NEUTRAL CITATION NO. 2025:MPHC-IND:7735

**IN THE HIGH COURT OF MADHYA PRADESH**

**AT INDORE**

**BEFORE**

**HON'BLE SHRI JUSTICE SUSHRUT ARVIND DHARMADHIKARI**

**&**

**HON'BLE SHRI JUSTICE SANJEEV S KALGAONKAR**

**ON THE 24TH OF MARCH, 2025**

**FIRST APPEAL NO. 263 OF 2025**

***NITESH SETHI***

*Versus*

***SHIKHA SETHI***

**Appearance:**

Shri Pankaj Khandelwal and Shri Yash Pal Rathore,Advocates for the appellant.

Ms. Varsha Gupta, Advocate for respondent.

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**JUDGMENT**

**PER JUSTICE SANJEEV S KALGAONKAR**:

This appeal under Section 19(1) of The Family Courts Act, 1984 is filed assailing the order dated 8.2.2025 passed by learned 1st Additional Principal Judge, Family Court, Indore, whereby learned Principal Judge returned the application filed under Section 13B of the Hindu Marriage Act, 1955 concluding that provisions of the Hindu Marriage Act do not apply to the parties, who are members of the Jaina Community.

2 The exposition of facts, foundational to present appeal, is as under:

a. Appellant Nitesh Sethi and Respondent Shikha Sethi were married on 17th July 2017 according to Hindu rituals and customs. Due to marital discord, the Respondent left her matrimonial home on 18.04.2018 and started living with her parents. Both the parties have been living separately for the last six years. They decided to dissolve their marriage, therefore, a petition under Section 13B of Hindu Marriage Act for dissolution of marriage was submitted before the Family Court Indore on 06.07.2024. The petition was registered as HMA Case No. 1510 of 2024. Learned 1st Additional Principal Judge, Family Court, Indore, returned the petition *vide* impugned order dated 08.02.2025 for prosecuting the same in accordance with Section 7 of the Family Courts Act, 1984.

b. Learned Principal Judge, Family Court considered the notification dated 27.01.2014 of Ministry of Minority Affairs, notifying Jaina community as minority community and proceeded to compare the religious practices of the members of Jaina community with that of the Hindu religion and concluded that the practices followed by members of Jaina community are distinguishable, specially, with regard to the marriage. Therefore, the members of Jaina community are not bound by Hindu Law. Learned Principal Judge mentioning the distinctive features of the customs and rituals practiced by the members of Jaina community, concluded that the provisions of Hindu Marriage Act, 1955 are not applicable to the members of Jaina community, therefore, they may apply for dissolution of marriage in accordance with their customs and rituals under Section 7 of the Family Courts Act.

3/ The impugned order is assailed in the present appeals on following grounds:

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i) As per Section 2 of Hindu Marriage Act, 1955, the provisions of the Act are applicable to the parties.

ii) There was no amendment in Hindu Marriage Act, 1955 in view of the notification declaring Jaina Community as a minority community to exclude the community from the application of the Act.

iii) The Impugned order is against the law and the Constitution.

On these grounds, it is prayed that the Impugned order be set aside and the appellant be granted relief of dissolution of marriage.

4/ Learned counsel for the Respondent supports the appeal and contends that the Impugned order was passed without according proper opportunity of hearing to the parties.

5/ Heard both the parties.

6/ The points for determination in present appeal are as under: -

(i) Whether in view of the notification dated 27.1.2014 issued by Ministry of Minority Affairs notifying Jaina Community as a minority community, the Appellant being member of Jaina community is excluded from application of the Hindu Marriage Act, 1955?

(ii) Whether learned 1st Additional Principal Judge, Family Court, Indore has committed an illegality or impropriety in returning the petition filed under Section 13B of Hindu Marriage Act, 1955 for presentation under Section 7 of the Family Courts Act 1984?

**POINT FOR DETERMINATION NO. (i) & (ii) - REASONS FOR CONCLUSION**

The reasons and conclusion for both the points for determination are inter-connected, therefore, they are evaluated together.

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Learned Additional Principal Judge relying on judgments of various High Courts and Treaties observed as under:-

यह सही है कि उक्त प्रावधानों में जैन धर्म के अनुयायियों को भी हिन्दू के रूप में परिभाषित किया गया है, किंतु जैन धर्म का अपना एक विशिष्ट इतिहास है और मूलत: जैन धर्म एवं हिन्दू धर्म के मूलभूत सिद्धांतों में कई भिन्नताएँ हैं। यह कि, हिन्दू धर्म की मान्यता के अनुसार ब्रम्हाण्ड की रचना ब्रम्हा द्वारा की गई थी, जबकि जैन धर्म के अनुसार यह मान्यता नहीं है कि ब्रम्हाण्ड की रचना ब्रम्हा द्वारा की गई थी, बल्कि जैन धर्म के अनुसार ब्रम्हाण्ड की रचना कभी नहीं हुई थी, क्योंकि ब्रम्हाण्ड शाश्वत है।

हिन्दू धर्म के अनुसार आत्मा और परमात्मा को अलग-अलग माना गया है और यह माना जाता है कि जीवन का अन्त होने पर आत्मा का पुन: परमात्मा में विलय हो जाता है, जबकि जैन धर्म के अनुसार प्रत्येक आत्मा स्वयं परमआत्मा होती है।

यह कि, हिन्दू धर्म में कई देवी-देवताओं की पूजा की जाती है, जबकि जैन धर्म में तीर्थंकरों की पूजा की जाती है।

यह कि, हिन्दू धर्म में विभिन्न जातियों और वर्गों का समावेश है, जबकि जैन धर्म में जाति और वर्ग के आधार पर कोई विभाजन नहीं है।

यह कि, हिन्दू धर्म में वेद, उपनिषद ओर स्मृति जैसे ग्रंथों को पवित्र माना जाता है, किंतु जैन धर्म द्वारा वेद एवं हिन्दू धर्म के अन्य ग्रंथों को स्वीकार नहीं किया जाता है और जैन धर्म के पास "आगम" और "सूत्र" जैसे अपने पृथक पवित्र ग्रंथ हैं।

इसके अतिरिक्त जहाँ तक दोनों धर्मों में विवाह की अवधारणा का प्रश्न है, तो जैन धर्म में विवाह का मुख्य उद्देश्य स्वयं के धर्म से संबंधित मानव जाति की निरंतरता बनाये रखना है और जैन धर्म की इस अवधारणा में कोई धार्मिक उद्देश्य शामिल नहीं माना जाता है, जबकि हिन्दू धर्म में विवाह की अवधारणा के अनुसार विवाह को एक पवित्र धार्मिक संस्कार माना जाता है, जैसा कि न्यायदृष्टांत **डॉली रानी विरुद्ध मनीष कुमार चंचल 2024 आई.एन.एस.सी. 355 निर्णय दिनांक 19.04.2024** में माननीय सुप्रीम कोर्ट द्वारा निर्धारित किया गया है।

इसके अतिरिक्त जहाँ तक जैन धर्म के अनुयायियों को दिये गये अल्पसंख्यक समुदाय के स्तर का प्रश्न है, तो इस संबंध में भी जैन धर्म के अनुयायियों द्वारा स्वयं को अल्पसंख्यक घोषित किये जाने की मांग एक शताब्दी से भी अधिक पुरानी रही है और जैन धर्म के अनुयायियों द्वारा मार्च-अप्रैल 1947 में ही संविधान सभा के सामने जैन धर्म के अनुयायियों को अल्पसंख्यक धार्मिक समुदाय के रूप में मान्यता की मांग की गई थी और उक्त प्रकृति की मांग लगातार निरंतर रहने के आधार पर ही वर्ष 2014 में केन्द्र सरकार द्वारा जैन धर्म को अल्पसंख्यक धार्मिक समुदाय के रूप में मान्यता प्रदान की गई है और जैन धर्म के अनुयायियों को बहुसंख्यक हिन्दू धर्म के अनुयायियों से एक पृथक मान्यता प्रदान की गई है।

अत: ऐसी स्थिति में स्पष्ट है कि जैन धर्म के अनुयायियों को भी अपनी धार्मिक एवं सामाजिक मान्यताओं तथा परंपराओं का स्वतंत्र रूप से पालन करने का संवैधानिक अधिकार प्राप्त है और ऐसी स्थिति में हजारों वर्ष पुराने जैन धर्म के अनुयायियों को विपरीत विचारधारा वाले हिन्दू धर्म की विधियों का पालन करने के लिये विवश किया जाना निश्चित रूप से जैन धर्म के अनुयायियों को प्राप्त धार्मिक स्वतंत्रता के संवैधानिक अधिकार से वंचित करने के समतुल्य है।

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यह कि, तर्क के समय इस आशय का भी तर्क किया गया है कि जैन धर्म के अनुयायी द्वारा भी विवाह के समय हिन्दू विवाह अधिनियम की धारा 7 में उल्लेखित सप्तपदी संस्कार का पालन किया जाता है और इस कारण ऐसी अनुयायी को हिन्दू विवाह अधिनियम की धारा 13 के अंतर्गत भी अनुतोष पाने का अधिकार है।

**इस संबंध में दसवीं शताब्दी में आचार्य श्री वर्धमान सूरीश्वरजी महाराज द्वारा रचित ग्रंथ "आचार्य दिनकर ग्रंथ" का उल्लेख किया जाना आवश्यक है, जिसके चौदहवें खण्ड में जैन मान्यताओं के अनुसार विवाह के लिये किये जाने वाले सम्पूर्ण अनुष्ठानों का उल्लेख किया गया है, जिसके अनुसार जैन विवाह विधि में स्थापना विधि, आत्मरक्षा, मंत्रस्नान, क्षेत्रपाल पूजा, मनधोड़ बंधन, अरहत पूजन, सिद्ध पूजन, गांधार पूजन, शास्त्र पूजन, चौबीस यक्ष यक्षिणी पूजन, दस दिगपालन पूजन, सोलह विद्यादेवी पूजन, बार राशि पूजन, नवग्रह पूजन, सत्यविश नक्षत्र पूजन, चोरण प्रतिष्ठा, विधि प्रतिष्ठा, हस्तमिलाप, प्रदक्षिणा (चार बार), वरमाला, अभिसिंचन, सात प्रतिज्ञा, आरती एवं क्षमायाचना किये जाने का उल्लेख किया गया है जिससे स्पष्ट है कि जैन धर्म में उल्लेखित विवाह विधि हिन्दू धर्म में उल्लेखित विवाह विधि से भिन्न है।**

अत: यह तथ्य तो स्पष्ट रूप से प्रमाणित है कि जैन धर्म एक ऐसा धर्म है, जो हिन्दू धर्म की बुनियादी वैदिक परंपराओं और मान्यताओं का विरोध करता है और वैदिक परम्परा पर आधारित नहीं है, जबकि हिन्दू धर्म पूर्ण रूप से वैदिक परम्परा पर आधारित है।

अत: उपरोक्त संपूर्ण विश्लेषण से यह तथ्य निश्चित रूप से प्रमाणित है कि जैन धर्म निर्विवाद रूप से हिन्दू धर्म का हिस्सा नहीं है और जैन धर्म के अनुयायियों की लगभग 100 वर्ष पुरानी मांग स्वीकार करते हुए केन्द्र सरकार द्वारा भारत के राजपत्र में दिनांक 27.01.2014 को प्रकाशित अधिसूचना से यह तथ्य भी प्रमाणित है कि केन्द्र सरकार द्वारा जैन समुदाय अर्थात जैन धर्म के अनुयायियों को अल्पसंख्यक समुदाय के रूप में अधिसूचित किया जा चुका है।

अत: ऐसी स्थिति में हिन्दू धर्म की मूलभूत वैदिक परंपराओं को सिरे से नकारने वाले और पूर्व उल्लेखित वर्ष 2014 की राजपत्र अधिसूचना के पश्चात स्वयं को बहुसंख्यक हिन्दू समुदाय से पृथक अल्पसंख्यक समुदाय के रूप में स्थापित कर चुके जैन धर्म के किसी अनुयायी को उनके धर्म से विपरीत मान्यताओं वाले धर्म से संबंधित व्यक्तिगत विधि का लाभ दिया जाना उचित प्रतीत नहीं होता है।

अत: स्पष्ट है कि उक्त न्यायसिद्धान्त के आलोक में हिन्दू धर्म के मूलभूत सिद्धांतों विरोध करने वाले और बहुसंख्यक हिन्दू समुदाय से स्वयं को स्वेच्छा से अलग कर अल्पसंख्यक समुदाय के रूप में स्थापित कर चुके जैन धर्म के किसी पक्षकार द्वारा अपने हजारों वर्ष पूर्व से सुस्थापित वैभवशाली एवं गौरव से परिपूर्ण जैन धर्म में व्यक्तिगत विधि से संबंधित विवादों के संबंध में प्रचलित एवं सुस्थापित धार्मिक एवं सामाजिक परम्पराओं का अभिवचन करते हुए निश्चित रूप से ऐसे विवाद के संबंध में कुटुंब न्यायालय अधिनियम, 1984 की धारा 7 के अंतर्गत कुटुंब न्यायालय अधिनियम, 1984 की धारा 7 के अंतर्गत कुटुंब न्यायालय के समक्ष प्रकरण प्रस्तुत किया जा सकता है और इस कारण हिन्दू धर्म के मूलभूत सिद्धांतों का विरोध करने के पश्चात भी किसी जैन धर्म के अनुयायी को अपने धर्म की मूलभूत मान्यताओं के विपरीत मान्यताओं वाले हिन्दू धर्म से संबंधित व्यक्तिगत विधि का अनुसरण करने की कोई वैधानिक बाध्यता शेष नहीं रहती है। अत: उपरोक्त संपूर्ण विश्लेषण के आधार पर यह निष्कर्ष दिया जाता है कि "हिन्दू धर्म की मूलभूत वैदिक मान्यताओं को अस्वीकार करने वाले एवं स्वयं को बहुसंख्यक हिन्दू समुदाय से अलग करके अल्पसंख्यक समुदाय के रूप में स्थापित कर चुके जैन धर्म के अनुयायियों को पूर्व उल्लेखित राजपत्र अधिसूचना दिनांक 27.01.2014 के पश्चात हिन्दू विवाह अधिनियम के अंतर्गत अनुतोष प्राप्त करने का कोई अधिकार शेष नहीं रहा है, किंतु जैन धर्म का कोई भी अनुयायी अपने जैन धर्म की हजारों वर्ष पुरानी सुस्थापित धार्मिक एवं सामाजिक परंपराओं

का अभिवचन करते हुए कुटुंब न्यायालय अधिनियम की धारा 7 के अंतर्गत अपने किसी वैवाहिक विवाद को निराकरण हेतु कुटुंब न्यायालय के समक्ष प्रस्तुत करने के लिये पूर्णत: स्वतंत्र है"।

8/ The present day society is fragmented on religion, caste, sects, origin and language. Learned Additional Principal Judge attempted to find out the differences between the religious practices of followers of Hindu religion and that of the Jaina community, to bolster his conclusion that religious practice and customs especially regarding marriage are distinguishable. However, the practices stated in the impugned order itself show that the marriage rituals performed by followers of both the communities are generally similar. The learned Additional Principal Judge ought to have applied the explicit legal provisions to the matter under consideration rather than engaging in scholarly interpretation of rituals and practices of Jaina community. Be that as it may, the law of the land as it exists today is being considered in the following discussion.

9/ The Part III of the Constitution of India provides for the Right to Freedom of religion. Article 25 provides as under: -

> "**25. Freedom of conscience and free profession, practice and propagation of religion-(1)** Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
> (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
> (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
> (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.
> *Explanation I*.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.
> ***Explanation II* — In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons**

**professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."**

10/ The Hindu Marriage Validity Act, 1949 was passed to validate all the existing marriages between Hindus, Sikhs and Jaina and their different castes subcastes and sects. Section 2 of the Act defines "Hindu" as including the persons professing Sikh or Jaina religion. Section 3 of the said Act explicitly states that no marriage between Hindus, including Sikh and Jaina, shall be deemed invalid by virtue of any other existing law, interpretation, text, rule, custom or usage.

11/ Thereafter, the Hindu Marriage Act was passed on 18th May 1955. It is an Act to amend and codify the law relating to marriage among Hindus.

12/ Section 2 of Hindu Marriage Act, 1955 provides as under: -

**2. Application of Act** — (1) This Act applies—

(a) **to any person who is a Hindu by religion in any of its forms or developments**, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) **to any person who is a Buddhist, <u>Jaina</u> or Sikh by religion**, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

*Explanation*.—The following persons are Hindus, Buddhists, **<u>Jainas</u>** or Sikhs by religion, as the case may be:—

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, **<u>Jainas</u>** or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, **Jaina** or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

(c) any person who is a convert or re-convert to the Hindu,

Buddhist, **Jaina** or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) **The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.**"

13/ Thus, the provisions of Hindu Marriage Act are applicable to all the persons, who are Buddhist, Jaina or Sikh by religion. The Sub-section (3) of Section 2 fortifies the applicability of Hindu Marriage Act to the members of Jaina community. These express provisions of the law were unfortunately not considered in the correct perspective by the learned Additional Principal Judge.

14/ In case of ***CWT v. Champa Kumari Singhi*****,** reported in **(1972) 1 SCC 508,** while considering the question, whether a 'Jaina undivided family' is included in the expression 'Hindu undivided family', it was observed that-

**"5.** The main reasoning which prevailed with the High Court is that although Hindu law applies to Jainas except insofar as such law is varied by custom, Jainas do not become Hindus in the same way as Khojas and Cutchi Memons of Bombay and Sunni Borahs of Gujarat etc. cannot be regarded as Hindus although Hindu law applies to them in matters of inheritance and succession. Moreover, Hinduism does not include Hindu converts to Christianity and Islam and also dissenters from Hinduism who formed themselves into distinct communities or sects with peculiar religious usages so divergent from the principles of the Shastras that they could not be regarded as Hindus. Reliance was placed on the decision of the Mysore High Court in *P.F. Pinto* v.*Commissioner of Wealth Tax*,*Mysore* [65 ITR 123]. In that case the ancestors of the assessee were originally Hindus. They later on became converts to Christianity. It was found that although for the purposes of succession to property the Hindu law was still applicable to the family of the assessee, he could be assessed only as an individual for wealth tax purposes and could not be assessed in the status of a Hindu undivided family. The Mysore High Court was inclined to the view that the expression "Hindu undivided family" in Section 3 of the Act was limited to Mitakshra families or families of persons professing Hindu religion governed by Mitakshra law and thus, it could not

include a Christian undivided family although governed by Hindu law. The Calcutta High Court in the judgment under appeal, however, did not consider that the Mysore High Court was right in holding that Section 3 of the Act was limited only to Mitakshra families. It may be pointed out that so far as Income tax law is concerned the expression "Hindu undivided family" has been held to have reference to all schools of Hindu law and not to one school only. (See *Kalyani Vithal Das* v.*CIT*[LR 64 IA 28] .)

**6.**The real question for determination is whether the word "Hindu" preceding the words "undivided family" signifies that the "undivided family" should be of those: (*i*) who profess Hindu religion; or (*ii*) to whom Hindu law applies; or (*iii*) who though not professing Hindu religion have come to be regarded as Hindu undivided family by judicial decisions and legislative practice. It may be mentioned that for a long time the courts and particularly the Privy Council seem to have taken the view that Jainas are of Hindu origin; they are Hindu dissenters and although generally adhering to the ordinary Hindu Law they do not recognise any divine authority of the Vedas nor do they practice a number of ceremonies observed by the Hindus. But the modern trend of authority is against the view that Jainas are Hindu dissenters. As a result of comparative research in Hinduism, Jainaism and Buddhism, it is being emphatically claimed that the theory that Jainas are Hindu dissenters is based on a misreading of the ancient authorities relating to these religions (See C.R. Jaina —*Jaina Law*— pp. 3-23 and 219-58). One of the early decisions in which Jainas were stated to be of Hindu origin being Hindu dissenters is that of Westropp, C.J., in *Bhagwandas Tejmal* v. *Rajmal* [(1873) 10 Bom HCR 241]. The learned Chief Justice based his view on high authority including the researches of Mr Mountstuart Elphinstone, Late Col. Mackenzie (9th Vol. of the Asiatic Researches, including the essay of Mr Cole Brooke on the Sect of Jainas), the work of Abbe Dubois on the Manners etc. of the People of India and the elaborate account of the Jaina sect in the First Volume of Prof. H.H. Wilson's work. He also referred to certain decisions of the Sudder Divani Adalut in Calcutta and the High Court of Calcutta; in particular to the opinion of Peacock, C.J. In *Lala Mohabeer Pershad* v.*Musammut Kundar Koover* [8 Cal W Rep 116 Civ Rul]. The following passage from the judgment of Westropp, C.J. is noteworthy:

> "The term Hindu or Gentu, when used in Regulations Act, Statutes, and Charters in which Hindus or Gentus have been declared entitled to the benefit of their own law of succession and of contract, has been largely and liberally construed. See the remarks at pp. 184, 185, 186, 5 Bom. High Court Reports (*Lopes* v. *Lopes*), where Sir Edward Hyde East's evidence in 1830 before the House of Lords' Committee is mentioned, in which he stated that Sikhs were treated as a sect of Hindus or Gentus of which they were a dissenting branch. The authorities, already quoted, show that Jaina are regarded as a sect of Hindus."

Out of the decisions of the Privy Council, we may mention *Sheokuarbai* v. *Jeoraj* [AIR 1921 PC 77] in which Their Lordships relied on the statement in *Mayne's Hindu Law and Usage* that Jainas are of Hindu origin; they are Hindu dissenters and although "generally adhering to ordinary Hindu law, that is, the law of the three superior castes, they recognise no divine authority in the Vedas and do not practice the Shradha or ceremonies for the dead".

The above view has been challenged by Jaina historians and writers and it has

been maintained that the Jainas are quite distinct from Hindus and have a separate code of law which unfortunately was not brought to the notice of the courts. Kumaraswami Sastri, Officiating Chief Justice, delivering the judgment of the Bench in *Bobbaladi Gateppa* v. *Bobbaladi Eramma* [AIR 1927 Mad 228] elaborately discussed the contrary view and observed that if the matter were res integra he would be inclined to hold that modern research had shown that Jainas were not Hindu dissenters but that Jainaism had an origin and history long anterior to Smritis and commentaries which were recognised authorities of Hindu law and usage.

**7.**Mr C.R. Jaina in his work "*Jainas Law*" written in 1926, has discussed the findings of various Orientalists subsequent to those mentioned in the judgment of Westropp, C.J. and has put forward the thesis that Hinduism and Jainaism were parallel creeds though they shared the same form of social order and mode of living. Jaina law was quite independent of Hindu law. According to him the Courts had tried on each occasion to ascertain the Jaina Law but unfortunately for various reasons Jainas concealed their Shastras and objected to their production in Courts. He has emphasised that Jaina Law which is found in the available books should still be applied and the error which has crept in the matter of Jainas being governed by Hindu Law should be rectified. Since 1926 there have been several enactments apart from the codification of certain major Branches of Hindu law which in express terms have been made applicable to Jainas. The course suggested by C.R. Jaina cannot possibly be followed particularly in the presence of statutory enactments.

**8.** In *Panna Lal* v. *Sitabai* [ILR 1954 Nag 30] Hidayatullah, J. (as he then was) delivering the judgment of the Division Bench observed that it was too late in the day to contend that "Jainas" are not included in the term "Hindus" for the purposes of law. He referred to *Mayne's Hindu Law* as also the leading cases on the point apart from *West and Buhler's Hindu Law* (4th Edn.), *Gopal Chandra Sarkar's Hindu Law* (7th Edn.) and *Hari Singh Gour's Hindu Code* (4th Edn.). All these are acknowledged authorities and the conclusion which was derived not only from the statements contained in their works on Hindu law but also from decided cases was that the Jainas were to be regarded as Hindus for the purposes of law though they seem to dissent from some of the principles of orthodox Hinduism. In *Nagpur case* the question which was being considered was whether, the Hindu Women's Right to Property Act, 1937 was meant to apply to Jainas as well or to Hindus proper. It was in that connection that the extent to which Jainas were governed by Hindu law or were to be treated as Hindus for purposes of that law came up for discussion. The following passage may be reproduced with advantage:

> "The Legislature must be taken to be aware of the pronouncements of the Privy Council as well as the leading decisions of the Indian High Courts where a liberal interpretation was given to the term "Hindu". We do not think that the Legislature used the term without advertence to these dicta and, in our judgment, the Legislature must be deemed to have used the term "Hindu" in that larger sense which has been explained by Mayne at p. 5 of his treatise in the passage quoted by us elsewhere and which has been the foundation of decisions on the subject in the courts of India."
>
> It may be mentioned that the statement from Mayne's Hindu Law referred to above is the same which was relied upon by the Privy Council in *Sheokuarbai* v.

*Jeoraj*.

**9.** We may next notice certain decisions in which the word "Hindu" as used in various statutes came to be interpreted by the Courts. In *Kamawati* v. *Digbijai Singh* [AIR 1922 PC 14] Section 331 of the Indian Succession Act, 1865, has to be interpreted. According to that section the provisions of that Act were not to apply to intestate or testamentary succession to the property of any Hindu. It was held that the person who had ceased to be a Hindu in religion and had become a Christian could not elect to be bound by the Hindu Law in the matter of succession after the passing of the Indian Succession Act and that a Hindu convert to Christianity was solely governed by that Act. In other words, according to the Privy Council a person who had ceased to be a Hindu by religion was not a Hindu within the meaning of Section 331 of the aforesaid Act. It was held in *Bachebi* v. *Makhan Lal* [ILR 3 All 55] that the term "Hindu" in Section 331 of the Indian Succession Act, 1865, included a Jaina and consequently in matters of succession Jainas were not governed by that Act. It was pointed out that the ordinary Hindu law of inheritance was to be applied to Jainas in the absence of proof of custom or usage varying that law. The Privy Council in *Bhagwan Koer* v. *J.C. Bose* [ILR 31 Cal 11] expressed the view that a Sikh was a "Hindu" within the meaning of that term as used in Section 2 of the Probate and Administration Act, 1881. It was pointed out that the Courts had always acted upon the premise that Sikhs were Hindus and that Hindu Law applied to them in the same way as it applied to Jainas in the absence of custom varying that law. It was observed:

> "It appears to Their Lordships to be clear that in Section 331 the term "Hindu" is used in the same wide sense as in earlier enactments, and includes Sikhs. If it be not so, then Sikhs were, and are, in matters of inheritance, governed by the Succession Act, and Act based upon, and in the main embodying, the English law; and it could not be seriously suggested that such was the intention of the Legislature."

10. In *Ambalal* v. *Keshav Bandhochand Gujar*, [ILR 1941 Bom 250] the question was whether Jainas were governed by Hindu law of Inheritance (Amendment) Act, 1929, which applied to all persons governed by Mitakshara as modified by the Mayukha. It was argued in that case that the Indian Succession (Amendment) Act of 1929 speaks of Jainas as well as Hindus and Sections 4 and 57 of the Indian Succession Act, 1925, also did the same. The Court pointed out that Section 331 of the Indian Succession Act, 1865, did not make any separate mention of Jainas and even then it had been held that the term "Hindu" included Jainas. The Hindu Wills Act of 1870 which applied to the territories under the Lt. Governor of Bengal and the cities of Bombay and Madras no doubt mentioned Jainas as well as Hindus being governed by certain sections of the Succession Act of 1865 and the Indian Succession Act, 1925 was a consolidating Act which repealed the previous Act of 1865 as well as the Hindu Wills Act of 1870. It was, therefore, probably thought necessary *ex majors cautela* to separately mention the Jainas in the consolidating measure. However, in all the other enactments affecting the Hindu Law there was no separate mention of Jainas along with the Hindus. The Jainas were, therefore, governed by the Hindu Law of Inheritance (Amendment) Act, 1929. The mention of Jainas separately in Article 25 of the Constitution was noticed in *Pannalal* v. *Sitabai* and it was observed that the framers of the Constitution felt, having regard to the differences in the two faiths that an express

> mention might be made of all faiths *ex abundanti cautela* and to put the matter beyond all controversy, and that faith is one thing and law is another and the Constitution could not be taken to have undone the long series of decisions on the subject. Before the amendment and codification of major branches of Hindu law by the four statutes i.e. the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, the Hindu Adoption and Maintenance Act, 1956, the undisputed position was that the Jainas were governed by the Hindu law modified by custom and a Jaina joint family was a Hindu joint family with all the incidents attached to such a family under the Hindu law. The legislative practice also was to generally treat Jainas as included in the term "Hindu" in various statutory enactments. Wherever Jainas were mentioned in addition it was by way of abundant caution. The new statutes did not change the situation and it is not possible how the High Court in the judgment under appeal pressed them into service in support of its view. The fallacy underlying the reasoning of the High Court is that the artificial field of application of the law in those statutes shows that Jainaism is not treated even as a form or a development of Hinduism. That is an erroneous approach. We are not concerned with the question whether Jainas are a sect of Hindus or Hindu dissenters. Even if the religions are different, what is common is that all those who are to be governed by the provisions of these enactments are included in the term "Hindu". They are to be governed by the same rules relating to marriage, succession, minority, guardianship, adoption and maintenance as Hindus. The statutes thus accord legislative recognition to the fact that even though Jainas may not be Hindus by religion they are to be governed by the same laws as the Hindus. In this view of the matter the expression "Hindu undivided family" will certainly include the "Jaina undivided family". The latter class of family is not known to law. The Jainas are governed by all the incidents relating to the Hindu joint family. Hindu undivided family is a legal expression which has been employed in taxation laws. It has a definite connotation and embodies the meaning ascribed to the expression "Hindu joint family". (emphasis added)
>
> 11.

15/ The learned Additional Principal Judge, although, made a passing reference to this Judgment but failed to appreciate aforestated observations.

16/ The notification relied upon by learned Additional Principal Judge, Family Court is considered. The Central Government in exercise of powers conferred by Clause (c) of Section 2 of the National Commission for Minorities Act, 1992 notified the Jaina community as a minority community in addition to five communities already notified as minority communities viz. Muslims, Christians, Sikhs, Budhists and Zoroastrians (Parsis) ***for the purpose of said Act***. This notification recognises Jaina community as a minority community. It does not

amend, invalidate or supersede express provision of any existing laws. No corresponding amendments have been made to exclude the members of Jaina community from application of any existing law.

17/ The founders of the Constitution of India and the Legislature in their collective wisdom have integrated the Hindu, Buddhist, Jaina and Sikh for application of the Hindu Marriage Act. Both the parties had pleaded that they married according to Hindu rituals and customs. There was no occasion for learned Additional Principal Judge to substitute his own views and perceptions against the express provisions of the law. If the concerned Court was satisfied that the case pending before it involves a question as to operability of provisions of the Hindu Marriage Act to the members of Jaina community, it could have referred the case for opinion of High Court under the proviso to Section 113 of the Code of Civil Procedure, 1908 read with Section 10 of the Family Courts Act, 1984.

Section 113 provides as under:-

> **"113. Reference to High Court**.—Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit:
> [Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and **is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative,** but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of the High Court."

18/ Thus, learned Additional Principal Judge Family Court has committed grave illegality and manifest impropriety in concluding that the provisions of

Hindu Marriage Act, 1955 are not applicable to the members of Jaina Community and returning the petition filed under Section 13B of the Hindu Marriage Act for being presented under section 7 of the Family Courts Act.

19/ Consequently, the impugned order dated 08.02.2025 is set aside. The appeal is allowed. The 1st Additional Principal Judge Family Court, Indore is directed to proceed with the Petition in accordance with law.

**(SUSHRUT ARVIND DHARMADHIKARI)**
**JUDGE**

**(SANJEEV S KALGAONKAR)**
**JUDGE**

BDJ

BHUNESH WAR DATT

Digitally signed by BHUNESHWAR DATT
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