CHAPTER – IV
DIFFERENT THEORIES OF DIVORCE

1. Introduction

There are various theories of divorce such as fault theory, on the basis of which most of the grounds of judicial separation and divorce are formulated in section 13(1) of the Hindu Marriage Amendment Act, 1976. There are also modern theories of divorce such as Mutual Consent on the basis of which a new ground of divorce; divorce by mutual consent has been incorporated. Yet there is one more theory called breakdown theory which is reflected in some grounds such as failure to resume cohabitation within one year getting the degree of restitution of conjugal rights and failure to resume cohabitation within one year after getting the degree of judicial separation. These two grounds are stated in section 13(1) (a) and section 13(1) (b) of the Marriage Law Amendment Act, 1976.

In early Roman law marriage and divorce were essentially private acts of parties. Whenever two persons wanted to marry they could do so, and whenever they wanted to put their marriage asunder they were equally free to do so. No formalities or intervention of an agency was necessary for either. In England before 1857, a marriage could be dissolved only by an Act of Parliament. After a considerable pressure, divorce was recognised under the Matrimonial Causes Act, 1857, but only on one ground i.e. adultery. This continues to be position in India in respect of the Christian marriage. Later on insanity was added as a ground of divorce.

However, marriage is also regarded as a social institution and not merely a transaction between two individuals, and therefore, it was argued that there was a social interest in prevention and protection of the institution of marriage was hedged with legal protection. The inevitable consequence of this philosophy was that marriage came to be

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2 Mental disorder has been defined as mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia; The expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub normality or intelligence) which results in abnormally aggressive or seriously ‘irresponsible conduct on the part of the defendant, and whether or not it requires or is susceptible to medical treatment. Under the Hindu Law, Parsi Law and the Special Marriage Act, the language is identical.
regarded as a special contract which cannot be put to an end like an ordinary contract. A marriage can be dissolved only if one of the spouses is found guilty of such an act and conducts which undermined the very foundation of marriage. This led to the emergence of the offence or guilt theory of divorce. Marriage as an eternal union was not altogether immune to rejection. Divorce or tyaga was not alien to Indian society; it was devoid of any formal recognition as a tool of self-emancipation by the marriage partners. During the pre-Vedic era, despite separation of marriage partners, the marriage was not null and void. Women had never used their rights to disown men. However, two ancient smriti writers’ Narada and Parasara laid down few grounds on which women could remarry. Impotency, she was allowed to take second husband if the first one was missing or dead, or had taken to asceticism, or degraded in caste. However, earlier there was no systematic code to regulate divorce in specific.

The Hindu Marriage Act, 1955 as amended by the Marriage Laws (Amendment) Act, 1976 lays down nine grounds, based on guilt theory of divorce; adultery; cruelty; desertion; conversion to a non-Hindu religion; incurable insanity or mental disorder; virulent and incurable leprosy; venereal disease in communicable form; taking to sanyasa (i.e. renunciation of world by entering into a holy order) and presumption of death; and four additional grounds on which wife alone can sue for divorce. The Special Marriage Act, 1954 as amended by the Marriage Laws (Amendment) Act, 1976 recognizes eight grounds based on guilt on which either party may seek divorce and two additional grounds on which wife alone may seek divorce, viz, rape, sodomy or bestiality of the husband. The eight grounds are: adultery; desertion for at least three years; respondent undergoing a sentence of imprisonment for seven years or more for an offence under the Indian Penal Code, 1860; cruelty; venereal disease in a communicable form, leprosy (only if the disease was not contracted by the respondent form the

3 Section 13: when carefully analyzed shows that there are in all fifteen grounds for divorce. If we classify these grounds they fall into the following three divisions:

(1) Nine grounds based on ‘fault liability theory’ of divorce. These grounds are laid down in sub-section (1) and only the party aggrieved may avail of them.

(2) Two grounds based on ‘breakdown theory’ of divorce which are contained in sub-section (1-A). They may be availed of by any party to the marriage who is aggrieved or who is guilty.

(3) Four grounds which are special and which can be availed of by a wife only. These are shown in sub-section (2).

Grounds shown above in (1) and (2) are available in every case of marriage whenever solemnized.
petitioner); incurable insanity or continuous or intermittent mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent, and presumption of death (respondent not been heard of as alive for a period of seven years or more). Following are the major theories of divorce:

2. Indissolubility of Marriage Theory

According to this theory marriage is an unbreakable tie between husband and wife. It is a union of bone with bone and flesh with flesh. It is eternal. Even if the relations between the parties are unhappy, they have to live and die with it. This is the theory of the shastric Hindu Law. The marriage could be dissolved neither by the act of the parties nor by the death of one of them. Divorce was an anathema. However, this was the law for the regenerate castes, the so called upper three castes. The shudras and tribes recognised divorce and had their customs relating there to. The Hindu marriage Act abandoned the shastric position. Marriage is no more unbreakable rope even for the regenerate caste. If the necessary conditions as given under section 13 and 13B exist, every Hindu is entitled to the dissolution of his or her marriage. The Hindu Marriage Act is indeed a revolutionary piece of legislation from this point of view.

3. Divorce at Will Theory

According to this discreditable theory one can divorce one’s spouse whenever one pleases. Marriage is more difficult than divorce here, whereas the case should be just the opposite. This theory is recognised by the Mohammedan law. A Muslim husband of sound mind may divorce his wife whenever he so desires without assigning any ground therefore. He need not seek the assistance or intermeddling of a judicial officer or of the counsel of his community. Although the Mohammedan Law favours the husband only in

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4 Under the general uncoded Hindu Law, divorce was not recognized, it was rather unknown to the old textual Hindu Law of Marriage. The reason is very simple that a marriage was undissoluble tie between the husband and wife. Divorce was thus not recognized unless it was allowed by custom. Section 13 therefore introduces a vital and dynamic change in the marriage law of Hindus.

5 The Hindu Marriage Act, 1955 (25 of 1955): The Act has been extended to Union Territory of Dadra and Nagar Haveli by Regulation 6 of 1963, sec. 2 and Sch. 1 (w.e.f. 1-7-1965) and Pondicherry by Regulation 7 of 1963, sec. 3 and Sch. 1 (w.e.f. 1-10-1963). The Act has been extended to Sikkim by S.O. 311 (E), dated 28th April, 1989 (w.e.f. 1-5-1989).

6 The Khula and the Mubaraa are considered by many as species of divorce by mutual consent. The word mubaraa denotes the act of freeing each other by mutual consent. In the case of khula, the wife begs to be released and the husband agrees for a certain consideration, which is usually a part or the whole of the mahr. (Hedaya Vol.1, p.322).

7 Moonshee Buzul-ul-Raheem v. Luteefut-on-Nissa, (1861) 8 MIA 379.
this matter, yet we can imagine a rule which gives the right to dissolve marriage at will to both the parties.

Both the theories, that marriage is unbreakable and that marriage subsists during the pleasure of one or any of the parties thereto, touch the opposite extremes. They are alike in one respect that both are unreasonable and unjust. The first compels a spouse to bear the yoke of even torturous marriage also. The second makes marriage a play thing of the party entitled to proclaim divorce at will. In the first case the lawmaker has arbitrarily made marriage a prison. Marriage is for making a loving home, not a rigorous imprisonment, and there should be an escape from strained relation. In the second case, a party may dissolve marriage arbitrarily disregarding the sentiments, services, helplessness and above all, the innocence of the other party. As the shastric Hindu Law had faith in the first theory\(^8\), the question of second theory did not arise. The customary Hindu Law which recognised divorce among the so called low communities also did not recognised divorce at the pleasure of any party o the marriage. The Hindu Marriage Act gives no room to the second theory.\(^9\)

4. Fault/guilt/offence Theory

The guilt or offence theory of divorce is essentially a 19\(^{th}\) century concept where the society abhorred divorce as an evil, as devil’s mischief, and therefore that society could agree for divorce only on that basis that one of the parties has committed some sin, some very heinous offence against marriage. As a corollary to the guilt of one party, the other party was required to be totally innocent.\(^{10}\)

According to this theory, if a party commits a matrimonial offence the aggrieved party may seek divorce form the delinquent spouse. It is only the matrimonial offence

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\(^8\) Section 13 B of Hindu Marriage Act, 1955- Divorce by mutual consent.

(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws Amendment Act, 1976 , (68 of 1976 .) on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that thy have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made no earlier than six months after the date of the presentation of the petition referred to in sub- section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.\]

\(^9\) Ramesh Chandra Nagpal, “Modern Hindu Law” Eastern Book co.

\(^{10}\) See Paras Diwan, “Modern Hindu Law” (3rd ed.), p.61-75.
which is a ground of divorce. No criminal offence, howsoever heinous, is a ground for divorce. Traditionally, adultery, desertion and cruelty are considered as matrimonial offences. But this should be treated only as an illustrative list. Rapes, sodomy, bestiality, refusal to obey the order of a court to pay maintenance to the wife, marring an underage person, are also examples of matrimonial offences. If the respondent is not guilty of any of these offences, divorce cannot be granted against him even if he has committed the offence of murder, dacoity, cheating, theft, treason, smuggling, black marketing or bribery etc. hence what matters for divorce is the person injury to the marital relations of the other spouse and not the injury done to any other person(s) in the society. A fault divorce is usually chosen by a spouse who wishes to be vindicated by proving the other's fault. In some states, the spouse who proves the other's fault may receive a greater share of the marital property or more alimony.11

The offence theory stipulates for two things: (i) a guilty party, i.e., the party who has committed one of the specified matrimonial offences, and (ii) an innocent party, who has been outraged and who has played no role in the criminality or the matrimonial offence of the other party. If the purpose of the divorce law was the punishment of the guilty party, then it was natural to lay down that the other party should have no complicity in the guilt of the offending party. If the petitioner’s hands are not clean, he cannot seek relief12. It is a different matter that the English courts took this principle to its logical end. This dichotomy of matrimonial offence and innocence led not merely to the evolution of matrimonial offences but also to the matrimonial bars. Such are the notions of matrimonial offence and matrimonial innocence that the burden of proof of both is on the party who seeks relief. English law classified these bars to matrimonial relief into discretionary bars and absolute bars. The existence of the absolute bar was fatal to the matrimonial petition, while in the case of discretionary bars, the court had discretion and it might exercise in

11 Ramesh Chandra Nagpal, “Modern Hindu Law” Eastern Book co.
12 Connivance, acquiescence in the misconduct of respondent, condonation and collusion (collusion was made a discretionary bar by the Matrimonial Causes Act, 1963) were absolute bar, while petitioner’s own adultery, unreasonable delay, conduct conducing to respondent’s guilt were discretionary bars under English Law before the coming into force of the Divorce Reform Act, 1969: see the Matrimonial Causes Act, 1950, section 4, and the Matrimonial Causes Act, 1965, section 5. These bars were done away with by the Divorce Reform Act, 1969: see sub-sections (1) and (2) of section 2. See also section 5 of the Act of 1973 under which, inter alia, on account of grave hardship to the respondent the petition of divorce may not be granted. See also section 23 of Hindu Marriage Act, 1955.
favour of the petitioner, or it might refuse to do so. Under Indian law all bars are absolute bars.

The guilt theory, on the one hand, implies, a guilty party, i.e., commission of matrimonial offence on the part of one of the parties to the marriage, and, on the other hand, it implies that the other party is innocent, i.e., in no way a party to, or responsible for, the offence of the guilty party. This principle was taken very far in English law; so much so that if both the parties, independently of each other, committed matrimonial offence the marriage could not be dissolved. For instance, if a petition is presented on the ground of respondent’s adultery and it is established that the petitioner is also guilty of adultery, then the petitioner cannot be allowed divorce. This is known as the doctrine of recrimination. One of the Chief Justice of England caustically remarked; “Perhaps it is not vouchsafed to everybody, whether in Holy Orders or out of them, to appreciate the full beauty of the doctrine that if one of the two married persons is guilty of misconduct there may properly be divorce, while if both are guilty they must continue to abide in the holy state of matrimony.” English law has now abandoned this position.

Since the guilt theory requires that the petitioner should be innocent, the English law evolved the doctrine of matrimonial bars, discretionary bars and absolute bars. This means that even if a petitioner is able to establish a ground of divorce to the satisfaction of the court, he may not get divorce if one of the matrimonial bars\(^\text{13}\) is proved against him.

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\(^{13}\) Section 23, the Hindu Marriage Act, 1955: Decree in proceedings.

(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that-

(a) any of the grounds for granting relief exists and the petitioner [ except in cases where the relief is sought by him on the ground specified in sub- clause (a), sub- clause (b) or sub-clause (c) of clause (ii) or section 5] is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified or [ in clause (i) of sub- section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(bb) [ when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and] (C) [ the petition (not being a petition presented under section 11)] is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e)there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to
Possible Faults

This type of divorce can be based in any of the following:

- cruelty\textsuperscript{14}, which includes the infliction of unnecessary emotional or physical pain and abusive treatment
- adultery\textsuperscript{15} means voluntary sexual activity between a married person with a person other than his or her spouse
- desertion\textsuperscript{16} for a specified length of time
- confinement in prison for a number of years\textsuperscript{17}
- alcohol or drug abuse
- insanity\textsuperscript{18}
- physical inability to engage in sexual intercourse, if it was not disclosed before marriage\textsuperscript{19}
- infecting the other spouse with a sexually transmitted disease\textsuperscript{20}

\[ \text{make every endeavour to bring about a reconciliation between the parties:} \] [ Provided that nothing contained in this sub- section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub- section (1) of section 13.]

(3) [ For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.]

(4) In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of cost to each of the parties.]

\textsuperscript{14} See Section 13 (1) (ia), the Hindu Marriage Act, 1955; section 27 (1) (d), the Special Marriage Act, 1954; section 10 (1) (x), the Divorce Act, 1869; section 2 (viii), the Dissolution of Muslim Marriage Act, 1939; section 32 (dd), the Parsi Marriage and Dissolution Act, 1936.

\textsuperscript{15} See Section 13 (1) (i), the Hindu Marriage Act, 1955; section 27 (1) (a), the Special Marriage Act, 1954; section 10 (1) (i), the Divorce Act, 1869; section 32 (d), the Parsi Marriage and Dissolution Act, 1936.

\textsuperscript{16} See Section 13 (1) (ib), the Hindu Marriage Act, 1955; section 27 (1) (b), the Special Marriage Act, 1954; section 10 (1) (vii), the Divorce Act, 1869; section 2 (ii), the Dissolution of Muslim Marriage Act, 1939; section 32 (g), the Parsi Marriage and Dissolution Act, 1936.

\textsuperscript{17} See Section 27 (1) (c), the Special Marriage Act, 1954; section 2 (iii), the Dissolution of Muslim Marriage Act, 1939; section 32 (f), the Parsi Marriage and Dissolution Act, 1936.

\textsuperscript{18} See Section 13 (1) (iii), the Hindu Marriage Act, 1955; section 27 (1) (e), the Special Marriage Act, 1954; section 10 (1) (iii), the Divorce Act, 1869; section 2 (vi), the Dissolution of Muslim Marriage Act, 1939; section 32 (b) and section 32 (bb), the Parsi Marriage and Dissolution Act, 1936.

\textsuperscript{19} See Section 2 (v), the Dissolution of Muslim Marriage Act, 1939.
Defences

There are also defences which can be raised by the other spouse in a fault divorce proceedings.

- **Recrimination** - It is the defence wherein the accused spouse in an action for divorce makes a similar accusation against the complainant spouse.
- **Condonation** - Which usually takes the form of implied or express forgiveness of a spouse's marital wrong and, therefore, weakens the accusers’ case.
- **Connivance** - Which is the act of knowingly and wrongly overlooking or assenting without placing any opposition to a spouse's marital misconduct, especially to adultery.
- **Reconciliation** - Where the spouses voluntarily resume marital relation by cohabiting as spouses prior to a divorce becoming final with mutual intention of remaining together and re-establishing a harmonious relationship.
- **Provocation** - Inciting the other spouse to do a certain act. An example of this is when a spouse claiming for abandonment, the other spouse may raise the defense that the claiming spouse provoked the abandonment.

Proof

It is equally important to consider all the circumstances when making these charges or planning a defense. Proof of marital fault is needed. It usually requires witnesses, involves a lot of time and expenses, and there is a high probability that the divorce will turn vicious.

It is important to note that the grounds and defenses for a fault divorce are defined by the different jurisdictions and that the legal interpretation may likewise vary from one

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20 See Section 13 (1) (v), the Hindu Marriage Act, 1955; section 27 (1) (f), the Special Marriage Act, 1954; section 10 (1) (v), the Divorce Act, 1869; section 2 (vi), the Dissolution of Muslim Marriage Act, 1939; section 32 (e), the Parsi Marriage and Dissolution Act, 1936.
place to another. Also, be aware that actual legal definitions may be very dissimilar to a layman's concept of the term.\textsuperscript{21}

**Expenses**

Fault divorce is usually more expensive, because it may necessitate a trial. This means hiring the services of an attorney and correspondingly paying for investigations, interrogatories and requests for evidence. Oftentimes, expert witnesses are invited during the hearing. However, there are also instances when fault divorce cases are settled with good reason before trial commences.

If the scenario is of both spouses being at fault or both spouses have shown grounds for divorce exist, the court will grant a divorce to the party who is least at fault under the doctrine of "comparative rectitude." This is a recent development in the field of law, because years ago, when both spouses were at fault, neither was entitled to a divorce.

Under English law the absolute bars are: connivance, acquiescence in the misconduct of the respondent, condonation and collusion\textsuperscript{22}. The discretionary bars are: Petitioner’s own adultery, cruelty, unreasonable delay, conducts conducting to the respondent’s guilt, and the like. The existence of an absolute bar is fatal to the petition, while in the case of discretionary bars the court may exercise, or refuse to exercise, its discretion in favour of the petitioner. The modern English law has abandoned practically all the bars\textsuperscript{23}

It has been seen that in early English law adultery, cruelty and desertion were the only three grounds of divorce.\textsuperscript{24} Later on insanity was added as a ground of divorce.


\textsuperscript{22} Collusion was made a discretionary bar by the Act of 1963.

\textsuperscript{23} Bars have now been abolished by Divorce Reform Act, 1969; See now the Matrimonial Cause Act, 1973. According to the rule of interpretation and construction of statutes, when there is conflict between two provisions of an Act, they are to be given a harmonious interpretation so that both may exist and none is made nugatory. This may be done by limiting the scope of one provision to make room for the other. Here also section 13 (1-A) and section 23 (1) (a) have to be harmoniously construed; Bimla Devi v. Singh Raj, AIR 1977 P&H 167(FB).

\textsuperscript{24} Matrimonial Causes Acts of 1857, 1923 and 1937.
Insanity did not fit in within the framework of guilt or matrimonial offence theory, as the party suffering from insanity could hardly be called a guilty party. It is a misfortune rather than misconduct. This led to renaming of the guilt theory as fault theory. If one of the parties has some fault in him or her, marriage could be dissolved whether that fault is his or her conscious act or providential. In some systems of law, there exists several grounds of divorce. Sentence of imprisonment for a specified period, whereabouts of a party not been known for a specified period to the other party, wilful refusal to consummate the marriage, leprosy, venereal diseases, rape, sodomy, bestiality, etc., have come to be recognised as grounds of divorce. Some systems also include grounds like incompatibility of temperament.

Originally, the Hindu Marriage Act incorporated the guilt or fault theory, and laid down that there must be a guilty party and an innocent party. The Act had a conservative stance. All the three traditional fault grounds, adultery, cruelty, and desertion, were made grounds of judicial separation and not of divorce. But now under Section 13, nine grounds of divorce were recognized both for husband and wife, and two additional grounds were recognized on which the wife alone could seek divorce. Barring aside insanity and leprosy, rest of the grounds arose out of some offence or wrong of the respondent. These were: living in adultery, change of religion, insanity, leprosy, venereal diseases, presumption of death, renunciation of world, non-resumption of cohabitation by the respondent after a decree of judicial separation and non-compliance with the decree of restitution of conjugal rights; (Before 1964, the petitioner, in the petition for restitution of conjugal rights, or in the petition for judicial separation, alone could seek divorce). Thus, these were incorporated essentially as guilt grounds. The wife’s additional grounds, viz., rape, sodomy or bestiality of the husband and the existence of another spouse of the polygamous pre-1955 marriage of the husband, were also based on the same theory. Even renunciation of the world by becoming a sanyasi fitted into the framework of fault theory,

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25 Ramesh Chandra Nagpal, “Modern Hindu Law” Eastern Book co; See also Paras Diwan, “Modern Hindu Law” (3rd ed.), p. 70-78.
26 The Hindu Marriage Act, 1955.
27 Ibid.
28 Definition of ‘rape’ as given in the Indian Penal Code holds good here. Forced cohabitation with a wife under 16 years of age, or during judicial separation, may be regarded as rape. Sodomy is anal intercourse by a man with his wife or with another woman or with a man. Consent of the victim and the victim’s age are not relevant considerations here. Bestiality is sex with an animal.
though the orthodox will not agree that if one of the spouses enters into the holy order he could be said to have committed any offence, yet looked at from the angle of the other spouse it is nothing but permanent desertion. Section 23 of the Hindu Marriage Act\textsuperscript{29} deals with the matrimonial bars. Recently, the Supreme Court in \textit{Darshan Gupta v. Radhika Gupta},\textsuperscript{30} held that the petitioner must approach court with clean hands. Grounds of divorce under S. 13(1) are based on matrimonial offence or fault theory. It is only commission of matrimonial offence by one spouse that entitles the other spouse to seek divorce. Hence, if petitioner himself/herself is guilty or at fault, he/she would be disentitled to seek divorce. Again in \textit{Badshah v. Sou. Urmila Badshah Godse}\textsuperscript{31}, the Court held that where a man marries second time by keeping that lady in dark about the first surviving marriage, such lady will be treated to be a legally wedded wife of the man for the purpose of claiming maintenance as if this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Stating that the husband cannot take advantage of his own wrong by saying that such second wife cannot claim maintenance under Section 125 of \textit{Cr.P.C.} as she is not his “legally wedded wife”, the Court held that while dealing with the application of destitute wife or hapless children or parents under the said provision, the Court is dealing with the marginalized sections of the society and hence, it is the bounden duty of the Courts to advance the cause of the social justice. The court further held that though such marriages are illegal as per the law, they are not ‘immoral’ and hence a financially dependent woman cannot be denied maintenance on this ground.

Thus, it is laid down that the petitioner will not be allowed to take advantage of his or her own wrong or disability, this is to say, if the guilt of the respondent is, in any way, the direct or indirect outcome of some wrong or disability of the petitioner, the petitioner will not be entitled to the matrimonial relief asked for, even if he had been able to establish his ground of relief beyond reasonable doubt. In case the ground for seeking matrimonial relief (divorce or judicial separation) is adultery, the petitioner must show that he is in no way accessory to the respondent’s adultery, and that he did not connive at the adultery of the respondent. In every petition, the petitioner had to show that there is no

\textsuperscript{29} The Hindu Marriage Act, 1955.
\textsuperscript{30} (2013) 9 SCC 1 (Civil Appeals Nos. 6332-33 of 2009, decided on July 1, 2013).
\textsuperscript{31} Criminal Misc. Petition No. 19530/2013, decided on October 18, 2013.
collusion between him and the respondent. In case the ground is cruelty or adultery, the petitioner is also required to show that he or she did not condone the offence. The petitioner in every matrimonial cause is required to prove that there is no improper delay in the presentation of the petition.

Even after the amendments of 1964\(^2\) (Which introduced the breakdown theory of divorce) and of 1976\(^3\) (Which introduced consent theory of divorce), that fault grounds of divorce and the bars to matrimonial relief are still part of Hindu law of divorce. The amending Act of 1976 has made adultery, cruelty, and desertion as fault grounds of divorce, and has added two more fault grounds of divorce for wife.

5. Frustration of Marriage Theory\(^4\)

The wedlock may be frustrated for a party to marriage even though the other party is not guilty of any marital offence. This may happen when he or she is suffering from mental unsoundness or has changed his religion or renounce the world or has disappeared for a very long period. If a person prefers a release from such a fruitless marriage he or she should be, according to this theory helped. Divorce is a relief from this point of view. The Hindu Marriage Act recognises these grounds as being good for divorce.

6. Consent Theory of Divorce

According to this theory, if the husband and wife agree to part for good, they should be permitted to get their marriage dissolved. It is they who have to live with their marriage. If for any reason they cannot do so they must not be compelled. Compulsive cohabitation may give birth to matrimonial delinquencies which give rise to grounds for divorce. Why should the law refuse a person a thing which may be given to him on his degeneration when he asks for it before such degeneration? Granting divorce before the matrimonial life is spoiled by the delinquency or degeneration of one or both of the spouses is a positive goodness for both, for the parties to marriage and for society. Besides saving the parties from moral degradation, this procedure for granting divorce has an additional advantage that the parties are not forced to wash their dirty linen in public. They need not level allegations and counter-allegations against each other and try to outwit each other for proving that the other party is a “sinner”. It is feared that the grant of

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\(^2\)The Hindu Marriage (Amendment) Act, 1964 (44 of 1964) (w.e.f. 20-12-1964).

\(^3\)The Hindu Marriage (Amendment) Act, 1976 (68 of 1976) (w.e.f. 27-5-1976).

Divorce by mutual consent will enable a party to obtain divorce by wresting the consent of the other unwilling party by a malpractice, say; coercion or fraud etc. there is no valid reason for this fear. Consent essentially means free consent. Where the consent of a party is obtained by a malpractice, the affected party can ever refuse so in the court and the ground for divorce will automatically vanish. It is also argued against this theory that this is in a way divorce by collusion. This objection is based on a misunderstanding of the difference between consent and collusion. Every collusion is, no doubt, by consent between the parties but every consent between them does not mean collusion.35

Divorce by mutual consent mean that the case is not like usual ones in which one party petition against the other for divorce and the other party resist the same. It means that both the party makes a joint petition to the court for divorce between them. There may be a genuine desire on the part of both to get rid of each other. When a party to marriage wants divorce, it is not necessary in the nature of things that the other party must oppose it. The other party may be equally or rather more willing for it. They may be sensible enough to part for good amicably.36

Collusion on the other hand means an agreement or understanding between the parties to make the court believe in the existence or truth of the circumstances which parties know to be none existent or falls and the existence or truth of which is necessary for the grant of the relief claimed in the petition.37 In a collusive proceeding, the claim put forward is false, the contest over it is unreal and the decree prayed therein is a mere mask having the similitude of a judicial determination. It is acquired by the parties with the

35 Syal v. Syal, AIR 1968 P&H 439. By keeping the wife ignorant of the proceedings under sec.9 the husband obtained a decree for restitution of conjugal rights. She was again kept in dark about the execution proceedings. Held, the husband was in the wrong and divorce was denied. Ahluwalia v. Ahluwalia, AIR 1962 Punj 432: The husband after getting the decree for restitution in his favour, petitioned under section 12 (1) (c) for the annulment of marriage. His petition was dismissed. Then he petitioned for divorce on the basis that no restitution has taken place for the statutory period after the decree to that effect. Held, that it was impossible for the wife to comply with decree of restitution of conjugal rights as along as the husband was proceeding with the petition for the nullity of marriage. He was, therefore, not given the decree of divorce.
36 Dharmendra Kumar v. Usha Kumari, AIR 1977 SC 2218: This case presents an illustration of the application of the rule of harmonious construction by the Supreme Court. In this case, the wife was granted restitution of conjugal rights under section 9 of the Act. After two years she petitioned for divorce under section 13 (1-A) (ii) on the ground that there has been no restitution of conjugal rights after the passing of a decree to that effect. The husband stated that the wife herself refused to receive or reply to the letters written by him and did not respond to his other efforts to make her agree to live with him. If divorce is granted to her she would get the advantage of her own wrong which is not permitted under Section 23 (1) (a).

If the husband and wife present a petition for divorce by mutual consent with the actual intent and purpose of getting their marriage dissolved, it does not amount to divorce by collusion. It will be a collusive divorce if they ask for it without meaning to divorce each other in fact. Hence divorce by a real consent of the husband and wife is not synonymous with divorce by collusion. The chances of collusion in the case of divorce by consent are neither more nor less than in that of litigious divorces.

It is also objected that this procedure will lead to hasty divorces. The objections are groundless. This theory does not propound that a husband and wife have the right to go hand in hand to the court and inform it that they wish to be divorced and the court would there and then write down a decree for their divorce. This theory only facilitates the party who are unable to pull on well to get divorce without litigation. But it is necessary to establish some concrete proof of a rift between them and their desire to be untied. This checks hasty divorces by mutual consent. Whenever divorce by mutual consent is permitted, it is provided as a pre-condition for submitting the petition to the court that the parties to marriage must have lived separately for a considerable period, say, a year or two. Moreover, the court does not start hearing at an early date and instead the parties are required to come again together after a considerable time to move the court for taking a decision on their joint petition. If they do not do so the court will not summon them. It will be deemed that they have changed their mind. If only one of them comes, then also no decision will be taken because the absence of the other party negates the mutuality of their consent. This proves that the divorces by mutual consent is not so simple and short a matter. It has its own checks and time – consuming preconditions.

Now there is a welcome provision in the introduction of divorce by mutual consent under the Hindu Marriage Act.\footnote{Section 13B, Hindu Marriage Act, 1955.} Under the Special Marriage Act such a provision already
The protagonists of the consent theory have maintained that mutual fidelity in marriage can prevail only when parties have the same freedom of divorce as they have of marriage. Just as an individual may err in entering into any other transaction, he may as well err in marriage. If two parties realize that this is so, then they should be permitted to put the marriage to an end by mutual consent. But the drawbacks of consent theory are that either it makes divorce too easy or too difficult. To prevent hasty divorces by mutual consent the law in various countries provides several safeguards. But nothing can be done, if one of the parties withholds his consent, innocently or wickedly or maliciously. Under the Special Marriage Act it was laid down that a couple may present a petition for divorce by mutual consent on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed to divorce. On doing so, they were required to wait for one year. If, after the expiry of the period of one year, if they move a motion that they wanted their marriage to be dissolved, then the court might pass a decree of divorce. Now this latter period of one year has been reduced to six months. A provision of divorce by mutual consent in this modified form has been introduced into the Hindu Marriage Act. It is submitted that the latter period of six months desirable as it gives parties an opportunity for rethinking and reconsidering. But the initial period of separation of one year is not justified. In our Indian situation sometimes, it may not be possible to live separately—even though parties are living together very miserably.

If a married couple realizes that they are finding it difficult to pull on together; they have tried hard to make the marriage a success, but all their efforts have failed. It is not that they are wicked people or bad persons. They are average human beings who have, somehow or the other, not been able to pull on together. In such a case, only alternative for them is to get out of the matrimony. But they cannot do so. The fault theory requires

41 Section 28, Special Marriage Act, 1954.
42 See Paras Diwan, “Modern Hindu Law” (3rd ed.), p. 70-72; also if and when the irretrievable breakdown is also included among the grounds for divorce as recommended by the Law Commission, the Hindu Law of divorce would be one of the reasonably most liberal laws of divorce in the world.
43 See Section 23, the Hindu Marriage Act, 1955.
44 Section 28, Special Marriage Act, 1954.
45 Section 13B, Hindu Marriage Act, 1955.
that one of them (and only one of them) should be guilty of some matrimonial offence\(^{46}\), then and then only the marriage can be dissolved. Then it was thought that a divorce by mutual consent was the answer to this problem. It was asserted that freedom of marriage implies freedom of divorce.\(^{47}\)

Thus as against the guilt theory, there has been advocated the theory of free divorce or the consent theory of divorce. The protagonists of this theory hold the view that parties to marriage are as free to dissolve a marriage as they are to enter it. If marriage is a contract based on the free volition of parties, the parties should have equal freedom to dissolve it. Just as an individual may err in entering into some other transaction, so also he or she may err in entering into a marriage. The argument may be summed up thus: it may construe that two parties who have entered into a marriage with free consent, later on, realize that they made a mistake, and for one reason or another, are finding it difficult to pull on together smoothly and to live together harmoniously. It is not because they are wicked, bad or malicious people. They are just ordinary average human beings, but it has just happened that their marriage has turned out to be a bad bargain, and they find it impossible to continue to live together. Should they have no right to correct their error, to cast off a burden which has become onerous, intolerable and which is sapping the vital fluid of life and eating into its very vitals? It is not merely their physical life, it is also their entire family life, including moral life, which is affected. If from this situation they have no way out, they are likely to go astray, may be, willy-nilly, one is forced to commit a matrimonial offence, may be one, out of sheer frustration, murders the other. Such an unhappy family is a breeding ground for delinquent children. In short, continuance of such a marriage is neither in the individual nor in the social interest. Thus, it is argued, that freedom of marriage implies freedom of divorce, then and then only can mutual fidelity continue, can real monogamy exist.

It is stated that the very basis of marriage is mutual fidelity, and if for any reason the parties feel that mutual fidelity cannot continue, they should have freedom to dissolve the marriage, as only by dissolution, fidelity can be preserved. Divorce by mutual consent

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\(^{46}\) Only Matrimonial Offences like adultery, bigamy, cruelty, rape etc. and not criminal offence which are punishable under Indian Penal Code, 1860.

\(^{47}\) Section 13B, the Hindu Marriage Act, 1955; section 28, the Special Marriage Act, 1954; section 10 A, the Divorce Act, 1869; section 32 B, the Parsi Marriage and Divorce Act, 1936.
means that the law recognizes the situation that has existed for some time and in effect
says to the unhappy couple.

The supporters of this theory hold that the freedom of divorce will bring about
more happy marriages, and reduce the number of unhappy one. It will help both the
husband and the wife to live in harmony and consolidate the unity of the family, so that
they may fully engage in their career. Since there is freedom of divorce, both man and
woman are forced to take a very serious and sincere attitude towards marriage.

Under Muslim law also, divorce by mutual consent is recognized in two forms (i)
Khul, and (ii) Mubbaraat. The word Khul literally means “to put off”. In law it means
laying down by a husband of his right and authority over his wife for an exchange.\(^{48}\)

In Khul the desire for divorce emanates from the wife, while in mubbaraat
aversion is mutual; both parties desire dissolution of marriage. Mubbaraat denotes the act
of freeing one another mutually, and the proposal for divorce may emanate from either
spouse. But even in mubbaraat wife has to give up her dower or part of it.

The Soviet Union introduced this theory in the family law. In the People’s
Republic of China, in most of Eastern-European countries, Belgium, Norway, Sweden,
Japan, Portugal and in some Latin American States divorce by mutual consent is
recognized in one form or the other. At home, the Special Marriage Act, 1954, and the
Hindu Marriage Act, 1955 (after the amendment of 1976), the Divorce Act, 1869, the
Parsi Marriage and Divorce Act, 1936 recognize divorce by mutual consent.\(^{49}\)

The criticism of the consent theory is two-fold: (i) it makes divorce very easy, and
(ii) it makes divorce very difficult. It has been said that divorce by mutual consent offers a
great temptation to hasty and ill-considered divorces. More often than not, parties
unnecessarily magnify their differences, discomforts and other difficulties, which are
nothing but problems of mutual adjustments, and rush to divorce court leading to
irrevocable consequences to the whole family. This criticism has been met by the law of
many countries which recognize divorce by mutual consent by providing several
safeguards.

\(^{48}\) Baillie, Digest of Mohammed Law, 38; Hedaya, 112.
\(^{49}\) Section 13B, the Hindu Marriage Act, 1955; section 28, the Special Marriage Act, 1954; section 10 A, the
Divorce Act, 1869; section 32 B, the Parsi Marriage and Divorce Act, 1936.
In the modern English law, the Matrimonial Causes Act, 1973, the consent theory has been accorded recognition by laying down that if the parties have lived apart for a continuous period of at least two years, immediately preceding the presentation of the petition, divorce may be granted by the mutual consent of the parties.

Under the Special Marriage Act,\textsuperscript{50} 1954 and the Hindu Marriage Act\textsuperscript{51}, 1955 no petition for divorce can be ordinarily presented before a period of one year has elapsed since the solemnization of marriage. A similar provision has been made in Parsi Marriage and Divorce Act, 1936\textsuperscript{52} by the amending Act of 1988.

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\textsuperscript{50} Section 29 of the Special Marriage Act, 1954: Restriction on petitions for divorce during first one years after marriage.

(1) No petition for divorce shall be presented to the district court [unless at the date of the presentation of the petition one year has passed] since the date of entering the certificate of marriage in the Marriage Certificate Book: Provided that the district court may, upon application being made to it, allow a petition to be presented [before one year has passed] on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the district court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case the district court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the [expiry of one year] from the date of the marriage or may dismiss the petition, without prejudice to any petition, which may be brought after the [expiration of the said one year] upon the same, or substantially the same, facts as those proved in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the [expiration of one year] from the date of the marriage, the district court shall have regard to the interests of any children of the marriage, and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the [said one year].

\textsuperscript{51} Section 14 of the Hindu Marriage Act, 1955: No petition for divorce to be presented within one year of marriage.

(1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, [unless at the date of the presentation of the petition one year has elapsed] since the date of the marriage: Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented [before one year has elapsed] since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the [expiry of one year] from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the [expiration of the said one year] upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the [expiration of one year] from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the [said one year].

\textsuperscript{52} Section 32B in the Parsi Marriage and Divorce Act, 1936: Divorce by mutual consent.

(1) Subject to the provisions of this Act, a suit for divorce may be filed by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Parsi Marriage
The other criticism of the theory is that it makes divorce very difficult. Since divorce by mutual consent requires the consent of both the parties and if one of the parties withholds his consent, divorce can never be obtained. It may happen that one of the parties to marriage may not give his or her consent for divorce on account of a belief in the indissolubility of marriage, or on account of sheer malice, bigotry or avarice, then divorce can never be obtained.

Thus, it became necessary to find an alternative to the consent theory also. But in countries like England where it was found difficult even to replace fault theory with consent theory, much less to introduce irretrievable breakdown of marriage theory, two modes were found to mitigate its rigor. Firstly, some countries went on enlarging the fault grounds of divorce so much so that “incompatibility of temperament” or “profound and lasting disruption” was made grounds of divorce.

The second course adopted was to give a very wide interpretation to some fault grounds. Cruelty was found to be most handy ground which could be moulded into any shape. Some States of the United States of America went to the extent of saying that if husband snored during the night thus disturbing the sleep of the wife, it amounted to cruelty. Gradually, cruelty was given such a wide interpretation that it virtually amounted to recognition of breakdown theory of divorce.53

In Gollins v. Gollins54, the wife soon after the marriage found out that her husband was heavily indebted at the time of the marriage and his farm was also heavily mortgaged. The husband was not in a position to provide maintenance for her. It was she who had to lend money to her husband from time to time to pay off pressing debts. The wife ran a guest house for elderly people: husband did not contribute anything. In short, husband did nothing to help her; he could have obtained paid employment but did not care to get it.

The husband however, did nothing at any time to cause any physical harm to the wife. Under these circumstances, the wife brought an action for divorce on the averment that she could not stand the strain of his debts and that her husband had wilfully neglected to provide reasonable maintenance to her and children. On these facts the husband was held guilty of persistent cruelty.

The question again came in Williams v. Williams\textsuperscript{55}, where the wife filed an action for divorce on the ground that the husband persistently accused her of adultery as a consequence of which her health had been injured. The husband was a mental patient and therefore insanity was taken as a defense. Rejecting the husband’s plea, the House of Lords allowed the wife’s petition.

Thus, the scope of the cruelty—one of the fault grounds—has been so much widened by judicial interpretation as to include virtually the breakdown principle. The Matrimonial Causes Act, 1963 removed ‘collusion’ from absolute bars and placed it among the discretionary bars. This resulted in the acceptance of several collusive agreements which virtually implied acceptance of divorce by mutual consent of the parties.

The provision for dissolving marriage through mutual divorce in India is included in Section 13B of the Hindu Marriage Act by the Marriage Laws (Amendment) Act, 1976. Any marriage solemnized before and after the Marriage Laws (Amendment) Act, 1976 is entitled to this provision.

Though several laws have been passed with the progress of time, the divorce procedure in India is still complex and one will have to contest the divorce for several months. The Indian judicial law believes that the extended time span might work out well for the couple to reconsider their marriage and hence, a marriage will be saved from being dissolved forever.

A marriage may be said to have broken down when the purpose of the marriage tie is defeated or when the objects of the matrimony cannot be fulfilled. Broadly speaking, the main objects of the marriage are twofold, viz, the maintenance of stable sexual relationship and the protection and care of the children of the marriage. When the life of the spouses reach such a stage that each has his or her own way, when there are constant bickering and nagging, when there is no mutual affection and trust, it may be presumed

\textsuperscript{55} (1963) 2 All ER 994.
that the marriage has failed. Under such condition neither sexual fidelity is possible nor are the interests of the children secured. In many countries the fact of separation is considered to be an indication of the breakdown. Some countries provide certain guidelines apart from a separation period, as indicative of the marital breakdown. There can, however, be no absolute rule and every sick marriage may have its own peculiar reasons for being so. The entire history of the marriage has to be studied. It is only when there is not an iota of hope that the parties will reconcile that the marriage can be considered as irretrievably broken down.

It cannot be denied that a system which permits divorce on the fault of the other party has a number of flaws. Under the fault system of divorce, parties whose marriage has obviously broken down are impaired to live together in law. In the absence of a technical fault viz, the fault grounds enumerated in the divorce section, no divorce can be granted. Similarly, when both parties are at fault – the “clean hands theory” equity makes matters difficult for the spouses.

Besides, since the proof of matrimonial fault is a condition precedent for the grant of a divorce in a fault oriented system, parties are at a virtual tug of war in the court with accusations and counter accusations against each other.

7. Breakdown Theory of Divorce

The basic human and social problem is of the maladjusted couples. Many marriages fail not because of the wickedness of one party or the other, but they just fail. Many couples try, and try their best to make their marriage a success but they fail. Sometimes marriages fail because of selfishness, boorishness, callousness, indifference and thinks like these on the part of one of the parties to the marriage. All this does not amount to any matrimonial offence. Yet, the marriage is not get-going. There are several cases in which parties live separate and apart from each other for several years and just because one of the parties wants the marital bond to continue, there is no way out for the other. In the context of a Muslim case, V.R. Krishna Iyer, J. said: “daily, trivial differences get dissolved in the course of time and may be treated as the teething troubles

56 The logic behind is that what could not be mended should be ended. See, Anam Abrol, “Irretrievable Breakdown of Marriage as a ground of divorce” CULR 1988 (12) at 71.
57 Paul W. Alexander, Let’s Get the Embattled Spouses out of the Trenches, 18 Law & Contemp. Prob. 98 at 102 (1953).
of early matrimonial adjustment. While the stream of life, lived in married mutuality, may wash away smaller pebbles, what is to happen if intransigent incompatibility of minds breaks up the flow of the stream? In such a situation, we have a breakdown of the marriage itself and the only course left open is far law to recognize what is a fact and accord a divorce."\textsuperscript{59}

Breakdown of marriage as the sole basis of divorce is now recognised in several countries of the world. The Soviet Union recognized it in 1944. In most of the communist countries it is recognized basis of divorce. In some states of the United States it is recognized. In England—so far considered the citadel of conservatism—it was recognized in 1969.\textsuperscript{60} It is more and more now accepted that for divorce, why should it be necessary for one party to prove that the other party has in a culpable manner violated the marital bond. To use the language of the law of the German Democratic Republic, "If a marriage...has lost its significance for the married partners, for the children and thereby for the society, if it has become merely an empty shell, it must be dissolved, independently, whether one of the married partners, or which of the two, bears the blame for its disintegration.\textsuperscript{61}

In the countries of the world the breakdown principle has found recognition in three forms: (i) the determination of the question of fact whether in fact a marriage has broken down is left to the court; if the court, in a case before it, is convinced that a marriage has broken down, it passes a decree of divorce. (ii) The legislature lays down the criterion of break-down; and the criterion that has been laid down in most countries is that if parties are living separate and apart for a certain duration—ranging from one year to seven years—it is sufficient proof of breakdown of marriage, and a decree of divorce may be granted at the instance of either party. (iii) If parties are living separate for a certain duration—one year to two years—under a decree of judicial separation, or if a decree of restitution of conjugal rights is not complied with for a certain duration—one year to two years—then either party may seek divorce. It should be noticed clearly that in breakdown

\textsuperscript{59} Abubacker Haji v. Mamu Koya, 1971 KLT 663.
\textsuperscript{60} See Paras Diwan, Marriage and Divorce Law Reforms (The Marriage Laws (Amendment) Act, 1976); "the Breakdown Theory in Hindu Law" 1969 Lawyer (J) 192-204.
\textsuperscript{61} Breakdown; Australia and Germany (1969) ICLQ 896.
principle of divorce culpability or guilt or innocence of either party does not figure anywhere. A marriage is dissolved just because it has broken down.\(^{62}\)

In Hindu law the breakdown principle in the third form of divorce was introduced in 1964, and in 1970 in the Special Marriage Act. This was done by amending the last two clauses of divorce of the two statutes. The new Section 13(IA) of the Hindu Marriage Act laid down that if parties have not resumed cohabitation for a period of two years or more after a decree of judicial separation, or if a decree of restitution of conjugal rights has not been complied with for a period of two years or more, then \textit{either} party may sue for divorce. The provision in Section 27(2) of the Special Marriage Act is identical except that the period therein is only one year. When the Hindu law provision came for interpretation before our courts, our courts tested it on the touchstone of guilt theory and looked in the question very closely whether the petitioner is thereby note taking advantage of his own wrong, and if they found culpability in him, they refused the relief.\(^{63}\) In most of the cases the question came in this form: a wife obtained a decree of restitution of conjugal rights but the husband did not comply with it. After a period of two years the husband sued for divorce. The courts said that since he himself has not complied with the decree, he is in the wrong, and if divorce is allowed to him, it will amount to giving him an advantage of his own wrong.\(^{64}\) Looked at in this manner the argument is not merely plausible but appears convincing. But the point is, if non-compliance is a criterion of breakdown of marriage, then divorce should be granted, without bothering which of the two parties bears the blame for the disintegration of marriage.

It is very unfortunate that neither the Law Commission, the report of which constitutes the basis of the Marriage Laws (Amendment) Act, 1976, nor the framer of the Marriage Laws (Amendment) Bill, 1976 looked at this aspect of the matter. In this regard only suggestion that has been made is this that the period of two years separation under

\(^{64}\) Ibid.
the Hindu Marriage Act, should be reduced to one year.65 One wished very much that Parliament should have enacted a simple provision that if parties have ceased to cohabit for a period of two years (irrespective of fact whether there is a decree of judicial separation or restitution), then either party may sue for divorce. A provision like this would help us in achieving the goal of a uniform civil code, as such a provision would be, it is submitted, acceptable to all communities. It will not work hardship on the women, as, even after divorce, under both the statutes, a wife, who has no means of livelihood, can claim maintenance from her divorced husband.

Irretrievable Breakdown of Marriage Theory- The basic postulate of breakdown theory is that if a marriage had broken down without any possibility of repair (or irretrievably) then it should be dissolved, without looking to the fault of either party. If a marriage has broken down irretrievably, should we not recognize this fact? Should we insist to find out the party at fault?66 Suppose, no party is at fault or one is or both are, but marriage has nonetheless broken down, should the divorce be refused? The breakdown theory holds the view that what we are concerned with is the fact of breakdown of marriage; if a marriage has broken down irretrievably, and then divorce should be granted, as there is no use in retaining the empty shell. Thus the law recognizes an unhappy situation and says to the petitioner: If you can satisfy the court that your marriage has broken down irretrievably, and that you desire to terminate a situation that has become intolerable to you, then your marriage shall be dissolved whatever may be the cause.67

In a landmark judgment, the Supreme Court held that situations causing misery should not be allowed to continue indefinitely, and that the dissolution of a marriage that could not be salvaged was in the interests of all concerned. In Naveen Kohli v. Neelu Kohli,68 the parties were married in 1975 and after a few years, the marriage turned sour. There were allegations of cruelty, adultery and other types of misbehaviour from both the parties against each other. Wife initiated several civil and criminal proceedings against

65 See the amended s. 13 (IA), Hindu Marriage Act, 1955.
68 AIR 2006 SC 1675.
husband indicating her resolve to make his life miserable. Husband also initiated some legal proceedings and was living separately from the wife for more than ten years. Thus, it was evident from the facts of the case that the marriage has been wrecked beyond redemption. The trial court stated that though both the parties have leveled allegations of character assassination against each other, they failed to prove the same. According to the court, the allegations were of such serious nature that there was no cordiality left between the parties and no possibility to reconnect the chain of marital life between them. Hence, it found that there was no alternative but to dissolve the marriage between the parties. The high court took the stand that the trial court erred in granting a divorce to the husband without properly appreciating the evaluating the evidence on record. In appeal, the Supreme Court while analyzing the concept of irretrievable break down of marriage discussed other issues also like physical and mental cruelty in matrimonial matters. The court came to the conclusion that where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. When the marriage becomes a fiction, the legal tie has to be severed.

A look at the provisions of the Hindu Marriage Act, 1955 reveals that most of the grounds under sub-sections (1) and (2) of section 13 are based on fault or guilt theory of divorce. According to this theory a marriage can be dissolved only if one of the parties to marriage has committed some matrimonial offence recognized as a ground for divorce. A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce courts are open with concrete instances of human behaviour as to bring the institution of marriage into disrepute. Once a marriage has broken down beyond repair, it would be unrealistic for the law not to take note of that fact, as it would be harmful to society and injurious to the interest of the parties. There is also a provision for obtaining divorce by natural consent under section 13-B69 and section 14,70 which is based on the consent theory of divorce.71

69 S. 13-B reads: “(1) subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976) on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

70 S. 14 reads: “Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, [unless at the date of the presentation of the petition one year has lapsed] since the date of the marriage:
With the advance in socio-economic conditions, the concept of marriage has also changed. The spouses are more self-reliant and independent than they used to be before. The spirit of forced tolerance of yesteryears is disappearing. They are prepared to live separately rather than stay united while unhappy.

It can be seen that the inclusion of section 13(1-A) in the needs of the time. In the same way, “irretrievable breakdown of marriage” should also be made a ground for divorce by amending the law to enable parties whose marriage is irretrievably broken down. This will be in consonance with English law. Moreover, if there is a special provision in the statute, the courts would be relieved of the task of reading into the already existing provisions something new or interpreting the statutory provisions and thereby inviting strictures. Moreover, family relations always depend on the understanding and faith between the spouses and once it is broken, the very existence of the family is in question. The best course in such cases would be to set them free of the bond, which does not serve and purpose at all.

Over the years there has been a sea change in social thinking in the matter of relations between husband and wife. The desire and determination to live separately rather than to remain united in an unhappy marriage is gaining acceptance in our society. The

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71 The guilty theory of divorce has been found deficient as it recognizes divorce only on certain grounds. This deficiency was cured by introducing sections based on the consent theory of divorce.

72 S. 13 (1-A) says that either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground.

(i) That there has been no resumption of cohabitation as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.
law commission of India has also in its Seventy-first Report on the Hindu Marriage Act, 1955 has adverted to this aspect. The Commission in its report says:73

The essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one’s offspring. Living together is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage – ‘breakdown’ – and if it continues for a fairly long period, it would indicate destruction of the essence of marriage – “irretrievable breakdown.”

In several countries of the world, the breakdown of marriage as a ground for divorce has been recognized.74 But in India only Special Marriage Act, 1954 assigns recognition to irretrievable breakdown of marriage as a ground for divorce. It has been judicially legislated upon by the Muslim law also but no other Indian personal law recognizes it.75

When the marriage is dead both emotionally and physically and there is no possibility of its revival, the normal course of action that any court would take would be to dissolve the marriage unconditionally. But the question that arises is whether the Supreme Court can grant a decree of divorce on the ground of irretrievable breakdown of marriage when there are instances of mental as well as physical cruelty alleged against each other as in the instant case under comment.

The logic behind granting divorce on breakdown of marriage is that what could not be mended should be ended.76 The guilt or fault theory of divorce should be replaced, though gradually, in exceptional cases by breakdown of marriage theory. This will enable the embattled couple, who failed to secure conjugal happiness, a fresh start in life. A marriage could be broken down on account of fault of either party or both parties or on account of fault of neither party. It may happen that relations of husband and wife became so strained that they stopped living with each other. In such a situation, it is desirable that

73 Supra note 3.
74 Russia, New Zealand, USA, Australia, South Wales and Canada.
the relationship is brought to an end by a decree of divorce on the ground of irretrievable breakdown of marriage without fixing any responsibility on either party in the interest of both the parties and also the society. It is good to give de jure recognition to what exists de facto to enable them to resettle their life.

However, in the absence of legislative recognition to this ground, the apex court has been granting relief to the parties by exercising its plenary powers under Article 142 of the Constitution of India. But it is doubtful whether the Supreme Court has such extraordinary powers under this article by ignoring the express provisions of law and rights of parties. Can Article 142 be used to build a new edifice where none existed and thereby achieve something indirectly which cannot be achieved directly?

77 Art. 142 of the Constitution of India says about enforcement of decrees and orders of Supreme Court and orders as to discovery, etc. It reads:

(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter tending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under law made by Parliament and, until provision in that behalf is so made, in such manner as the President may be order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and very power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.