschewing radical measures, preferred to retain the discretion-based framework of the present law.

It has been alleged that the "destiny of English family law reform" seems to "proceed in a piece-meal fashion." England did not adopt the system of community as it was adopted in other Scandinavian countries by a complete overhaul in 1920 and which is applied in various other European countries and some States in the U.S.A. The idea of the


145. Nordic Countries by the organised co-operation through Conferences and committee of lawyers, they were able to introduce a similar type of matrimonial regimes: Sweden, 1920; Denmark, 1925; Norway, 1927; and Finland, 1929, see Margrete Pederson, "Matrimonial Property Law in Denmark", (1965) 28 M.L.R.137.

146. See for instance, the law in West Germany introduced by the Equality Act of 1957(Gleichberechtigungsgesetz), see Dieter Giesen, "Sex Discrimination in Germany(W)", (1978) 41 M.L.R.526; for Poland, see Jan Gorecki, "Matrimonial Property in Poland", (1963) 26 M.L.R.156; for Belgium, see Monique Gysels and Mary Vogela, "Belgium Husbands and Wives:Equal in Patrimonial Matters?"(1982)10 Int.Jour. of Soc.of Law 207. There are eight states in the U.S.A. which have adopted community property system. These are Arizona, California, Idaho, Louisiana, Texas, Nevada, New Mexico and Washington. Three States still retain separation of norm principle, viz., Florida, Mississippi and West Virginia. The rest of the States have adopted limited community with respect to matrimonial home as in England, see Martha F.Davis, "The Matrimonial Home:Equal (contd...)
Introduction of community principle was rejected summarily first in 1956 and then ultimately foreclosed by a detailed discussion in 1973.

The basic idea underlying the community system is that "the spouses eat the same bread and share the uneaten bread". In contrast, in separation of property each bread winner keeps his or her uneaten bread. A community regime may be of various types. For instance, it may be complete 'community of property'. In this type whole of the property is common property and is generally administered by the husband and divided between them when the marriages comes to an end. Second type might be 'community of gains', i.e., in this type the community is limited to property acquired during marriage otherwise than by gift or inheritance. Third type is 'deferred community'. In this type each spouse remains free to acquire and dispose of his or her own property but at the end of the marriage any net gain or surplus is divided equally between them. Under these broad types there might be numerous combinations and permutations.


Against a general system of community of property there are strong arguments. For instance, one argument against such a system is that it is "incompatible with equality of sexes". Common assets and particularly common investments, cannot, for practical reasons, be administered by both the spouses. Therefore, generally, the common property is administered by husband. Thus, it amounts to the subjection of women. Again, where community of property is the statutory regime, the law is inevitably very complex. For instance, very complex rules of division of such property has to be made which may be profitable to the pockets of the lawyers, but certainly cause headaches to the judges and a source of economic waste to the people. Kahn-Freund has remarked that such a system may be "a lawyer's dream and a client's nightmare".

Comparing to this system of community, the separate property regime has certain advantages. For instance, during marriage a spouse is free to deal with his or her property as

151. A German writer has pointed out that where both the spouses are given equal right in the administration of common property, it jeopardises the assets of the spouses and "produce quarrels and sometimes even lead to divorce", F.Massfeller,"Matrimonial Property Law in Germany", in Friedmann (ed.) Matrimonial Property Law (1955), quoted by Jan Gorecki, supra, at p.157.
152. See Kahn-Freund, supra, at p.243.
153. See Peter,M., Maldave,"A Division of the Family Residence Acquired with a Mixture of Separate and Community Funds", (1982)70 Cal.L.Rev. 1263, where the author has, by quoting two American decisions (In re marriage of Lucas, 27 Cal.3d,808(1980), and in re Marriage of Moore, 28 Cal.3d. 366(1980) has made out that the division of matrimonial home on the community principle may lead to inequitable results.
154. O.Kahn-Freund, supra, at p.245.
155. See generally Jennifer Temkin,"Property Relations During (contd...)
he or she likes. Moreover, unlike the complexity of rules regarding the distribution of property in community regime, this system has simplicity to command it. The position of parties with respect to property is clearcut. It has been further argued that it has an ideological advantage: it guarantees the independence of the spouses. But this principle of equality usually causes hardship to the wife in those cases where she remains occupied in the household and brings up the children. Moreover, the husband (who is generally the earning spouse and the property is purchased in his name) can make the transfer inter-vivos to the detriment of his family.

Now the discretion based separation of property system which prevails in England appears to combine the advantages of both the systems. For instance, the discretion of the court to make an order for the periodical payments or


156. It has been argued that this discretion of judiciary without any indication that interest of the children will be given priority over other matters, is of little use. The reason for this is that "these powers are exercised in most cases by county court judges and registrars and also that the Appeal Court is notoriously unwilling to upset a judge's discretionary decision unless he has clearly exercised that discretion according to the legal principles, it would appear that there is a need of clear statutory directions...," see D.A. Nevitt & J. Levin, "Social Policy and the Matrimonial Home", (1973) 36 M.L.R. 345, at p.351. But it is submitted the criticism is unfounded. Section 41 of the Matrimonial Causes Act, 1973, enjoins upon the court not to make a decree absolute till a proper arrangement of the children is made which the court thinks is adequate in all respects. Moreover, a decree disregarding the enjoinment is declared void. ibid.

with respect to property adjustment in favour of a spouse who has made a contribution in looking after the home or caring for the family, has the effect of compensating the wife where she remains in the house caring for children, thus, obviating the hardship of separation norm. Similarly, the court can evaluate the loss chance of acquiring any benefit (for example, a pension) which, the spouse might lose after the dissolution of marriage. Moreover, if there are children of marriage, generally, the risk of childcare falls disproportionately on the wife. This causes the impairment of the caregiver's earning potential. This matter can be taken care of by considering the "financial needs, obligations, and responsibilities which each of the parties to the marriage has or is likely to have in foreseeable future". Above all, the residuary principle of putting the parties "in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards each other", has, in fact, came closer to the community principle.

While exercising its discretion under section 25(1) of the Matrimonial Causes Act, 1973, the English courts have

158. Id., section 24.
159. Id., Section 25(1)(f).
160. Id., Section 25(1)(g).
161. Id., section 25(1)(b).
162. Id., section 25(1).
faced with three types of cases:

(1) In first type of cases were where two people starting their married life with little or nothing but their earning capacities, and together founding a family and building up by their joint efforts such capital as they were able to save. Typically, their main capital asset was the matrimonial home bought on mortgage and paid for out of their income. In such cases the courts divided the family property on the ground of equal partnership. 161a

(2) In second type of cases the parties did not have a modest start, but one or other or perhaps both spouses may bring into the marriage substantial capital assets, or may acquire such assets during the marriage by inheritance or by gift from members of their families. The wife or the husband, as the case may be, cannot claim a share in the property or business as such. It is not but by the active help of the either. For instance in Trippas v. Trippas, 162a the wife gave moral support to her husband by looking after the home. If he was depressed or in difficulty, she would encourage him to keep going. But merely moral help in the business did not gave her a share. 163 But it was plain that she had a good chance of receiving a financial benefit on the

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161a. See for instance Watchel v. Watchel, (1973) Fam. 72;
163. Id., at p. 141, per Lord Denning, M.R.
sale of the business. Therefore, she was compensated for the loss of that chance. 164

(3) But the third type of cases differ from the above as much as the wife was not a passive spectator or merely gave moral support but actively and certainly contributed substantially to the success of the business. For instance, in O.D v. O.D.165 the husband purchased the lease of a hotel jointly with his mother. After his mother's death with the substantial backing of the father acquired the freehold of the hotel for £20,000, enlarged it and became the manager of that increasingly profitable business. Wife played an important role in building up this business working as "receptionist, chamber-maid, cook, waitress and clerk as required." But when the business was coming to "fruition", the husband left for another woman. The case was decided on the concluding part of section 25(1) which requires the court to make such order as in all the circumstances is just and fair. So it was not her share in the business which she had earned but it was an attempt to put her in the position she would have been had the marriage continued.166

164. The principle laid down in section 25(1)(g) discussed above was applied.
165. (1975) 3 W.L.R.308.
For the division of family property, the English courts seem to have accepted the 'contribution theory' rather than 'status theory'. The wife is regarded as earning a share in family assets by her contribution to the family welfare over a period (particularly in a case where she looks after the home) rather than mere fact of marriage. Thus, where there had only been a very short de facto marriage, no financial provision at all was made.  

Apart from the matrimonial home as an important asset to be divided on divorce, there might be cases where the property may be of such a nature, which, in the circumstances of the case, may not admit division. For instance, the husband may own investments, like shares, or may have investments in business. The wife might be in need of cash money with which she might purchase a matrimonial home for herself and children. A division of the share property of business might not serve the imminent needs of the wife. Such a division might, on the other hand, cripple the husband's resource. Thus, in such cases generally the court compensates the wife by making an order for lump sum. This is a very potent weapon on the court's armoury to make equitable division where equal division is not possible.

It has been argued in an earlier chapter that although the subject of lump sum may be said to be germane to the


168. See Chapter II, Part D, Sec. (a) (ii), entitled "lump Sum Payments", supra.
law of maintenance, yet, the concept of lump sum in the shape of the transfer of capital, comes nearer to the readjustment of capital assets than merely a payment of a specified sum in full and final settlement of any claim of maintenance. Maintenance also, in a sense, indicates, albeit in a rudimentary state, the entitlement to what is due to a spouse by virtue of his or her contributions. Thus, we come to a point where distinction, between matrimonial property and maintenance blurs. Lump sum, between these two concepts of matrimonial property and matrimonial maintenance, acts as an osculant shadowing into both.

If we look towards the development of English law, it seems to have developed in two phases. In the first phase, the law recognised the separation of property norm and awarded maintenance to the wife to compensate her contributions towards the family. Since the husband was the bread-winner, all the property which was purchased during marriage belonged to him. It was only after the Second World War that wife's contributions in the purchase of 'family assets' were recognised. Starting from Re Roger's Question 169 in 1948, and ending with Hazell v. Hazell, 170 the Court of Appeal in numerous decisions recognised her active participation in the acquisition of 'family assets', when ultimately the Parliament intervened by passing the Matrimonial Proceedings and Property

169. (1948) 1 All E.R.328.
170. (1972) 1 W.L.R.301.
Act, 1970.

In the second phase, the emphasis has shifted from periodical payments to once-for-all settlement between the spouses. The purpose of lump sum and property settlement is that this issue should be made to settle in such a way that there is a minimum possible dependence of one spouse upon the other. For instance, in O'D v. O'D., it was argued on behalf of the husband that it was appropriate to raise the periodical payments and reducing the lump sum. Holding that periodical payments alone would not do justice, Ormrod, L.J., quipped:

"Moreover, the court cannot overlook that as periodical payments cease on remarriage an order of this size must be very strong disincentive, if not a prohibitive, to remarriage to this comparatively young woman. She requires an adequate capital sum over and above the house."

One reason why it should be done so is the realization that a continuing financial relationship after the dissolution of marriage is not helpful in the emotional rehabilitation of the divorced couple. It creates rather a feeling of negativism. On the other hand, a long-term burden on the husband

171. (1975) 3 W.L.R. 308.
172. Id., at p. 315.
might militate against the stability of his second marriage. It also helps to remove bitterness which is often attendant as periodical payments. 174 Once made, the parties can regard "the book as closed". 175 In periodical payments emotional element also comes to the fore. 176 Animosities that would otherwise would have burnt out with the passing of time are rekindled each time a check is mailed. The wife, on the other hand, by reason of being dependent upon the divorced husband is encouraged to remain idle, when she would have been much happier and led a fuller life had she become independent and taken employment instead of sitting at home and brooding over the past. 177 It is for this reason that an alimony recipient wife is sometimes termed as a "parasite", or an "alimony drove" sitting "upon her powdered bum" expecting "a bread ticket for life...". 178

174. It is not that only in a country with meagre resources, the enforcement of a maintenance award is difficult. Even in affluent societies, it is very difficult to exact payment from the ex-husband. In a written answer the Secretary of State for Social Services in England has stated that in 1979 £72 million were spent to recover £20 million from ex-husbands, see Carol Smart, "Regulating Families or Legitimating Patriarchy? Family Law in Britain", (1982) 10 Int. Jour. of the Soc. of Law, at p. 146 n.9.


176. Edward Pokorny who was the 'Friend of the Court' for Circuit Court for the County of Wayne, in the State of Michigan, states that generally the lawyers and the alimony-payers think that the word "alimony" contains "a sinister idea that it relates solely to the support of worthy and unworthy ex-wives", in "Practical Problems in the Enforcement of Alimony Decrees", (1939) 6 Law and Contemp. Probs. 274, see also C.G. Peele, "Social and Psychological Effects of the Availability and the Granting of Alimony on the Spouses", (1939) 6 Law and Contemp. Probs. 283.

177. See Margaret Puxon, supra note, at p. 177. See also C.G. (contd...)
Now, in the changed social and economic set-up, when opportunities for self support are becoming wider and wider, the traditional theory under which support was to be granted until death or remarriage is giving place to a new theory called "rehabilitative theory". The approach of this theory reflects the belief that the former spouse should support the other only during the period which the other prepares for a career. The English Law Commission has also now recommended that "periodical financial provision should be primarily concerned to secure a smooth transition from the status of marriage to the status of independence", and that the court should have power to dismiss a wife’s claim for maintenance without her consent.

In the light of these observations inescapable conclusion is that in a divorce situation it is not only desirable but should also be made feasible to make a clean break between...

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Peele, supra note, at p.292.


the parties in respect of financial dependence of the wife upon her husband.

In the conditions which prevail in India, particularly, in the light of our experience that it is very difficult to exact payments from the ex-husband, it is submitted that the courts should be inclined more and more to grant lump sum payments. One obvious advantage of granting lump sum is that it is relatively easy to realize. Secondly, it makes a clean break from the past and "it enables the parties to start afresh without relics of the past hanging like millstones round their necks." The problem of resources of the non-claimant spouse may be approached in two ways. One, lump sum may be allowed to be paid in suitable instalments. Two, where a non-claimant spouse's resources does not permit even such a course, he should be provided with option to raise a loan to meet the situation. In such cases, it is submitted, the State or private or public sector like Insurance Corporation or the Nationalized Banks, should chalk out a scheme

181. In an empirical study of 24 divorced Hindu women, Ms. Devinder Kumar has found that due to the problem of non-realization of maintenance amount, 21 women out of these 24 abstained from seeking maintenance. The fate of the remaining three cases was also doubtful. "Some findings and Re-Divorced Hindu Women", in Law Towards Stable Marriages, P.Diwan and V.Kumar, Eds.,1984, at p.110.

182. In Balwant Kaur v. Bahadur Singh, 1982 H.L.R.123(P&H), the court awarded Rs 15,000/- by way of a lump sum which was to be paid in six six-monthly instalments. The court adjourned the passing of the decree of divorce till all the instalments were paid.

under which loans on liberal terms could be provided to such spouses. A worthwhile suggestion has been made to the effect that there should be a sort of Insurance Scheme for the married persons who should pay a fixed premium so that in the contingency of breakdown, Insurance Company should pay a fixed maintenance until a particular period. In the beginning the suggestion in the nature of Matrimonial Support Insurance Plan (MSIP) may sound strange because it makes the conjugal life suspect, but gradually, however, the realities of life should enable people to grasp the significance of this move.

It has been argued that a provision of lump sum is mere in consonance of achieving the coveted objective of a clean break between the parties after the dissolution of marriage. While making a lump sum provision, the court, under section 25, takes into account the income and other property of both the spouses. This accountability of the income and other properties of both the spouses is resulted irrespective of the respective titles to such properties. It is only by taking into consideration their all round respective interests that a lump sum provision is made affecting, albeit indirectly, the property rights of the spouses. In sum, in the exercise of

184. For ensuring a guaranteed payment of maintenance a scheme has been suggested which is termed as "Matrimonial Support Insurance Plan" (MSIP), Vijay K. Bhardwaj, "The Impact of Serial Monogamy and Living Outside the Marriage on the Public and Private Law of Matrimonial and Child Support", in Marriage and Cohabitation in Contemporary societies, in Reikelaar and Katz, Eds., 371, at p.379-81.
power under section 25, short of transferring non-claimant's title to property to the claimant spouse, the courts by making a lump sum provision do affect the interest in that property.

Under section 27, on the other hand, the ambit of the court's power, in adjudicating upon their property rights, is limited only to that property which the spouses have received individually or collectively, at or about the time of marriage. On this premise, the scope of section 27, if read with section 25, is widened empowering the court to re-adjust their respective rights by taking into consideration their entire property as if it were a one single unit.

Happily enough, in matrimonial proceedings in A v. B, for instance, the prayer for an injunction restraining the husband and his agents from entering the matrimonial home. The plea taken by the husband was that such an injunction could not be granted by the court under section 27 since it was not a joint property presented at or about the time of marriage. Granting that, although such a property is not covered under section 27, nevertheless, the court while making a provision for maintenance which certainly includes residence, could take into consideration any property belonging to the

186. See section 3(b), Hindu Adoptions and Maintenance Act, 1955.
husband. Accordingly, it was held:

"...the Court has power to grant an injunction restraining the husband from entering the matrimonial home as such a matrimonial home is 'maintenance' as defined in Hindu Adoptions and Maintenance Act even if not joint property within the meaning of s.27 of the Hindu Marriage Act."

The total effect of section 27 via section 25 of the Hindu Marriage Act is that court under section 25 while exercising its discretion makes an order "as it deems just and proper" in the adjustment of property rights, may affect property interests of the parties irrespective of the fact whether such a property was presented at or about the time of marriage. In other words, the court while resolving matrimonial conflict problem in terms of a clean break between the spouses could include within the sweep of the order and property belonging to the spouses whether individually or collectively.

187. (1976) 60 Bom.L.R. 384, at p.390, per Vaidya, J.