CHAPTER- VI
JURISTIC OPINION RELATING TO DIVORCE

1. Introduction

In ancient law of the Hindus, rooted in Vedas announced in Smritis, explained and commented in the recognized commentaries and Digests; Supplemented and varied by custom and usage, we find three expressions uttered by the divine sages and they are, abandonment”, “supersession” and “remarriage”. But it is only in the “Arthasastra of Kautilya” we find some interesting observations bearing on divorce. However, it is the unanimous view of the law givers that divorce was unknown in Ancient Hindu Law. If we refer to Narada\(^1\), Parasara\(^2\), Vasistha\(^3\), Gautma\(^4\), Manu\(^5\), Yajnavalkya\(^6\), there is reference of “abandonment” or “supersession but not to divorce as Kautilya has referred. Reason is obvious that Hindu marriage is sacrament and its object is continuity of progeny and performance of religious ceremonies. Though the provision to have another wife is positively contemplated but not divorce as the present law indicates.

But as is also clear, ancient Hindu law did speak of customary divorce and P.V. Kane, an authority on Hindu Dharmasstras in two paragraphs spoke thus:-

In the Vedic literature there are at least some texts capable of being interpreted or relating to the remarriage of widows and we have the word “punarbh”), but as regards divorce there is absolutely nothing in the Vedic texts nor is there much in post Vedic literature.\(^7\)

But inspite of the supremacy of a custom, it clearly appears that law was based on two-tier system, one for the intellectuals or cultural elite and the other for the less sensitive or ill-informed. Hindu law approved the divorce to non-caste Hindus i.e, the lowest rung of the ladder in the socio-cultural hierarchy\(^8\).

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1 Narada (XII 97, 98).
2 Parasara (IV.30).
3 (XVII 74, 78, 79).
4 Gautma (XVIII, 15, 17).
5 Manu (IX.76)
6 Yajnavalkya (III.74)
7 P.V. Kane, “History of Dharamasstras” 1962, p. 619.
8 Ibid. History of Dharamsatras Chapter III & IV.
Thus customary divorce was prevalent among the communities to whom Hindu law was not made applicable in view of their orthodox assimilation with the usage and custom and the concept of customary divorce is not ignored by the judiciary unless the custom pleaded is derogatory in essence. Various cases are needed to be mentioned where the parties to the marriage sought customary divorce and when challenged, how the judiciary viewed it.

2. Customary Divorce and Judicial Recognition

Khemkor v. Umiashankar\textsuperscript{9}

In this case the question was whether a Sompura Brahma woman who has contracted a marriage with a man of that caste, during the lifetime of her husband and without his consent, is entitled to maintenance.

Held that among Sompura Brahma Natras or remarriages are allowed among them but with the consent of the first husband but since consent was lacking, it was held that the second marriage is not valid as per custom of her caste.

Sundor v. Nihala\textsuperscript{10}

It was held that it was found that by the customs of Jats of the district of Sialkot, a woman who has received a written divorce from her husband was free to contract a second marriage.

Kudomee Dossee v. Joteeram Kolita\textsuperscript{11}

It is case where a Hindu husband sued his wife for restitution of conjugal rights and the defendant pleaded divorce. It was held that though the Hindu Law does not contemplate divorce, still in those districts where it is recognized as an established custom, it would have the force of law. There can be no doubt that the Hindu Law has been affected in particular district by particular usages and these usages have hitherto been respected unless clearly repugnant to the Principles of Hindu Law. According to Sham Churu\textsuperscript{12}, where it is said that reason and justice are more to be regarded than mere texts and that wherever good customs exists, it has the force of law.

\textsuperscript{9} (1873) BHCR 381.
\textsuperscript{10} (1889) 84 PR 1889.
\textsuperscript{11} (1877) ILR 3 Cal 305
\textsuperscript{12} Sham Churu’s Vayvastha Darpana, p. 387
**Sankaralingam Chetti v. Subban Chetti**\(^{13}\)

The question in issue is whether there has been a valid and legal divorce between plaintiff and second defendant and the only point argued is that whether the caste custom is valid as it was contended that it is immoral and that the courts will not recognise it. It was held that divorce in this form is consistent with the ‘original’ custom of the potters and if this be so, the custom is sufficiently ancient and it is not immoral since it does not ignore marriage as a legal institution but provides a special mode by which it may be dissolved.

**Keshav Hargovan v. Bai Gandhi**\(^{14}\)

In this case the court held that a custom by which the marriage tie can be dissolved by either husband or wife, against the wish of the divorced party and for no reason but out of mere caprice, the sole condition being the payment of a sum of money fixed by the caste, is opposed to public policy and is also repugnant to Hindu Law and, therefore cannot be judicially recognized. In this case the custom pleaded was not recognised by the court.\(^{15}\)

**Thangammal v. Gengayammal**\(^{16}\)

In this case the validity of custom was challenged. It was held that there is no invalidity in a custom by which married couple being unable to live together, by consent seek divorce and are divorced by the parties, approaching the headman and other relations, paying certain amount and taking away the *thali* from around the neck of the wife and giving it back to the husband. It is only where the divorce is enforced against the wish of the wife that the custom permitting the divorce may be illegal.

In Mayne’s Hindu Law,\(^{17}\) it is said that it was doubted whether a custom authorising her to marry again during the lifetime of her husband and with her consent, would have been valid.

\(^{13}\) (1894) 17 ILR Mad 479.

\(^{14}\) AIR 1995 Bom 197.

\(^{15}\) (1875-77) 1 Bom 347; (1892) 19 Cal 627; (1864-66) 2 BHCR; (1877-78) 2 Bom 140.

\(^{16}\) (1945) 1 MLJ 299.

\(^{17}\) Mayne, Hindu Law, para 37, p. 50, 13\(^{th}\)Edn., November 1991,
Nallathangal v. Nainan Ambalam\textsuperscript{18}

The case was under section 488 of Cr. P.C. 1898 wherein the point of divorce by custom was agitated by the court. The court held that though Hindu Law does not recognise divorce between husband and wife, nevertheless the custom in certain communities may permit a valid divorce by means of a caste \textit{panchayat} or similar tribunal. Even after passing of the Hindu Marriage Act, 1955 customary rights of divorce were saved and such divorces continue to have the force of law among the communities where the custom prevailed.

\textit{Kishenla v. Mst. Prabhu}\textsuperscript{19}

It was a case of customary divorce and the court held that courts do not recognize the authority of the caste to dissolve a marriage or to give permission to a married woman to remarry. Therefore, a custom by which a caste \textit{panchayat} can grant a divorce whenever it thinks fit irrespective of the mutual consent of the parties cannot be countenanced by court of law as valid custom. It is incumbent on the plaintiff to state with precision and clarity what the custom is.

\textit{Premanbai v. Channoolat Punao}\textsuperscript{20}

It is a case wherein the validity of customary divorce was challenged. The court held that divorce is unknown to Hindu law and is a creature of custom amongst the communities in which it obtains. Where a custom permits a divorce between \textit{patvas} with the mutual consent of the spouses, the age of discretion under the Mitakshara School of Hindu Law does not govern the case and a wife in a \textit{Patva} community can, at the age between 14 and 15 years, when she has attained sufficient maturity of understanding to comprehend the nature of the act she is doing, validly consent to her divorce from her husband in a caste \textit{panchayat} held for the purpose and a consent so given is binding on her according to the caste custom.

\textit{Gurdi Singh v. Mst. Angrej Kaur}\textsuperscript{21}

In this case the point regarding customary divorce and the remarriage of the wife during the life-time of the first husband was in issue. The court held that a custom exists

\textsuperscript{18} 1960 Cr LJ 490.
\textsuperscript{19} AIR 1963 Raj 95.
\textsuperscript{20} AIR 1963 MP 57.
\textsuperscript{21} AIR 1968 SC 142.
among the Hindu jats of the Jalandhar district which permits a valid divorce by a husband of his wife which dissolves the marriage. On the dissolution of such marriage the divorced wife can enter into a valid marriage with a second husband in the life-time of the first husband. In this case the Supreme Court affirmed (1962) 64 Punj LR 1179.

3. Dissolution of Marriage and Arbitration

*Raj Kumar Bansal v. Anjana Kumari*\(^{22}\)

It is a case where the court referred the matter to a referee and passed a decree of divorce on the basis of the award received from the referee. This decree of the court was challenged. The High Court referred to section 23(3) of the Act which envisages nomination of a person by the court to bring about reconciliation between spouses engaged in matrimonial litigation. It does not say that such nominated person can dissolve the marriage by a decree of divorce. The Act does not postulate that the matrimonial court can refer the matrimonial dispute for dissolution of marriage to a referee or an arbitrator. The Arbitration Act stipulates that all civil and legal disputes may be referred to arbitration,\(^{23}\) but in matrimonial matters, suit for divorce or for restitution of conjugal right cannot be referred to arbitration\(^ {24}\). Even in *Russel v. Russell*\(^ {25}\), it is said that judgment in default or by consent is unknown in matrimonial law. Even section 13B is, in fact, not a decree by consent. The three ingredients stipulated in section 13B (1) are to be satisfied.

4. Hindu Law on Divorce: Judicial View

Now Divorce though unknown to Hindu Law, was statutorily recognised under the Hindu marriage Act on the grounds specified under section 13 of the Act to be read with section 23(2) of the Act to make every endeavour to bring about reconciliation between the parties. While permitting divorce, this Act protects the customary divorce.\(^ {26}\) The grounds specified and enumerated under section 13 need individual treatments and analysis.

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\(^{22}\) AIR 1995 P&H 18.


\(^{24}\) Malika v. Sardar, AIR 1929 Lah 394.

\(^ {25}\) (1924) AC 678.

\(^ {26}\) See section 4 and section 29(2) of the Act.
Adultery: Section 13(1) (i)

The word “adultery” has not been used in present section 13 instead expression, “voluntary sexual intercourse with any person other than his or her spouse.” Adultery in matrimonial law may be defined as consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of marriage.\(^{27}\)

Before the Marriage Laws (Amendment) Act, 1976, “Living in adultery” was a ground of divorce. “Living in adultery” implies more or less continuous course of adulterous conduct continuing right up to the filing of the petition. These conditions proved too severe for numerous ignored spouses and thus come the amendment by which one act of sexual intercourse with a person, not the other spouse, is sufficient, to grant decree of divorce, if proved.\(^{28}\)

*Virupaxi v. Sarojini*\(^{29}\)

Where in a petition for annulment of marriage with his wife inter alia on the ground that she committed adultery which was witnessed by the husband himself. The petitioner’s own version is for the sake of dignity of the family, he condoned the lapse of the wife then, even if it is assumed that an adulterous conduct on the part of the respondent wife had been established by the subsequent conduct of the petitioner it must be held that he had condoned such an act and upheld the order passed by the civil judge.

*Arun Kumar Bhardwaj v. Anila Bhardwaj*\(^{30}\)

It is a case of divorce on the ground of adultery against the wife. Circumstance shows that witness was procured by husband to prove his version. Husband failed to prove adultery. Further averment in the petition that parents of the wife were apprised of her

\(^{27}\) Redpath v. Redpath, (1950) All ER 600, Charlton v. Charlton, (1952) 1 All ER 611, Sapsford v. Sapsford, (1954) 2 All ER 373 (adultery need not be a “veracoupla” Gita Bai v. Fatto, AIR 1966 MP 130.


\(^{30}\) AIR 1993 P&H 33.
misdeeds and wife was given opportunity to mend her ways. The parties thereafter were living together. Held that condonation of offence by husband can be presumed.

**Rajee v. Babu Rao**

It is a case of adultery against the wife but without any details. Evidence produced was not sufficient. Even the suspicious circumstances were not stated by the witnesses. Here high reputation of the family is not sufficient to raise presumption of adultery.

**Prem Chand Pandey v. Savitri Pandey**

In this case a petition is filed by a wife alleging adultery against the husband. Her conduct was found to be most unreasonable and the allegation of adultery was found false. Held that wife is not entitled to divorce. The court also dismissed the petition filed under section 27 of the act.

**Sunita Singh v. Raj Bahadur Singh**

It is case under section 13 on the ground of cruelty and adultery. Wife was found to be in love with person other than her husband. She was found indulging in sexual intercourse with other person after the marriage held that order granting divorce to the husband is not to the interfered with. She was also found not entitled to maintenance and litigation expenses.

**Nidhi Dalela v. Deepak Dalela**

A petition was filed by the husband on the ground of adultery against the wife. There was untainted evidence against the wife of her adulterous conduct. Explanation given by the wife is not truthful. There was a counter allegation against the husband of the same nature. The court found that the marriage has irretrievably broken down. No interference in the decree of divorce granted to the husband.

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Arun Kumar Agarwal v. Radha Arun\textsuperscript{35}

The court observed that in divorce matter pertaining to the ground of adultery, it is necessary that the adulterer be made a party. By such procedure the court shall be in a better position to effectually and completely adjudicate upon the controversy. Adulterer is, though not a necessary party but he is a proper party. Order of family court deleting the name of the adulterer is set aside.

Rajesh Kumar Singh v. Rekha Singh\textsuperscript{36}

It is a case under cruelty and adultery against the wife that she has illicit relations with a stranger. Facts reveal that she has been duped and gang raped by some known acquaintance. Held rape does not fall within the ambit of adultery. No cruelty is also established. Appeal is dismissed.

Recent cases

Smt. Kamani Devi v. Sh. Bhagat Ram and anr.\textsuperscript{37}

Adultery as defined under Section 13 of the Act does not require evidence where it has to be established that the persons living in adultery have been caught in flagrante delicto or eye witnesses who have actually witnessed the couple in the act of sexual intercourse. This would be asking for a near impossibility. Of course, that is not to say that such evidence may be there in rare and exceptional cases. On the totality of the facts and circumstances of the case, It was held that the appellant is guilty of adultery within the meaning of Section 13 (1)(i) of the Act which postulates that even if a spouse has a voluntary sexual intercourse with another person after solemnization of marriage, a decree for divorce would follow. This appeal was accordingly dismissed.


\textsuperscript{36} AIR 2005 All 16.

Ramratan s/o Pandurang Sunwani v. Smt. Maya w/o Ramratan Sunwani

Here parties were living separately since 1981 and wife was unreasonably giving threats to husband of committing suicide and attempting to commit suicide. Wife filing false complaint under Section 498A, IPC has to be treated as act of cruelty. Repeated attempts on part wife to pour kerosene on her person must have caused mental suffering and fear in mind of husband. Divorce by dissolution of marriage was granted.

U. Sree v. U. Srinivas

When sustained attitude of causing humiliation and calculated torture on the part of the wife to make the life of the husband miserable, it would amount to mental cruelty, behavioral pattern of the wife whereby a dent is created in the reputation of the husband, regard being to the fact that reputation is the salt of life, it would amount to mental cruelty.

Adultery is an act, generally done, unseen that the symptoms do tell the shabby tale through the behaviour, indecencies, strong familiarity, and exposition of inclination, seen in juxtaposition. So it is a presumption based on circumstances strongly tilting towards its happening. However, earlier our courts followed the English precedents and looked to the evidence to be proved beyond reasonable doubt. But now the proof is based on the principle of preponderance of probabilities as propounded by the Supreme Court.

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38 2012 (1) Marriahe L.J. 304 (Bombay), see also Swarup Tala Patra v. Gargi Tala Patra, 2011 (1) Marriahe L.J. (DB) (Cal) 52.
Sex is a biological urge. It has been given a very high status (Kama & Dharma). Hindu scriptures give “Kama”, a religious and moral touch as on it laid the continuity of the progeny. Marriage is sacred for the sages and a part time for the savages. Sex is inherently present in marriage but when element of sex falls outside the ambit of regulatory law of marriage, it becomes so abhorrent both morally and legally that it smashes the marital bond because it inflicts an unhealing injury and even if it heals, it leaves a scar.

**Cruelty: Section 13(1) (ia)**

Originally there was no ground of “cruelty” for divorce under section 13 of the Hindu Marriage Act, 1955 but it was a ground for Judicial separation under section 10(1) (b) of the Act. The marriage laws (Amendment) Act, 1976 stipulated “cruelty” to be a ground for judicial separation as well as for divorce.

But “cruelty” has not been defined in the statute, and all the law on cruelty is judge made law and thus consciously or unconsciously, cruelty draws it meaning from the social mood, disposition of mind and behavioural pattern of the society. So the meaning of cruelty as a ground for divorce cannot be put in a water tight jacket. Lord Denning has said that the doors of cruelty are not shut. So whether the act committed can be called act or cruelty or not is left at the discretion of the judge though the discretion has to be based on sound judicial principles as has been repeatedly said by the apex court.

*Bhagwat v. Bhagwat*

It was a case of insanity of the husband by which he had behaved in a deranged manner which was neither with any motive nor intentional. The court held that the question whether the husband was capable of forming an intention to be cruel or actually intended to be cruel is a matter of no consequence. He can relapse into a fit of

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42. Section 13(1) (ia) states, “has, after the solemnization of marriage treated the petitioner with cruelty.” This ground of cruelty appears to have been borrowed verbatim from the Matrimonial Causes Act, 1950 of English Law.
43. AIR 1967 Bom 80.
schizophrenia in which case anything may happen. The apprehension entertained by the wife is well founded. So the court depended upon the likelihood of the happening which can be dangerous.

_Sreepadachar v. Vasantha Bai_44

The allegation is of insulting conduct indulged in by the wife in public against her husband and the court held the view that it amounts to mental pain and agony and prove harmful and injurious to the health of the husband.45

_N.G. Dastane v. S. Dastane_46 is a landmark case in which the Supreme Court laid down various propositions as a legal trendsetter as are given below:

1. The first step in this process is to fix the probabilities, the second to weigh them. The impossible is weeded out at the first state and improbable at the second. It is the choice which ultimately determines where the preponderance of probabilities lies and that is the test. ‘Proof beyond reasonable doubt’ is not to be imported in trials of purely civil nature.

2. Even though condonation is not pleaded as a defence, it is court’s duty, in view of the provisions of section 23(1)(B) to find whether cruelty has been condoned by the appellant. Condonation means forgiveness of the matrimonial offence and the restoration of the spouse to the same position as occupied earlier.

3. An awareness of foreign decisions could be a useful asset in interpreting our own laws, but the interpretation has to be within the parameter of the specific provision as envisage in the statute.

4. Condonation is a conditional forgiveness. It does not give the condoning spouse a charter to malign the other spouse. If it is so, the condoned spouse would be required mutely to submit to the cruelty of the other spouse without relief or remedy.

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44 AIR 1973 Mys 232.
Since, Marriage laws (Amendment) Act, 1976 has removed the legal inconveniences of the concept of cruelty as earlier given under section 10(1) (h) before amendment, so English cases may not be of much help as visualized by the Judiciary.

**Physical Cruelty**

Acts of physical violence against another spouse resulting in injury to body limb or health or causing a reasonable apprehension thereto have been traditionally considered as legal cruelty but what physical acts will amount to cruelty will differ from case to case depending upon the susceptibility or sensibility of the parties and that can be illustrated with the help of various case laws.

*Macho v. Manu Singh*\(^{47}\)

It is said that general isolated acts of violence are not sufficient ground to form legal cruelty and in order to establish cruelty against the husband the wife must prove more than isolated acts of violence. Even single solitary act of cruelty followed by remorse were not found sufficient by the court to constitute legal cruelty. But in another case striking of blows was held to be sufficient legal cruelty to justify the grant of a decree. Even the beating of a wife by the husband in this age cannot be undermined and ignored.\(^{48}\)

*Saptami v. Jagdish*\(^{49}\)

It was a case of physical cruelty coupled with mental cruelty. The husband constantly abused and insulted the wife and ultimately one day in her father’s house he pushed her against wall causing her bruises.

*A.P. Mary v. K.G. Raghwan*\(^{50}\)

It is a case under section 27(1)(d) of the Special Marriage Act, 1954. In this case the husband assaulted the wife with an iron rod and caused her four injuries, one of them grievous in nature which resulted in fracture of right fibula. Even thereafter his conduct and behaviour was not conducive to healthy atmosphere for maintaining marital relations. The court, relying upon various case laws, held it a fit case of granting divorce on the ground of cruelty.

\(^{47}\) AIR 1928 Oudh 114.


\(^{49}\) AIR 1987 P&H 33; AIR 1980 Cal 370; AIR 1987 Del 52; 1967 Guj LR 57.

\(^{50}\) AIR 1979 MP 40
**Tapan Kumar v. Biva**\(^{51}\)

It is a case where the husband was at the mercy of the wife and she wanted him to live away from his Joint family. On refusal, she even assaulted him physically through her relatives. The court held it a fit case of cruelty by the wife and granted decree of dissolution of marriage.

**Rajinder Bhardwaj v. Anita Sharma**\(^{52}\)

In this case there were numerous allegations by the husband against the wife like not allowing husband to consummate marriage for the first seven days, abusing mother-in-law, giving threat to husband that she would kill him, throwing footwear on the husband in presence of her father and uncle. The court held that in deciding whether a particular act amounts to cruelty or not, the court has to consider the social status, the environment, the education, the mental and physical conditions and the susceptibilities of the innocent spouse and also the custom and manners of the parties. Considering all the factors cumulatively the court found that such harsh acts constitute cruelty.

**Poonam Gupta v. Ghanshyam Gupta**\(^{53}\)

It is a case of allegations and counter-allegations of misbehaviour, physical and mental torture. The husband filed a petition for divorce on the grounds of cruelty. During the pendency of appeal the husband has remarried and has two children. Held as the marriage has become emotionally and practically dead with no chance of revival, the decree of divorce should be granted.

**Seema v. Nilesh Chohan**\(^{54}\)

The allegations are:-

(i) That the wife went to her parental house after solemnization of marriage and did not return.

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\(^{51}\) AIR 1988 Cal 223


\(^{53}\) AIR 2003 All 51.

(ii) Parents of wife misbehaved with the husband when he went to bring her back.

(iii) The father of the respondent was beaten when he went to bring her back, in regard to which the FIR was lodged. The court relied on the judgment in *Jaya Chandra v. Aneel kaur*\(^{55}\), that, to constitute cruelty, the conduct complained of should be grave and weighty. Appeal was allowed and the decree awarded by the lower court was set aside.

**Erratic Behaviour and Cruelty**

No doubt, there are cases of physical violence but they are mostly now being dealt under sections 498A, 306, 304B, I.P.C. as an element of dowry is tagged with it. However, the basic fact is the erratic behaviour of the spouses in sharing the sanctity of marriage due to supremacy of egoism, in-compatibility to temperament, varying of tastes, indifferent attitude, lack of decency in behavioural pattern or any other such facts resulting in and amounting to cruelty and when this cruelty becomes severe, grave and weighty, the matter reaches the flash point and the result is breaking of marriage as such factors cause mental cruelty.

Section 13(1) (ia) is borrowed from the Matrimonial Causes Act, 1950. Since the borrowed clause is amended in the Matrimonial Causes Act, 1973 and is now worded, “the respondent has behaved in such a way that the petitioner cannot be reasonably expected to live with the respondent,” and whereas the section 13(1) (ia) is still worded, “has, after the solemnization of marriage, treated the petitioner with cruelty.” So it is better to consider both the English and Indian cases.

*Horton v. Horton*\(^{56}\)

Bucknill J. has said mere conduct which causes injury to health is not enough. If he marries a wife whose character develops in such a way as to make it impossible for him to live happily with her, I do not think that he establishes cruelty merely because he finds that life with her is impossible. He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery upon him and causing injury to his health.

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\(^{55}\) AIR 2005 SC 534.

\(^{56}\) (1940) 2 All ER 380.
**White v. White**\(^{57}\)

It was a case where the husband, in spite of wife’s protests, consistently practised *coitus interruptus*, with the result that the wife who was of a nervous disposition suffered in health. She was examined by a mental specialist who reported that unless the husband could be persuaded to change his attitude, nothing will improve the health of the wife and the husband persisted in the practice. Held that it is a cruelty in law and granted divorce.

**Gollins v. Gollins**\(^{58}\)

In this case the House of Lords dealt in great detail the question of cruelty in matrimonial relationship and made a distinction between ‘unequivocal conduct’, which is conduct which clearly constitutes cruelty and those involving ‘equivocal conduct’, conduct which may in certain circumstances amount to cruelty, and in other circumstances amount not to do so. Whether cruelty, as a matrimonial offence, has been established is a question of fact and degree, which should be determined by taking into account the particular individual concerned and the particular circumstances of the case rather than by any objective standard, accordingly, in cases where the two spouses are of normal physical and mental health and the conduct of the respondent spouse, so considered, is so bad that the other should not be called to endure it, cruelty is established, then it does not matter what was the respondent’s state of mind.

**Williams v. Williams**\(^{59}\)

In this case which came to the House of Lords, Lord Evershed talked about insanity and cruelty and said that insanity of a respondent spouse in terms of McNaghten Rules, is not necessarily a defence to a suit for divorce on the ground that the respondent treated the petitioner with cruelty but insanity is a factor to be taken into account in applying the test whether in all the circumstances of the case the respondent’s conduct is of such gravity that he has by his acts treated the petitioner with cruelty.

However, Lord Pearce said that if the conduct were such that it would amount to cruelty only if aggravated by intention to hurt, a spouse who could not form such an intention would not be held to have treated the other with cruelty.

\(^{57}\) (1948) PDA 151.
\(^{58}\) (1963) 2 All ER 966.
\(^{59}\) (1963) 2 All ER 994.
N. Sreepadachar v. Vasantha Bai\textsuperscript{60}

This case was under section 10(1)(b) of Hindu Marriage Act, 1955. It is a case of abusing the husband in public, in a bus and catching hold of his collar, making the husband cook food for her and when he served the food, throwing the plate on his head, threatening to burn herself, to give a false complaint to the police so that her husband may come into trouble. Stating before others that her husband may be killed in an accident so that she may get his insurance and provident fund amount.

The Honourable court discussed the matter at length, referred to various English and Indian decisions and observed that cruelty need not be only physical but there can be mental cruelty. The question of cruelty must be determined from the whole facts and the matrimonial relations between the spouses. It must be determined as a cumulative effect of all the circumstances.

\textit{Jia Lal Abrol v. Sarla Devi}\textsuperscript{61}

In this case the Honourable court referred to various English decisions, resurrected the element of intention when considering cruelty as a ground for matrimonial relief. The court held that the question of intention is important and, in some cases, even crucial.

\textit{Maya v. Brij Nath}\textsuperscript{62}

While dealing with cruelty the court observed thus:

Cruelty has not been defined in the Act. But it is now well-settled that the conduct should be grave and weighty so as to make cohabitation virtually unendurable. It must be more severe than the ordinary wear and tear of marriage. The cumulative conduct taking into consideration the circumstances and the background of the parties has to be examined to reach a conclusion of cruelty.

\textit{Nirmala Manohar Jagesha v. Manohar Shivram Jagesha}\textsuperscript{63}

In this case the Honourable court, referring to various case laws\textsuperscript{64} and discussed the concept of cruelty thus:

1. Cruelty in the matrimonial law means conduct of such type that the petitioner cannot reasonably be expected to live with the respondent.

\textsuperscript{60} AIR 1970 Mys 232.
\textsuperscript{61} AIR 1978 J&K 69 (FB).
\textsuperscript{62} AIR 1982 Del 240
\textsuperscript{63} AIR 1991 Bom 259
\textsuperscript{64} AIR 1984 Bom 413 (FB); IR 1985 Del 221 and AIR 1988 Ker 244.
2. The old English Law concept of danger is not applicable in India.

3. The making of wild, reckless and baseless allegations of impotency and lack of manliness itself amounts to cruelty in the matrimonial law.

**V. Bhagat v. D. Bhagat**

In this case the Supreme Court while discussing the concept of cruelty laid emphasis on the fact and circumstances of the case and observed that if it is a case of accusations and allegations regard must also be had to the context in which they were made. In this case, mental cruelty has been defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. Mental cruelty must be of such a nature that the parties cannot reasonably be exacted to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner.

**S. Hanumantha Rao v. S. Ramani**

Removal of Mangalsutra by wife to irritate her husband may amount to mental cruelty but when it is alone at the instance of the husband himself, it does not amount to cruelty.

**Rajendra v. Meena**

In this case based on the ground of cruelty, the court explained the words, “treated with cruelty” means harsh conduct of certain intensity and persistence emanating from spouse against whom divorce petition is filed. She had persuaded her husband to accept “Mahanubhav Panth” which preaches to lead simple life and take vegetarian food it does not amount to cruelty. The appeal was dismissed.

**A. Jayachandra v. Aneel Kaur**

The Supreme Court explained the meaning of cruelty. It relates to human conduct or human behaviour. The conduct complained of should be grave and weighty for arriving

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65 AIR 1994 SC 710: 1994 AIR SCW 45
67 AIR 2005 MP 166.
at conclusion that the petitioner spouse cannot be reasonably expected to live with other spouse. The Supreme Court found that the wife cast doubt on the character and fidelity of the husband. Even after filing of divorce petition the wife went to the extent of detention of her husband for alleged disobedience of injunctions order. Irretrievable breakdown of marriage is no ground, still in extreme cases, with a view to do justice and shorten agony of parties, the parties are granted divorce. Appellant is entitled to decree of divorce.\textsuperscript{69}

**Mental Cruelty**

In *V. Bhagat v. D. Bhagat*\textsuperscript{70}, mental cruelty has been defined in the light of various English and Indian cases and is a beacon light in the matrimonial law. When the conduct and behaviour becomes culpable and is projected with utter indecency, it has to upset the pulsating charms of life, affecting the mind, make its oscillations become un-rhythmical and hence cordiality gives way to confrontation and life becomes miserable. When cruelty is generated by shabby and dissipated conduct, it is the mode which is affected and whole fabric of love and affection is torn into pieces. More case laws on mental cruelty are referred here so as to see how it affects the stability of marriage.

**Meera v. Vijaya Shankar**\textsuperscript{71}

In this case the court observed that cruelty as a ground for divorce has to be of such type which should satisfy the conscience of court to believe that relations between parties had deteriorated to such an extent due to conduct of one of the spouses that it has become impossible for them to live together without mental agony, torture or distress. Every insignificant and trifling act may not constitute cruelty. In this case the wife took 3 Crocin tablets in excess. It was alleged to be done with intention to commit suicide and involve the husband in criminal case. The court held that conclusion of intention to cause mental torture is not possible. Other acts of cruelty were also alleged but not proved, taking place way back and deemed to have been condoned. Grant of decree of divorce was refused.


\textsuperscript{70} (1994) 1 SCC 337: 1994 AIR SCW 45.

\textsuperscript{71} AIR 1975 SC 1534: 1975 (2) SCC 326: 1975 (3) SCR 967.
Naval Kishore Somani v. Poonam Somani\textsuperscript{72}

In this case the question arose as to whether divorce can be claimed on grounds arising out of charges levelled in written statement by wife which amounts to cruelty. Held that such right cannot be claimed where wife has merely failed to prove charges. The husband has to prove that said allegations were false, baseless, vexations and malicious.

Dr. Lokeshwani v. Dr. Srinivasa Rao\textsuperscript{73}

It is a case where the husband filed a petition for dissolution of marriage by a decree of divorce on the ground of cruelty. The court observed that the traces of psychical cruelty could be apparent but the traces of mental cruelty could be felt. The husband stated various specific facts of cruelty and well corroborated by other witnesses that the wife humiliated the husband and caused him mental agony. The court upheld the decision of the lower court of granting of decree of divorce in favour of the husband.

Dr. A.R. Aruna Kumar v. Nalini\textsuperscript{74}

Husband filed a petition for divorce on the ground of cruelty and the allegation was that the wife was in the habit of stealing valuables found at any place and cited a specific instance of theft of gold chain which was also not corroborated. There was no other act of impropriety alleged by the husband against the wife to justify inference that she was unmindful of his position or status in the society and indulging in such acts deliberately to cause mental torture. It is not an act that is itself serious enough to grant divorce.

Rakesh Sharma v. Surbhi Sharma\textsuperscript{75}

It is a case where the wife made false and scandalous allegations against the husband of demand of dowry and regarding his adulterous life and voluntarily deserting


the husband. These acts constitute mental cruelty, Held that the court instead of granting judicial separation should have granted decree of divorce.\textsuperscript{76}

**Recent cases**

*Sanjoy Das v. Dipanwita Das*\textsuperscript{77}

The court held that cruelty includes:

1. Unjustifiable and reprehensible conduct affecting physical and mental health of the other spouse would only lead to mental cruelty and nothing short of it would attract the decree of divorce on the allegation of mental cruelty;
2. The married life should be assessed as a whole and a few isolated instances over certain period will not amount to cruelty;
3. Mere trivial irritations, quarrels, normal wear and tear of married life which happens in day to day life in all families would not be adequate for ground of divorce on the ground of cruelty;
4. Court must preserve a Marital Institution unless it is compelled to sign a Decree of Divorce;
5. Each and every allegation on discord would not amount to a ground of divorce unless it would fit in the grounds mentioned in section 13;
6. If a party to a marriage, by his own conduct brings the relationship to a point of irretrievable breakdown of the marriage—that would simply mean giving someone the benefits of his/her own misdeeds.

*Nalini Muthu v. Muthu*\textsuperscript{78}

The court held that the concept of ‘mental cruelty’ as defined in American Jurisprudence cannot remain static. There can never be any fixed parameter for mental

\textsuperscript{76} 1. Vague allegations of cruelty without sufficient particulars are not sufficient to discharge the burden of proof which lies on the petitioner. Amarjit Paul Singh v. Kiran Bala, AIR 1985 P&H 356; AIR 1991 NOC 29 (Mad).
2. Here allegation of impotency against wife is not cruelty.
3. If the allegation of immorality is repeated a number of times in examination it would amount to cruelty.
4. Where there is no specific denial of acts of cruelty, a general denial is insufficient and allegation of cruelty must be deemed to have been proved. Asha Handa v. Baldev Raj, AIR 1985 Del 76; P. Radha Krishna Murthy v. P. Vijayalakshmi, AIR 1983 AP 380.
5. Threat to commit suicide in a domestic tiff does not amount to cruelty; (1990) 2 HCR 128 Cal.
\textsuperscript{77} 2013 (1) Marriage L.J. 671 (Calcutta) (DB).
\textsuperscript{78} 2013 (2) Marriage L.J. 760 (Madras) (DB).
cruelty in matrimonial cases. Supreme Court has enumerated certain instances of human behavior, which may be relevant in dealing with the case of mental cruelty.

Sanjay Kumar v. Bhateri\footnote{2013 (2) Marriage L.J. 515 P&H (DB).}

The court held that a normal and healthy sexual relation is one of the basic ingredients of a happy and harmonious marriage. Willful or intentional denial of sexual relation by a spouse amounts to mental cruelty, particularly when parties are young and newly married.

Darshan Gupta v. Radhika Gupta\footnote{(2013) 9 SCC 1 (Civil Appeals Nos. 6332-33 of 2009, decided on July 1, 2013); 2013 (2) Marriage L.J. 578 (SC).}

Erratic Behavior in this case is that wife is suffering from fits and cognitive deficiency. Allegation that wife would wake up in the middle of night and thereafter would not allow him to sleep; allegations were rejected on following grounds;

1. No evidence except deposition of interested witnesses, namely husband himself, his maternal uncle and his elder brother.
2. No independent witness produced though available.
3. Husband failed to establish that wife’s behavior was aggressive, erratic or abnormal, or that he was subjected to cruelty on account of such behavior.
4. Doctors treating wife also did not observe any signs of aggressiveness in wife-divorce not granted.

Vilas Raosaheb Jadhav v. Aarti Vilas Jadhav\footnote{FCA No. 99 of 2013, decided on January 16, 2014.}

In the present case, the couple got married in 2004 and one year later the wife went to her parent’s home to give birth to their child and never returned. The husband made no attempts to get her back and in 2009 filed a case for divorce on the grounds of desertion and cruelty. He submitted a litany of allegations before the court, claiming his wife had treated him cruelly alleging misbehavior with him and his parents, demanding money from him for her father's business and stating the marriage was against her wish. He even claimed that his wife had accused him of having an affair with his sister-in-law and insisted that they should move out of his parent's house. The division bench observed that with the increase in the number of family members, it is the desirous of every woman
to have a separate accommodation and it is pertinent to note that the husband himself had
admitted that to avoid quarrels and disputes, such arrangements were made. From this
fact, it can be seen that the allegations were not serious in nature. The Court stated that no
proof had been submitted to back the allegations. And by looking at the evidence on
record, they were of the opinion that the appellant-husband could not prove that his wife
treated him with cruelty, which was of such a nature that it made it difficult for him to live
with her and denied him divorce.

**Desertion: Section 13(1)(Ib)**

This clause was added by the Marriage Laws (Amendment) Act, 1976, providing
“Desertion” as a ground for divorce.\(^{82}\) It contains two expressions:-

(i) Desertion

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

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

Sir Henry Duke in *Pulford v. Pulford*\(^{83}\), has said:-

“Desertion is not the withdrawal from a place, but from a state of things. The
husband may live in a place and make it impossible for his wife to live there, though it is
she and not he that actually withdraws; and that state of things may be desertion of the
wife. The law does not deal with mere matter of place. What it seeks to enforce is the
recognition and discharge of the common obligation of the married state.” So, keeping in
view the law, it looks to two things.

(i) Whether there is desertion

(ii) Whether desertion is justified or not.

Desertion is simply a physical act of separation and justification of this separation
lies in the explanation which the courts have to see, i.e.,

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\(^{82}\) Section 13(1) (Ib): This section postulates:- has deserted the petitioner for a continuous period of not less
than two years immediately preceding the presentation of the petition.

\(^{83}\) (1923) P 18.
(i) Without reasonable cause and without the consent or against the wish of such party.

(ii) It includes wilful neglect of the spouse by the other spouse.

The courts are flooded with three types of cases pertaining to desertion such as:-

(i) Maintenance and desertion;

(ii) Restitution of conjugal rights and desertion;

(iii) Desertion and Divorce/Judicial separation.

**Bipin Chandra Shah v. Prabhavati**\(^{84}\)

It was a case under Bombay Hindu Divorce Act, 1947, wherein the Supreme Court, referred to various authorities and English cases, and laid down that for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly, two elements are essential so far as the deserted spouse is concerned; (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. Desertion is a matter of inference to be drawn from the facts and circumstances of each case.

**Lachman v. Meena**\(^{85}\)

This was a case under section 10(1) and 9 of the Hindu Marriage Act, 1955, wherein the Supreme Court followed\(^ {86}\) and once again reiterated that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without the other’s consent and without reasonable cause. It is a total repudiation of the obligation of marriage. The Supreme Court said\(^ {87}\) that the burden of proving the ‘factum’ and *animus deserendi* is on the petitioner and he or she has to establish beyond reasonable doubt to the satisfaction of the court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause.

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\(^{84}\) AIR 1957 SC 176: 1957 SCR 838: 1957 SCJ 144

\(^{85}\) AIR 1964 SC 40.

\(^{86}\) AIR 1957 SC 176.

\(^{87}\) (1948) 2 All E 822 (823).
**Chakar Dhar Mohanty v. Kumunduni Del**

In this case the question was the burden of proof of desertion. The court relied upon the decision of the Supreme Court that ‘factum’ and animus deserendi co-existing at some point of time must be proved. In this case the ‘factum’ of separation was there but there was no abandonment or animus to bring about an abrogation of duties and obligations of a married life between the couple. The appeal was dismissed for want of animus deserendi.

**Kanchan Amar Asrani v. Amar Vishindas Asrani**

A catena of cases of desertion speaks only two things, i.e., factum of separation and animus deserendi. This case also speaks of the same. The court relying upon *Lachman v. Meena* held that there is clear evidence of factum of separation and of the intention to bring cohabitation permanently to an end.

When the ground for divorce is “desertion”, i.e., breaking the sanctity of matrimonial home, the court has to see whether the petitioner is guilty or not. If the petitioner is himself guilty, divorce will not be granted. If, however, the respondent is found justified in living apart, even then the divorce will not be granted. If the respondent is found unjustified, the petitioner shall be granted a decree of divorce. The issue is plain and simple. Who is guilty?

**Leela Devi v. Suresh Kumar**

In this case, the husband filed a petition for divorce but it was withdrawn on the assurance of the wife that she would start living with him, but the wife, thereafter, did not live with the husband for a single day. The husband filed a fresh application for divorce. Held that the petition is maintainable. Furthermore the wife herself left the house of her husband and not stated her willingness to live with her husband but instead levelled false charge of leading immoral life on the husband and indecent behaviour of her father-in-law. Held that desertion is proved and grant of divorce to the husband is proper.

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88 AIR 1972 Ori 64.
89 AIR 1964 SC 40.
90 1996 FLC 184.
91 AIR 1964 SC 40.
92 AIR 1994 Raj 128.
**Durga Prasanna Tripathi v. Arundhati Tripathi**

Wife deserted husband after seven months of marriage. Parties were living separately for almost 14 years. Wife was not prepared to lead conjugal life with the husband. All efforts were made to bring wife back to matrimonial home but failed: to bring quietus to litigation and bitterness as marriage has became irretrievably broken down, it is better to bring an end to the marital life. The divorce can be granted on the ground of desertion.

**Sau Varsha Pravin Patil v. Pravin Madhukar Patil**

Appellant never desired to abandon the matrimonial relationship with the husband. The husband had beaten up her and drove her out of the house and, therefore, she is required to reside with her parents under constraints. The appellant is not proved to be guilty of desertion.

**Deo Kumar Sah v. Anjali Kumari Sah**

The defendant wife has not lived with her husband for the part more than 26 years. After living apart for 26 years, at this stage the defendant cannot claim that she is willing to live with her husband. The husband is entitled to a decree of divorce on ground of desertion.

**Nitu Alias Asha v. Krishan Lal**

There is desertion by wife. The husband sent a mere notice to wife for returning home without any further effort. It would not be sufficient to prove desertion. Moreover, the notice was not a simple one but a reminder of a pre-emptory call fraught with threatening legal consequences.

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94 AIR 2009 Bom 60.

95 AIR 2009 Pat 4.

**Teerath Ram v. Parvati Devi**<sup>97</sup>

It is a case of divorce on the ground of desertion. Wife started living separately with a minor son. She was living separately so that her husband should establish himself an independent matrimonial home as his brother has done. Wife has no intention to break the matrimonial home; wife cannot be accused of desertion without sufficient reasons.

**Om Parkash v. Madhu alias Laxmi**<sup>98</sup>

It is a case where desertion on part of the wife was permitted by the husband himself as he had stubbornly refused the wife to get into his company because he wanted to complete his studies. The animus deserendi had to be in the doings of the wife herself and not on the basis of situations created by the husband. The husband thought that the plea of irretrievable breakdown marriage will dissolve the marriage and it was his mistaken notion. He has to prove that the stage had reached the point of no return. Held, that animus deserendi cannot be thrust on the wife.

**Sanghamitra Singh v. Kailash Chandra Singh**<sup>99</sup>

In this case the court explained that desertion is not the withdrawal from a place of abode but from a state of things. The intention to snap the tie of the sacrament of marriage for all times to come has to be apparent from the conduct. If a spouse abandons the other for a temporary period under certain circumstances without intending to cease the cohabitation permanently, it will not amount to desertion. For proving the offence of desertion so far as deserting spouse is concerned two essential conditions must be there, namely (i) the factum of separation and (ii) the intention to bring the cohabitation to an end. Similarly two elements are essential so far as deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home. The fact is that the wife was in service in place other than the place of matrimonial home and there was no intention to snap the matrimonial tie.

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<sup>97</sup> AIR 1995 Raj 86
Shyam Sunder Kohli v. Susma Kohli\textsuperscript{100}

Husband sought divorce on the ground of desertion. Evidence on record showed that wife was forced to leave matrimonial home, while she was in witness box she was confronted with some documents which were not proved. From the evidence adduced, desertion could not be made out. The court held that marriage cannot be dissolved merely on the pretext that it has irretrievably broken down.

Desertion and Cruelty

Many a time cruelty becomes the cause of desertion. When the atmosphere in the marital home crosses the limit of normal wear and tear and becomes over bearing, harsh, abusive or violent beyond tolerance, then desertion is the natural outcome as breathing in suffocation becomes too difficult. So in many cases cruelty precedes desertion and vice versa as case law discloses:-

\textit{Alka Bhaskar Bakre v. Bhaskar Satchidanad Bakre}\textsuperscript{101}

The petition for divorce was filed by the husband on the ground of cruelty and desertion. Both the husband and wife were working at different places whenever the husband was transferred; the wife resigned her job to live with the husband. Finally the husband was transferred to Bombay. She accompanied him to Bombay and got a job there. They also booked a flat at Bombay with a view to settle at Bombay. But the petitioner was again transferred from Bombay but she refused to either go with the husband at his new place of posting or to remain with in-laws in his absence. Held that it did not amount to cruelty so as to entitle him to decree of divorce. It is not a case of desertion as this flat at Bombay was the matrimonial home of the parties. Then the concept of matrimonial home was explained that in the present modern set up it can no longer be claimed that it is only the house of the husband or the house of his parents that will be the matrimonial home of the parties. In the present set up wife has equal say in determining the place of their matrimonial home and it is for this purpose that the flat was booked and as such there is no desertion on the part of wife.


**Dharam Pal v. Pushpa Devi**\(^{102}\)

Petition by husband for divorce on the ground of cruelty and desertion, it is a case where wife had been living separately for the last 20 years without explaining justifiability and furthermore, the wife made baseless complaints against the husband to the higher authorities which amounted to cruelty. Grant of divorce was proper.\(^{103}\)

**Manju Kumari Singh v. Avinash Kumar Singh**\(^{104}\)

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

**Recent cases**

**Mrs. X v. Mr. Y**\(^{105}\)

The court held that if one spouse by words compels other side to leave matrimonial home or stay away therefore, without any reasonable cause, former is guilty of desertion, though it is latter who is seemingly separated from other spouse.

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\(^{103}\) 1. Desertion is the active or willful termination of an existing cohabitation without the constant, express for implied, of the party alleging desertion and against his or her wish.
2. It consists of two essentials i.e.,
   (i) Factum of separation and
   (ii) animus deserendi
3. Animus deserendi consists of two element i.e.,
   (i) Absence of consent or against the wish of the petitioner, and
   (ii) conduct giving scope to a reasonable cause to the spouse leaving the matrimonial home; Bipinchandra Jaisingbhai Shah v. Prabhavati, AIR 1957 SC 176; Lachman v. Meena, AIR 1964 SC 40: (1964) 4 SCR 331.
5. Desertion should be without reasonable cause and without the consent or wish of such party.
7. Desertion comes to an end when the dersting spouse makes an honest and genuine offer to resume cohabitation; Bipinchandra Jaisingbhai v. Prabhavati, AIR 1957 SC 176: 1957 SCJ 144.
8. Mere forgiveness is not condonation as it must completely restore the offending spouse to the original position followed by cohabitation.

\(^{104}\) AIR 2009 Jhar 35.

\(^{105}\) 2011 (1) Marriage L.J. (Bombay) 736.
Flora Bose v. Suproti Bose

Quarrel had taken place between the parties in the night the respondent was violent and abusive towards the petitioner in so that he even inflicted injury to his son, respondent had deserted the petitioner because of the incident of the night. The court held that since respondent left the house under adverse and strained circumstances, it cannot be said that he deserted the wife within the meaning of section 13 (1) (ib) of the Hindu Marriage Act.

Conversion: Section 13(1)(ii)

Section 13(1)(ii) postulates:

“has ceased to be a Hindu by conversion to another religion.”

This concept consists of three expressions:

(i) who is a Hindu

(ii) ceased to be a Hindu

(iii) by conversion to another religion.

Lord Haldane has said, “that if a man is born a Hindu, deviation from orthodoxy not amounting to a clear renunciation of his religion does not deprive him of his status of a Hindu but that, though contact with other religions may well evolve sects which discard many characteristics of orthodox Hinduism and adopt ideas and rites popularly supposed to belong to their systems, continuity with a religion which is so elastic in its scope as in Hinduism may not be destroyed. It is this elasticity of Hinduism that when one is born a Hindu, the fact that he goes to a Buddhist temple, or a church, or dargah, cannot be said that he is no more a Hindu unless it is clearly proved that he has changed his religion. A solemn declaration under the Special Marriage Act, 1954, by a person that he does not profess the Hindu religion has been held to be insufficient to deprive him of his status as a Hindu.

107 Ma Yait v. Maung Chit Maung, (1921) 48 IA 553.
108 In the goods of Jnanendranath Ray, (1922) 49 Cal 1069; AIR 1928 Bom 74, AIR 1959 Punj 415; AIR 1955 HB 148; In Sridharan v. CWT, AIR 1970 Mad 249 it is said that if a Hindu is married to Christian r Parsi and the Child is brought up, it would be a Hindu (Also refer CIT. v. Venkatraman, 109 ITR 247; Maneka Gandhi v. Indira Gandhi, AIR 1985 Del 114). In Seethalaxmi v. Poonu Swami, (1967) 2 MLJ 337 it is said that clause (a) also applies to children of converts to Hinduism.
The Supreme Court in *Ganpat v. Presiding Officer*\(^{109}\), has said that in considering the question of conversion the court must consider the question in the context of Indian society and the place of religious observance in so far as they show what religion the alleged person professes.

Now the next question arises as to whether the conversion in *bona fide* or to play fraud with law. The Privy Council in *Skinner v. Skinner*\(^{110}\), held that he change of religion must be made honestly and without any intent to commit any fraud upon the law.\(^{111}\)

**Unsound Mind: Section 13(1)(iii)**\(^{112}\)

**A.S. Mehta v. Vasumati**\(^{113}\)

This case was agitated under sections 5(ii), 10(1)(e), 11, 12, 13(1)(iii) of Hindu Marriage Act, 1955, wherein it is said that epilepsy can fall under the expression ‘incurably unsound mind’ and then explained the expression that it cannot be so widely

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\(^{109}\) AIR 1975 SC 420; 1975 (1) SCC 589; 1975 (2) SCR 923.

\(^{110}\) referred in 1970 (2) SCJ 653.


Note:- Conversion will not automatically dissolve marriage. It is only a ground and the affected spouse has to file a petition for dissolution of marriage under section 13(1)(ii) of the Act.

\(^{112}\) Section 13(1) (iii) states: “has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.”

Explanations:- In this clause,-

(a) The expression ‘mental disorder’ means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) The expression ‘psychopathic disorder’ means a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment, or

Originally this clause was, “has been incurably of unsound mind for a continuous period of not less than two years, immediately preceding the presentation of the petition.” Section 10(1)(e) prior to 176 stood as, “has been continuously of unsound mind for a period of two years immediately preceding the presentation of the petition.” Section 59ii) prior to the amendment was, “that neither party should be an idiot or lunatic at the time of marriage.

But after the Marriage Laws (Amendment) Act, 1976 section 5(ii) was amended. Grounds for judicial separation as envisaged under section 10 earlier are now to be read as the grounds which are available for divorce read with section 13A providing alternate relief in divorce proceedings and thus the present section 13(1)(iii) afore stated consists of two elements i.e.:

(i) has been incurably of unsound mind, or

(j) has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the petitioner.

This section 13(1)(iii) is supplemented with an Explanation which explains the meaning of “mental disorder” and “psychopathic order” finding place in the Explanations verbatim.

\(^{113}\) AIR 1969 Guj 48; See also AIR 1934 All 273.
interpreted as to cover feeble-minded persons or persons of dull intellect, who understand the nature and consequences of their acts and are able, therefore, to control themselves and their affairs and their reactions in the normal way.

*Bani Devi v. A.K. Vindokumar Banerjee*114

A case under section 13(1)(iii) where the woman was suffering from incurable epilepsy and is also unable to manage herself or her affairs as an ordinary reasonable person, held that such state of mind falls within the expression ‘incurably of unsound mind’.

*Santosh v. Nandan Singh*115

The court was categorical that the expression ‘mental disorder’ which was explained in clauses (a) and (b) in the Explanation given under this sub-clause requires expert opinion, for the purpose of granting or rejecting the petition.

*Alka Sharma v. Abhinesh Chandra Sharma*116

It was a case under sections 5(ii)(b), 12(1)(c) and section 13. Wherein the court said that the degree of proof of mental disorder in avoiding a marriage is lighter compared to the degree of mental disorder required for seeking divorce under section 13.

*V. Bhagat v. G. Bhagat*117

In this case the husband’s application claiming decree of divorce on a plea that the averment in written statement by wife imputing lunacy and insanity to him, per se, constitutes “Cruelty”, was rejected. The husband filed special leave petition, later on withdrew it. Held that the order became final and would operate *res judicata* between the parties118. The court while passing the rejection order earlier held that mere averments in the written statement imputing lunacy and insanity cannot be the ground to grant divorce without any further proof thereof.

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114 AIR 1972 Del 50
115 1980 HLR 528.
116 AIR 1991 MP 205.
J. Sudhakar Shenoy v. Vrinda Shenoy

It is a case of mental disorder discovered by the husband after a lapse of 13 years. The story moderated by the wife with vivid description and birth of the child went to prove that she is an ordinary lady without any affliction of any disease and as such divorce cannot be granted.

Hema Redy v. Rakesh Reddy

In this case the issue was as to whether mental disorder and psychological depression is the same as ground for divorce and it has to be proved by the petitioner that psychological disorder is synonymous to mental disorder, which the husband could not prove by leading cogent evidence. Decree of divorce granted by the trial court was set aside.

B.N. Panduranga Shet v. S.N. Vijyalaxmi

In this case the doctor gave a report that the wife was suffering from mental disorder. It is not sufficient. It had to be proved. Further that the mental disorder was of such a nature that it was impossible to lead normal life. Mere reason of breaking down of marriage will not serve the purpose. The appeal is dismissed except for the fixation of maintenance.

Recent cases

Sampa Karmakar (Mrs.) v. Dr. Sanjib Karmakar

In this case there is no evidence of prior history of wife’s illness. Husband did not examine any doctor to either prove these documents and/or to explain the real implications of the medical terms used therein and/or the diagnosis finally made. Husband has failed to

121 AIR 2003 Kant 357; Ram Narain Gupta v. Rameshwari Gupta, AIR 1988 SC 2260; 1987 All LJ 483.
122 1. A person suffering from schizophrenia can be said to be of unsound mind.
2. Epilepsy falls under the expression, “unsound mind”, if it is incurable.
3. Mere “mental disorder’ is not sufficient. It must be incurable.
4. The burden to prove unsoundness of mind lies on the petitioner.
123 2013 (1) Marriage L.J. 429 (Gauhati) (DB)
prove that wife was a patient of paranoid schizophrenia either at the time of marriage or thereafter during her stay in the matrimonial home. The court held that the respondent husband not entitled to a decree of divorce.

**Leprosy**: Section 13(1)(iv)

In the original clause it was stated that the party should be suffering from leprosy, “for a period of not less than three years immediately preceding the presentation of the petition”. After the amendment by Act 68 of 1976, the clause stands as, “has been suffering from a virulent and incurable form of leprosy”.

This clause needs to be read with section 18(2) (c) of the Adoption and Maintenance Act, 1956 which reads as follows:

“if he is suffering from a virulent form of leprosy”. So under section 13(1)(iv) the expression used is, “virulent and incurable” and whereas inspection 18(2)(c) o the Hindu Adoption and Maintenance Act, 1956 the expression used is “virulent” only. Thus for the purpose of seeking divorce under section 13(1)(iv) of the Act the petitioner has to prove two things:

(i) The respondent is suffering from leprosy and

(ii) That disease is virulent and incurable.

It is to be noted that though the period of three years has been omitted, it does not mean that because of the omission, section 14 of the Act is not applicable. This section 13(1)(iv) has to be read with section 14 of the act which specifies a period of one year within which petition for divorce cannot be filed or entertained. So, now, the question revolves around the expression, “virulent and incurable.”

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124 According to medical terminology and as stated by medical authorities on tropical diseases leprosy is a chronic contagious glaucomatous disease due to infection by mycobacterium leprae. Leprosy is a disease extremely poisonous; noting a markedly pathogenic micro-organism. The main feature of this disease is the formation of granulomata which occurs chiefly in the skin and nerves and causes slowly developing deformities and tropic lesions.

However in medical terminology leprosy has been put into six categories such as:- (1) Lepromatous, (2) Tuberculoid, (3) Maculoanaesthetic, (4) Poluneuritic, (5) Border tine, and (6) Indeterminate. The first category of leprosy i.e., lepromatous is a severe and malignant form of leprosy. In such type one can think of its arrest and not its cure.
Annappornamma v. Appa Rao\textsuperscript{125}

The court held that it is only in a case where one of the spouses has a virulent and incurable type of leprosy that resort can be had to section 13(1)(iv). Every form of leprosy is not virulent but that which is malignant or venomous.

Annapoorna Dei v. Narakishore\textsuperscript{126}

A typical situation arose where the trial court passed an order to keep the wife under observation for six months and the report to the court. The High Court held that such an order is illegal. It is the duty of the petitioner to prove that the wife is suffering from leprosy and that it is virulent and incurable.\textsuperscript{127}

Venereal Disease: Section 13(1)(v)

The dictionary meaning of “venereal disease” is a contagious disease that is typically acquired in sexual intercourse. “Venereal” means “resulting from or contracted during sexual intercourse” and “Communicable” means “transmittable”, “Capable of communicated. This being the meaning, syphilis falls within the ambit of venereal disease. There are many diseases connected or caused through sexual intercourse and they are called \textbf{sexually transmitted diseases} (STD). AIDS also comes within the purview of STD.

Though there are many types of STDs but in specific, syphilis is considered both from medical and judicial angle as being of special nomenclature.

Birender Kumar v. Hemlata\textsuperscript{128}

Where it was agitated that even if the disease is curable, it could not be taken as cured until after a lapse of several years. However, the court held that syphilis is curable. It is important to note that the clause speaks of “venereal disease in a communicable form.” It does not speak of “incurable”.

\textsuperscript{125} AIR 1963 AP 312.
\textsuperscript{126} AIR 1965 Ori 72.
\textsuperscript{127} Medical research now reveals that the disease is not dreadful as previously thought of consistently. The disease is curable. Even if the deformities are formed that can be treated with corrective surgery. In view of this change, the change in socio-mental outlook and change in law has become imperative so that the sufferings of the respondent are not multiplied.
\textsuperscript{128} AIR 1921 Cal 459 and later on AIR 1921 Cal 464 after remand.
**Madhusudan v. Chandrika**

The case was under section 10(1) (d) of the pre-amendment of 1976 period for judicial separation. The court rejected the plea on two grounds:

(i) The petitioner could not prove that the respondent has been suffering from VD for the last three years.

(ii) That modern therapy with the antibiotic penicillin gives a satisfactory result in the treatment of syphilis undreamt of prior to 1943.

**Renunciation of the world: Section 13(1) (vi)**

This section stipulates, “has renounced the world by entering any religious order”. Before discussing this particular provision, it has to be kept in mind that the Hindu Marriage Act, 1955 was enacted to amend and codify the law relating to marriage among Hindus. It has not repealed the shastric law though section 4 of the Act provides on overriding effect of the Act. So except the insertion of this clause, the Act is silent about the concept of four “Ashramas” and the third and fourth “Ashramas” have legal relevance to this provision and as such full reliance has to be placed on the sastrik law.

Section 13(1) (vi) speaks of two elements:

(i) has renounced the world.

(ii) by entering any religious order.

Thus the petitioner has to prove not only that the respondent has renounced the world but also to prove that renunciation is due to entering any religious order.

**Kantal Row v. Swamula Varu**

It is said that the postulant has to perform his death ceremony and the eight sraddhas, the last of which is his own sraddha, he must then distribute his wealth among his sons and Brahmans reserving enough for the homam (sacrifice in the fire) to be subsequently performed. He then takes leave of his sons and standing in water utters a mantra three times to the effect that he has given up his desire for sons, wealth and world and everything. He does not become a samnyasi till the mantra is pronounced.

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130 Section 13(1) (v).
131 (1917) 33 MLJ 63.
Baldeo Parshad v. Arya Pratinidhi Sabha\textsuperscript{132}

It is said that the mere fact that a person declares that he has become a samnyasi or that he calls himself or is described by others as such, or wears clothes ordinarily worn by samnyasis would not be sufficient to make him a perfect samnyasi, so as to divest him of all property and amount to his civil death. He must not only retire from all-worldly interests and become dead to the world, but to attain this he must perform the necessary ceremonies. For a Hindu of the Santana Dharma the essential ceremonies include the performance of prajapati the prajapatiyestiyajna or homa is essential.

**Unheard of for seven years or more: Section 13(1) (vii)**

Section 13(1) (vii) stipulates:-

“has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.”

This clause is based on the rule of evidence contained in sections 107 and 108\textsuperscript{133} of the Evidence Act, 1872 and appears to have been borrowed from section 14(1) of the Matrimonial Cases Act, 1965, retained as section 19 of the Matrimonial Causes Act, 1973.\textsuperscript{134}

*Greenwood v. Greenwood*\textsuperscript{135}

The question arose, in the above mentioned case under the Indian Divorce Act as to its applicability, and is held that a wife who seeks annulment of marriage on the ground that at the time of her marriage with the respondent, the respondent had a wife alive is not relieved of the allegation to prove that fact, merely by proving that the first wife was alive within thirty years of the petition.

\textsuperscript{132} AIR 1930 All 643.

\textsuperscript{133} Section 108 of the evidence act states:-

“Provided that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it”.

This stipulation under section 108 of the evidence Act and the law of England on this presumptive notice as enunciated in re Pnene’s Trust Ch. 139 is the same as can be seen below:-

“If a person has not been heard for seven years, there is a presumption of law that he is dead, but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to establishment of which that fact is essential”. See also Harnam Kaur v. Ratna, AIR 1949 EP 267.

\textsuperscript{134} Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may, subject to the next following section, present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court may, if satisfied that such reasonable grounds exist make a decree or presumption of death and dissolution of marriage.”

\textsuperscript{135} AIR 1964 Mad 65.
Nirmoo v. Nikkaram\textsuperscript{136} 

Such question arose and the court held if the second marriage is performed on the presumption of death without getting a decree of divorce, no person other than the missing spouse can question the validity of the second marriage.

\textit{Ram Rati Kaur v. D.P. Singh}\textsuperscript{137} 

The Supreme Court held that presumption of death is reputable. Disappearance for more than seven years from the place of natural residence without whereabouts of the person concerned is a relevant factor in this regard.

Presumption of death is one thing and when the missing person died is another thing. In the former it is a case of presumption and in the latter it is a case of evidence. If a person has not been heard of for seven years there is a presumption under section 108 of the Evidence Act that he is dead, but at that time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.\textsuperscript{138}

Thus in \textit{Tadepali Ram Rathnam v. Kantheti Varadarajulu}\textsuperscript{139}, it is said that since this presumption is rebuttable so whatever may be the situation this presumption must be recognized legally to avoid any legal inconveniences.

\textbf{Wife’s Grounds of Divorce: Section 13(2) (i)}

Section 13(2) consists of four grounds which are exclusively meant for the wife to seek dissolution of marriage by a decree of divorce in addition to the grounds specified under section 13(1) of the Act.\textsuperscript{140}

\textsuperscript{136} AIR 1968 Del 260.
\textsuperscript{137} AIR 1967 SC 1134; 1967 (1) SCR 153; 1967 (2) SCJ 789.
\textsuperscript{138} Harnam Kaur v. Ratna, AIR 1972 MP 57.
\textsuperscript{139} AIR 1970 PA 246.
\textsuperscript{140} Section 13(2)(i) stipulates:-
“in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of solemnization of the marriage of the petitioner;
Provided that in either case the other wife is alive at the time of the presentation of the petition; or
Now section 13(2)(i) is to be read with section 5(i) of the Act which says:-
“No party has a spouse living at the time of marriage”. Section 5(1) speaks of bigamy and such marriage is void under section 11 and punishable under section 17 of the Act read with section 494 and 495 I.P.C. as the case may be. But section 13(2)(i) also speaks of bigamy prior to the commencement of the Hindu Marriage Act, 1955. The difference is that bigamy under section 5(i) of the Act falls under section 11
Nirmoo v. Nikka Ram\textsuperscript{141}

The court held that the right of divorce under section 13(2) (i) given to the first wife does not depend upon her conduct prior to the commencement of the Act. Compromise could not take away her right under section 13(2) (i) to obtain a decree of divorce and that compromise could not operate as an estoppel.

Laxmiammal v. Alagiri Swami\textsuperscript{142}

The court took a stand that section 13(2)(i) is also subject to section 23(1) of the Act and delay of six years after the first marriage, even having two children born after that was considered as valid for refusing divorce.\textsuperscript{143}

Rape: Section 13(2) (ii)\textsuperscript{144}

Rape has been defined under section 375 I.P.C. and the punishment for rape is prescribed under section 376, I.P.C.\textsuperscript{145}

Section 13(2) (i): This section is in two parts:-

(i) In case of any marriage solemnized before the commencement of this Act, that the husband married again, or

(ii) That any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner.

Under the first part of this clause a wife whose marriage was solemnized before the commencement of this Act gets the right to seek divorce. In the second part, it is the right of the second wife to seek divorce if the first wife is alive. Thus both the wives have the right to seek divorce and further illustration is by way of judicial pronouncements.

\textsuperscript{141} AIR 1968 Del 260.

\textsuperscript{142} AIR 1975 Mad 211.

\textsuperscript{143} (1972)1 MLJ 187; Jasmeal Singh v. Gurnam Kaur, AIR 1975 Punj 225.

\textsuperscript{144} Section 13(2)(ii):

“That the husband has, since the solemnization of marriage been guilty of rape, sodomy or bestiality or”

This clause consists of two elements:-

(i) The offence has been committed after the solemnization of marriage.

(ii) The husband is found guilty of such offence.

Firstly, such offence has been committed after the solemnization of marriage. Any misconduct of this nature prior to his marriage coming to the knowledge of the wife is not covered under the cover of this section.

\textsuperscript{145} 375. Rape: A man is said to commit “rape” who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following six descriptions:

First – Against her will.

Secondly – without her consent.

Thirdly – With her consent when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
R. v. Clarke

It is a case the wife has obtained a judicial separation. The husband, after such decree of judicial separation committed sexual intercourse by force. It was held that he is guilty of rape.

Unnatural Offences

It is covered under section 377 I.P.C. The word “sodomy” is not used in the section; the word “sodomy” means carnal intercourse by a man against the order of nature with another man. And “bestiality” refers to sexual intercourse by a human being against the order of nature with an animal. Both ‘sodomy’ and bestiality are punishable under section 377 I.P.C.

Ganesh v. Mayasundri

It is an unnatural sexual act done with any man, woman or animal. Bestiality means sexual union by a human being against the order of nature with an animal.

Vinit H. Joglekar v. Vaishali Vinit Joglekar

In this case, besides allegations of cruelty, and various allegations of other nature, there was an allegation to keeping or carnal relations as displayed in photographic books.

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Forthly – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly – With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequence of that to which she gives consent.

Sixthly – With or without her consent, when she is under sixteen years of age.

Explanation – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception – Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

The minimum punishment of rape is seven years and maximum punishment is life imprisonment as provided under section 376 of the Indian Penal Code.

146 (1949) 2 All ER 440.
147 377. Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment of life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.
148 ILR (1970) 1 Ker 517.
149 AIR 1998 Bom 73; Sodomy is a felony by the sexual offences act, 1956. Section 12 speaks for a person to commit buggery with another person, which means the action of a male person attempting to obtain sexual gratification by means of the anus of human being (sodomy) or with an animal (bestiality) whether per vaginum or per anus.
for his satisfaction. The court held that the appellant did not counter the allegation of carnal relationship. Held that the grant of divorce is proper.

**Non-resumption of cohabitation: Section 13(2) (iii)**

This provision is added by the marriage laws (Amendment) Act, 1976 and the stress is on non-resumption of cohabitation. This provision is akin to section 13(1A) with the exception that this ground is exclusively meant for the wife, whereas section 13(1A) is for either party to the marriage.

The provision is linked with the maintenance provisions with an inner inclination that inspite of allowing maintenance, the marriage has not come to an end and still it can be saved from breaking cohabitation provides condonation of the past and assurance of the future and if this inherent element of co-habitation remains missing then married life is an empty shell and it is better to throw it in the dustbin.

**Repudiation of Marriage: Section 13(2) (iv)**

This section consists of three elements:—

(i) Marriage is solemnized before the age of 15 years.

(ii) That she has repudiated the marriage after attaining that age.

(iii) That she has repudiated the marriage before attaining the age of 18 years.

These three elements have been reiterated by the High Court in *Jiviben v. Patel Dahyalal Lakhudas.*

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150 The clause stipulates:

“That in a suit under section 18 of the Hindu Adoption and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 Cr. P.C., 1973 (2 of 1974), or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree of order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards.

151 This clause says:

“That her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.”

Explanation - This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

152 AIR 1984 Guj 6;
Savitribai v. Sitaram\textsuperscript{153}

In this case wife was born on 23\textsuperscript{rd} January, 1961. Her marriage was solemnized on 21\textsuperscript{st} April, 1975. The marriage was repudiated on 29\textsuperscript{th} September, 1979 and the petition was filed on 29\textsuperscript{th} September, 1979. Repudiation was accepted by the court.

Ramesh v. Rajpati\textsuperscript{154}

In this case the petitioner submitted that she was 14 years old at the time of solemnization of marriage. Evidence produced by her supported her case. Petition duly verified by her was treated as substantive evidence. Decree of divorce in favour of can be granted.

Ramesh Kumar v. Sunita Devi\textsuperscript{155}

It is a petition under section 13(2) (iv) of the Act. The wife is competent to file the petition after attaining the age of 15 years and before attaining the age of 18 years petition was filed at the age of 13 years is premature. The petition was dismissed as withdrawn and that the order will not operate as \textit{res judicata}.\textsuperscript{156}

Alternate Relief

Section 13A is incorporated in the Act by Marriage Laws (Amendment) Act, 1976 by which the court is vested with a discretionary power to grant a decree of judicial separation instead of decree of divorce except when the petition is filed under sub-clauses (ii), (vi) and (vii) of clause (1) of section 13 of the Act. In these three cases there is no alternative remedy but in other cases the grounds must satisfy that the case is fit for the grant of judicial separation. It is clear from the provision itself that there is no need to file a separate petition for Judicial separation by way of amendment of petition for divorce\textsuperscript{157} but the court has to see that the conditions laid down in section 10 are to be satisfied.\textsuperscript{158}

\textsuperscript{153} AIR 1986 MP 218.
\textsuperscript{154} AIR 2003 P&H 316.
\textsuperscript{155} AIR 2005 P&H 55.
\textsuperscript{156} Marriage Laws (Amendment) Act, 1976 added this clause. At that time section 5(iii) was, “the bridegroom has completed the age of eighteen years and the bride the age of fifteen years. By the Child Marriage Restraint (Amendment) Act, 1978 the age was increased to 21 years and 18 years respectively but no change has taken place in section 13(2)(iv) of the Act. It seems that there is some legal flaw as still at the age of 15 years she is minor so far as section 5(iii) is concerned.
\textsuperscript{158} Manthena Siromani v. Venkateswara Raju, 1988 2 HLR 209 (AP).
When the couple is young and lived for three years together after marriage and begot a son and the wife refused to stay at the place of husband (Port Blair) in a petition for divorce by husband on the ground of desertion and cruelty by the wife, the alternative relief of judicial separation instead of divorce under section 13A is appropriate in the circumstances of the case and in the interest of minor child.\textsuperscript{159}

\textit{Devi Singh v. Baldev Singh}\textsuperscript{160}

A petition was filed for dissolution of marriage by a decree of divorce on the ground of desertion. It was dismissed due to failure to prove desertion. Now a suit for dissolution of marriage on the same ground cannot be granted under section 13A of the Act.

\textbf{No-Fault}

Section 13(1) (ii), 13(1) (vi) and 13(1) (vii) are those provisions which do not come within the ambit of marital misconduct. So these provisions are kept out of the preview of judicial discretion. Under these provisions either the divorce is granted or disallowed but no alternative remedy.

\textbf{Section 13(1) (ii)} stipulates, “has ceased to be a Hindu by conversion to another religion”. It has to be read in terms of section 2(1)(b) and (c) of the Act, which clearly shows that Hindu includes Buddhist, Jain and Sikh and other religion denotes, Islam, Christianity, Parsi (Zoroastrianism), Jewish. So conversion to other religion does not mean conversion to Buddhist, Jain or Sikh religion but Muslim, Christian, Parsi and Jain religion. So when he adopts a religion to which this Act does not apply it can be said that he has ceased to be Hindu by conversion to other religion.\textsuperscript{161}

\textbf{Section 13(1)(vi)}: It stipulates, “has renounced the world by entering any religious order”. “Renounce the world” means to follow the life of a hermit. So it has to be proved that a person has become a “Sanyasi”. It can be whether he has performed the necessary ceremonies such as “Pindadana” or “Biraja Homa” or “Prajapatiyesthi”. Thus a Sanyasi meets a Civil death.\textsuperscript{162}

\textsuperscript{159} 1980 HLR 375.
\textsuperscript{160} AIR 1982 Raj 48.
\textsuperscript{161} Vilyat Raj v. Sunita, AIR 1983 Del 351; AIR 1967 SC 185.
\textsuperscript{162} Krishna Singh v. Mathura Ahir, AIR 1980 SC 707
In *Krishna Singh v. Muthura Ahir*\(^{163}\), it is said that the question whether a person has become a “Sanyasi” has to be determined not according to the orthodox view but according to usage on custom of the particular sect or fraternity.

**Section 13(1) (vii):** It speaks of presumption of death if not heard of for a period of seven years. This provision is covered by section 108 of the Evidence Act. It says that the only presumption enjoyed by section 108 of the Evidence Act, being that a person who has not been heard of for seven years or more is dead at the time the question is raised.\(^ {164}\)

**Divorce by mutual consent**\(^ {165}\)

Looking to various other enactments like the Indian Divorce Act, 1869 there is no such provision as, “Divorce by mutual consent.” Originally the Parsi Marriage and Divorce Act, 1936 was also not having such provision but by the Parsi Marriage and Divorce (Amendment) Act, 1988 this provision is added as section 32B. In Muslim Law there is concept of “*Khula*” and “*Mubaraat*” by which marriage can be dissolved by agreement between the husband and wife. In English Law, Divorce Reform Act, 1969 as replaced by Matrimonial Causes Act, 1973 contains these provisions.\(^ {166}\)

\(^{163}\) Ibid.

\(^{164}\) *Band Veeramma v. Gangala Chinna Reddy*, 37 M 440, See also Re Phene’s Trusts, observations of their Lordships and cited in *Tani v. Rikhi Ram*, IL 554/56 IC 742, AIR 1934 Oudh 298 (FB); AIR 1953 TC 114; AIR 1926 PC 9.

\(^{165}\) (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.

(2) On the motion of both the parties made no earlier than six months after the date of the presentation of 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 date of the decree.

\(^{166}\) “That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to decree being granted.”

Originally, there was also no such provision in the Hindu Marriage Act, 1955. Later on by the Marriage Laws (Amendment) Act, 1976, section 13B was inserted. This section contains two clauses. The main aspects of clause (1) are:-

(i) A petition is to be filed jointly by the parties to the marriage in the District Court stating therein;

(ii) That they have been living separately for a period of one year or more;

(iii) That they have not been able to live together; and

(iv) That they have mutually agreed that the marriage should be dissolved.
Section 13B stipulates that the petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together. “District Court” has been defined under section 3(b) of the Act. However, the definition of “District Court” should now be read in the light of the provisions of Family Courts Act, 1984 wherever it is established.167

**Grounds for Filing Petition under section 13B**

There are three grounds:

(i) Parties to the marriage are living separately for a period of one year or more;
(ii) That they have not been able to live together.
(iii) That they have mutually agreed that the marriage should be dissolved.

“Living separately” in simplest terms, is desertion. It may be due to disagreeing temperaments, discordant tastes, conflicting attitude towards marital tie or any other reason that compels the spouses to remain deprived of conjugal bliss. Desertion has been explained.

**Hopes v. Hopes**168

In this case the husband had confined himself in two rooms of the house and ceased to have all contacts with the wife. It was held that there is separation of household. Thus in this case we find the distinction between house and household and this distinction explains desertion or living separately.169

**Santos v. Santos**170

In this case the concept of household has been explained. The court said that household essentially refers to people held together by a particular tie and if that tie is broken, only roof remains. Similarly in **Fuller v. Fuller**171, the court distinguished between living together and living in the same household.

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167 1986 AWC 396; AIR 1971 All 575; AIR 1972 All 474; Winder v. Barelal, AIR 1976 MP 83.
168 (1949) P 288.
169 See also Hollens v. Hollens, (1971) 115 SJ 327.
170 (1972) Fam 247.
171 (1972) Fam 1247.
In re K.S. Subhramaniam\textsuperscript{172}

The court held that the ingredients of section 13B are fully satisfied. The parties could not reconcile inspite of adjourning the matter for six months. The order of the trial court is set aside. The parties have satisfied all the ingredients of section 13B (1).

Malvinder Kaur v. Devinder Pal Singh\textsuperscript{173}

The court found that marriage between the parties has irretrievably broken down and that there is no collusion between the parties. The divorce petition is pending for the last five years. Even the period of six months has been waived of and allowed divorce by mutual consent.

The third ingredient of section 13B is “mutually agreed to dissolve the marriage”. It is preceded by two other ingredients i.e., “desertion and non-reconciliation”. “Mutually agreed” is a final consequence of the preceding two ingredients and as such it is not a mutual compromise but it is the mutual consent which is the essence of the section. Mutual Consent signified free consent. Thus section 13B is to be read with sections 23(1)(bb) and 23(1)(c) of the Act which read as follows:-

\textit{Section 23(1) (bb)} - “When a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or under undue influence; and”

\textit{Section 23(1) (c)} – “The petition (not being a petition under section 11) is not presented or prosecuted in collusion with the respondent, and”.

Rupali v. Sunil Data\textsuperscript{174}

The allegation is that the consent of the wife had been obtained by fraud and undue influence. The court framed an issue, “Whether consent of wife had been obtained by fraud or undue influence”, whereas the wife has withdrawn her consent for divorce by mutual consent. Hence order framing issue is set aside. The court said that the words, “Mutually agreed” means the consent should continue till the passing of the decree.

Another point arises out of the third ingredient as to whether the divorce should be by mutual consent or can be affected by mutual consent duly stamped by the judicial process.

\textsuperscript{172} AIR 2002 Mad 228.
\textsuperscript{173} AIR 2003 P&H 179.
\textsuperscript{174} AIR 2006 P&H 93.
It appears that the “divorce by mutual consent”, which is statutorily recognized has become “divorce by mutual compromise”. A fettered power of the court has become unfettered power of the court. Without going into the faithful satisfaction of the three ingredients of section 29(1) the courts have started giving effect to the compromise and thus now “divorce by mutual consent” has become “divorce by mutual compromise”. This is a new approach assuming and presuming that the court is vested with the jurisdiction to do so and many cases have been decided on the basis of compromise.\textsuperscript{175}

**Whether Petition after Filing can be withdrawn by one Party**

This question came up before the court in *Jayashree v. Ramesh*\textsuperscript{176}. The court held that the very object of section 13B would be frustrated if one of the parties at a subsequent stage refuses unreasonably to join in the petition and granted a decree of divorce.

*Harcharn Kaur v. Nachhatar Singh*\textsuperscript{177}

It was a case of withdrawal from the petition. The court held that petition cannot be dismissed as withdrawn at the instance of one party. Both the parties must ask for withdrawal.

*Chander Kanta v. Hans Kumar*\textsuperscript{178}

The case was discussed under section 13B (1) and section 23(1)(bb). The court held that unilateral withdrawal of consent, without proving that consent was obtained by force, fraud or undue influence is not allowed.\textsuperscript{179}

*Rachna Jain v. Neeraj Jain*\textsuperscript{180}

Held unilateral withdrawal of consent by the husband is baseless, *mala fide* and unjust. After agreeing for divorce by mutual consent and taking advantage under the compromise, he cannot be allowed to withdraw his consent unless it is obtained by fraud, undue influence, force misrepresentation and such consent not being free.


\textsuperscript{176} AIR 1984 Bom 302.

\textsuperscript{177} AIR 1988 P&H 27.

\textsuperscript{178} AIR 1989 Del 73.


Dinesh Kumar Sukla v. Neeta

Divorce petition was filed on ground of cruelty and desertion. It is pending for more than six months. Joint application was filed by the parties for divorce by mutual consent. Held that the period of 6 months be waived as all efforts for reconciliation had failed.

Anita Sharma v. Nil

Held that period of six months is directory. Couple is separated for the last six years. There is no possibility of reconciliation period of 6 months is waived and the marriage is dissolved.

Giridhari Maheswari v. Nil

Parties seek divorce from court within one month of filing date of second marriage of wife. The appellants failed to show any reason for waiving the period of six months. They are not entitled to any relief even though the requirement of waiting period of six months is not mandatory.

Recent cases

Anil Kumar Jain v. Maya Jain

in this case the court held that only Supreme court can convert a proceeding under section 13 of Hindu Marriage Act into under section 13 B and pass a decree for mutual divorce, without waiting the statutory period of six months. None of the other court can exercise such power.

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181 AIR 2005 MP 106.
184 AIR 2009 Raj 38.
185 2010 (1) Marriage LJ SC 51.
**Gijoosh Gopi v. Sruthi**\(^{186}\) in this case, on the date of marriage itself, parties realized that they could not continue the marital relationship wife expressed the view that she was not willing for the marriage and she wanted to marry another man. She also stated that she agreed for the marriage only due to compulsion on the part of her parents. Marriage was not consummated. The court held that once it is made out that there are exceptional circumstances warranting grant of leave to avoid hardship of depravity of the nature mentioned in the proviso to sections 14 of the Act, the court will grant leave to present petition notwithstanding that one year has not lapsed.

**Statutory Law on Muslim Talaq (Divorce): Judicial View**

Amongst all the nations of antiquity, divorce was, if we look from the angle of erratic sharing of marriage that leads to indifference creating a gulf, an unbridgeable gap, regarded as a natural corollary of marital rights and was present in some form or the other. But the divorce among the ancient Arabs was easy and of frequent occurrence. The husband was given unlimited and unilateral powers to divorce his wife and used it arbitrarily. There was no rule of justice or humanity. This was reckless practice in an uncultured and barbarous society.

When the prophet saw enlightenment or divine light, he ushered in various reforms to change this barbaric and uncivilized society into a religiously oriented civilized society. Ameer Ali has said that the reforms of Mohammad Sahib marked a new departure in the History of Eastern legislation. The Holy Prophet considered woman as the foundation of the society and in her protection lies the salvation of mankind and establishment of high ideals of humanity. He brought the concept of ‘soul’ in place of ‘body’. The concept of “Nikah” was founded on the touchstone of respect and happiness in the family. According to Bukhari, “The Prophet declared that marriage is a sacred duty and whoever dislikes this way of life is not of me.” Baihaqi has said ‘When a man got married; he has made his Islam half perfect. Then let him fear Allah for the remaining half.”

The Prophet also felt that if the husband and wife cannot live peacefully. Then they can part with equity and grace. He emphasised that exercise of right of divorce should be exercised only in exceptional cases when no other way was left open and all methods of making peace between husband and wife had failed. Thus the holy Prophet

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\(^{186}\)2013 (2) Marriage L.J. 696 (Kerala) (DB).
envisioned divorce the possibility of divorce in case of “irretrievable breakdown of marriage”. All the recorded sayings of Prophet show that he looked upon divorce with extreme disapproval. He repeatedly declared that nothing pleased God more than emancipation of slaves and nothing displeased him more than divorce.

**Forms of Dissolution of Marriage**

**By the Death of Spouse**

Under the Muslim law marriage is dissolved either by the death of the spouse or by divorce. If the wife dies, husband can immediately remarry. If the husband dies, the widow cannot immediately remarry. She has to wait for a specified period known as “Iddat”. The widow is to observe “Iddat” for four months and ten days from the death of the husband and if she is pregnant than till the delivery of the child.

**Talaq-ul-Sunnat**

The pronouncement of Talaq may be revocable or irrevocable. Prophet Muhammad Sahib only approved revocable form of Talaq and Talaq-ul-Sunnat is in conformity with the dictates of Prophet. It is said in *HEDAYA*\(^{187}\) translated by Charles Hamilton that “Talaq-ul-Sonna” literally means “divorce according to the rules of the Sonna”; Divorce is of three kinds i.e. (i) “the Ahsan” or most laudable, (ii) “the Hasan” or laudable. These are the two distinctions of “Talaq-al-Sonna”, and the third (iii) “the Biddat” or irregular.

**Talaq Ahsan**

It is the most laudable divorce. The husband repudiates the wife by a single sentence, within a “Tohr” (or term of purity) during which he has not had carnal connection with her and then leaves her to the observance of her “iddat” or prescribed term of probation. This is the most approved form as in this form of *talaq* the husband can, without any shame, can recover his wife, if he is so inclined. Even the wife remains a lawful subject of marriage to her husband even after the expiration of her “Iddat”. This form of talaq leaves latitude in her favour unreported by any of the learned\(^{188}\).

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\(^{187}\) Hedaya by Charles Hamilton.

\(^{188}\) Hedaya by Charles Hamilton.
**Talaq Hasan**

This form of *Talaq* is laudable divorce. It is where a husband repudiates an enjoyed wife by three sentences of divorce in three “*Tuhrs*”. It is less approved form than *Ahsan*. There will be three successive pronouncements during the three consecutive periods of *Tuhrs* and there is absence of sexual intercourse after each pronouncement. After the third pronouncement the wife will observe “*Iddat*” as specified. If during the period of three “*Tuhrs*” the husband Wilson calls “*Hasan*” means “*propere*”. In Arabic Hasan means good. So it also is approve form of divorce.

**Ahmad Kasim Molla v. Khatoon Bibi**\(^{189}\)

In this case the court held as follows:-

(i) Any Mohammadan may divorce his wife at this mere whim and caprice without assigning any reasons.

(ii) *Talaq* by written document is valid notwithstanding that it is not brought to the notice of wife.

(iii) Marriage is purely Civil Contract. Terms of *Kabulnama* must be construed in same way as provisions in any other kind of contract.

(iv) Court has to look to matter from strictly legal point of view and not from religious or ethical point of view.

**Asmat Ullah v. Mt. Khatun Unnisa**\(^{190}\)

The court held that if an acknowledgement is made by the husband, the divorce is held to take effect at least from the date upon which the acknowledgement is made.\(^{191}\)

**Chand Bi v. Bandesha**\(^{192}\)

Held that when the marriage has not been consummated, a *Talaq* in the *Ahsan* form may be pronounced even if the wife is in menstruation. Where the spouses are away...

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\(^{190}\) AIR 1939 All 592.

\(^{191}\) After referred to Syed Ameer Ali’s Muhammadan law and MacNaghten’s Principles and Precedents of Muhammadan Law, 1890 Edn.

\(^{192}\) AIR 1961 Bom 121.
from each other for a long period or where the wife is beyond the age of menstruation, the condition of “Tuhr” is not applicable.

**Talaq-ul-Biddat**

It is called irregular divorce. In this form of divorce a husband repudiates his wife by three divorces at once (included in one sentence) or where he repeats the sentence thrice separately in one ‘Tuhr’. If a husband gives three divorces in either of these ways, the three hold good but yet the divorce is an offender against the law\(^{193}\). Even two divorces in one ‘Tuhr’ and one divorce in the next ‘Tuhr’ come within the purview of “Biddat” or irregular.

**In re Abdul Ali Ismailji\(^{194}\)**

It is said that Talaq-ul-Biddat to be a perfectly legal form and to be irrevocable. Following this decision the Allahabad High Court in Amiruddin’ case reiterated the same view.

**Sarabai v. Rabia Bai\(^{195}\)**

In this case a Hanafi Mohammedan appeared before the Kazi of Bombay and executed a Talaqnama which ran as follows, “I, the declaring appear personally before the Kazi of my free will and divorce Sara Bai, my wife by ‘Nikah’, by one bain-Talaq and renounce her from the state of her being my wife.” Batchelor, J. Said, “To my mind this Talaqnama is decisive; it describes the divorce as Talaq-ul-bain”.\(^{196}\)

**Fazlur Rehman v. Mt. Aisha\(^{197}\)**

The court held that Talaq-ul-Biddat i.e., the irregular divorce, where the husband repudiates his wife by three divorces at once, is valid and binding form of divorce according to the law of Hanafis and when pronounced thrice it becomes irrevocable and further said that the plea of the husband that he pronounced Talaq thrice when she was not in a state of ‘Tuhr’. Even if it is accepted, the burden of proof lies on the husband. It is held that it is immaterial whether she was in a state of ‘Tuhr’ or not, it is the pronouncement of Talaq thrice which makes it irrevocable. The court referred to various

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\(^{193}\) HEDAYA by Charles Hamilton.

\(^{194}\) (1883) 7 Bom 180.

\(^{195}\) (1905) 30 Bom 357.

\(^{196}\) Refer further: Rasul Baksh v. Mt. Bholan, AIR 1932 Lah 498.

\(^{197}\) AIR 1929 Pat 81 (FB), Kasim Pirabai (in re:), (1871) 8 BHCR 95; Furzund Hussain v. Janu Bibi, (1879) 4 Cal 588; Abdul Ali Ismailji (in re:), (1883) 7 Bom 180; Sarabai v. Rabia Bai, (1906) 30 Bom 537; Asha Bibi v. Kader Ibrahim, (1910) 33 Mad 22; Amir-ud-din v. Khatooon Bibi, (1917) 39 All 371.
authors and verses from the *Quran*, in particular *SURA IV* verse 229 and 230 in arriving at the decision that this *Talaq* becomes irrevocable when spoken thrice in one go.

*Ila*

It is a vow of continence. When a husband swears by God that he will not have intercourse with his wife for a period of four months or more or for an unspecified period, he then has done "*ila*". As soon as four months expire, it will be treated as an irrevocable divorce.

After swearing within four months the husband resumes intercourse with his wife, divorce will be treated revoked but not after expiry of four months.\(^{198}\)

*Zihar*

When the husband compares his wife with the prohibited degree relations whether by consanguinity, affinity or fosterage, the marriage gets dissolved. The wife has a right to refuse herself to him until he has performed penance.\(^{199}\)

*Talaq by Wife-Talaq-Tafweez*

*Talaq-Tafweez* is *Talaq* by the wife under the husband’s delegated power. A husband may himself repudiate his wife or delegate this power of repudiating her to a child party or even to his wife. Such a delegation of power is called “*TAFWEEZ*”. Bailie in his digest speaks of three kinds of “*Tafweez*” i.e.

(i) **IKHTIYAR** or choice

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1. Allah hath heard the saying of her that disputeth with thee (Muhammad) concerning her husband, and complaineth unto Allah. And Allah heareth you colloquy. Lo! Allah is Hearer, Knower.
2. Such of you as put away you wives (by saying they are as their mothers)- They are not their mothers, none are their mothers except those who gave them birth. They indeed utter an ill word and a lie. And lo! Allah is forgiving, Merciful.
3. Those who put away their wives (by saying they are as their mothers) and afterward would go back on that which they have said, (the penalty) in that case (is) the freeing of a slave before they touch one another. Unto this ye are exhorted; and Allah is informed of what ye do.
4. And he who findeth not (the wherewithal), let him fast for two successive months before they touch one another; and for him who is unable to do so (the penance is) the feeding of sixty needy ones. This, that ye may put trust in Allah and His messenger. Such are the limits (imposed by Allah); and for disbelievers is a painful doom.

\(^{199}\) See: HEDAYA 117 and 602, Baillie Book IV Chapter 9. See also Section 2 of the Muslim Personal Law (Shariat) Application Act, 1973, speaks of application of Personal Law to Muslims which refers to, “Dissolution of marriage indulging Talaq, ila, zihar, lian, khula and mubarat,” Thus ‘ila’ and “zihar” are the modes of dissolution of marriage recognized by law.
(ii) AMR BU YUD, or Business in hand, and
(iii) MUSHEEUT or pleasure.

In HEDAYA, Charles Hamilton also speaks of three kinds of “Tafweez” i.e.
(i) Ikhtyar or option,
(ii) Amir-ba-yed or liberty, and
(iii) Masheeat or will.

Fayzee\textsuperscript{200}, has said that there are only technical differences and are not of any importance in India where the Arabic language is not used. However, a wife can enjoy right of divorce delegated by husband either by agreement before marriage or after the marriage but such agreement must be lawful and not opposed to public policy.

\textit{Hamidoolu v. Faizunnisa}\textsuperscript{201}

There was an agreement before marriage stipulating certain conditions (Instrument of Kabulnama) and if any of the conditions is violated the defendant should have the power of divorcing herself from him. The defendant exercised this power. The plaintiff sued for restitution of conjugal rights and it was decreed. On appeal, the Appellate court relying upon \textit{Mir Ashraf Ali v. Mir Ashad Ali}\textsuperscript{202} and \textit{Badarannissa Bibi v. Mafia Hala}\textsuperscript{203} held that a Mohammedan husband can vest his wife with the power of dissolving the marriage. Aggrieved by this the matter was taken to the High Court where it was held that, “We are aware of no reason why an agreement entered into before marriage between parties able to contract under which the wife consented to marry on condition that under certain specified contingencies, all of a reasonable nature, her future husband should permit her to divorce herself under the form prescribed under Mohammedan law, should not be carried out.”

\textit{Ayatunnessa v. Karam Ali}\textsuperscript{204}

In this case a power was given to a wife by the marriage contract to divorce herself on her husband marrying again. If the husband does marry again, and she does not

\textsuperscript{200} Fayzee, Outlines of Mohammedan law.
\textsuperscript{201} (1882) ILR 8 Cal 327.
\textsuperscript{202} 16 R 260.
\textsuperscript{203} 7 BLR 442.
exercise the power vested in her immediately on hearing the names of the marriage of the
husband, then she has delayed in exercising such power. She should have exercised
immediately, the matter was taken to the High Court where it was held that the inquiry
done to her is continuing one and it is reasonable that she should have a continuing right
to exercise the power and that the divorce given was valid and the suit of the respondent
herein should have been dismissed.

*Mirjan Ali v. Mt. Maimuna Bibi* 205

In this case the court held that the mere happening of the contingency is, however,
not sufficient, the wife must clearly establish that the events entitling her to exercise her
option have occurred and that she has actually exercised that option.

*Buffatan Bibi v. Abdul Salim* 206

An agreement giving the wife the right to separate maintenance and divorce on
default of maintenance for six months is valid and binding on the husband.


There was pre-nuptial agreement according to which the defendant agreed to live
in plaintiff’s parental house and if he would leave that house, he would pay certain
specified sum to the plaintiff in default of which, the condition, would operate as divorce.
It was held that the condition was not unconscionable and opposed to public policy
violation of such term would operate as divorce between the husband and wife. 208

**Talaq by Mutual Consent**

By whatever name we effect repudiation, i.e., talaq, ila, zihar, lian, khula and
mubarat, it means dissolution of marriage. It can be by mutual consent also as recognized
by Muslim Law. It is of two kinds:-

(i) Khula (Redemption).

(ii) Mubarat (Mutual release).

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205 AIR 1949 Assam 14.
206 AIR 190 Cal 304.
207 AIR 1972 J&K 8.
208 By virtue of delegating the power to the wife of pronouncing her own Talaq, the power of exercising of
divorce of the husband does not cease to exist. He is not deprived of that power.
There is a Quranic verse which says, “If you fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them in what she give up for her release. “This Quranic verse has been interpreted to mean that in Islam wife can seek freedom from her marital bond by providing “iwad” or compensation to her husband. According to HEDAYA, Khula in it primitive sense, means to draw off or dig up. In law it signifies an agreement entered into for the purpose of dissolving a connubial connection in lieu of a compensation paid by the wife to her husband out of her property.

In Baillie’s Digest, ‘Khula’ means ‘to put off’, as a man is said to khoola this garment when he puts is off. It also means to demit or depress generally. In law, it is the demission or laying down by a husband of his right and authority over this wife, for an exchange, to take effect on acceptance. Sir Ronald Wilson in Anglo Mohammadan law says that ‘Khula’ divorce is accomplished at once by means of appropriate words spoken or written by the two parties or their respective agents the wife offering and the husband accepting, compensation out of her property for the release of his marital rights. It is irreversible (bain), but does not, unless thrice repeated debar the parties from remarrying by mutual consent without the conditions specified.

Moonshee-Bzlu-I-Raheem v. Lateefuonnaissa

In this case ‘Khula’ has been defined. A divorce by ‘Khula’ is a divorce with the consent and at the instance of the wife which she gives or agrees to give a consideration to the husband for her release from the marriage tie. It signifies an arrangement entered into for the purpose of dissolving a connubial connection in lieu of compensation paid by the wife to the husband out of her property.

Ghansi Bi v. Ghulam Dastgir

A Muslim marriage may be dissolved not only by Talaq but also by an agreement between husband and wife. The dissolution by agreement is a dissolution which takes the form of ‘Khula’.

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209 Chapter II. 229.
210 See Kifayah Vol. II, p.278.
211 See Darull-Mukhtar, p.256.
212 (1862) 8 MIA 395.
Shahnaz Bano v. Babhu Khan

It is said that Khulanama proceeded a divorce wife was found unable to maintain herself. Held she is entitled to maintenance.

Consideration is the essential element of ‘Khula’. If it is not paid, the divorce does not become invalid but the husband has a right to claim the consideration. This kind of divorce is not common in India and as such it is necessary to cite some case law from Pakistan on different aspect of ‘Khula’.

Mubarat

It is also a form of dissolution of marriage contract. It signifies a mutual discharge from the marriage claims. Baillie says that Mubarat is a mutual discharge which leaves each party without any claim upon the other. Unlike ‘Khula’ the offer of repudiation of marriage contract can be from either side and accepted by the other side. By this in consequence of the declaration of both every claim which each had upon the other drops, so far as those claims are connected with their marriage. This is the doctrine of Haneefa. Sir Ronald Wilson says that Mubarat is a mutual agreement without any further significance. It is submitted that on the balance of authority the use of either term, (Khula or Mubarat) involves the release by the wife of her dower, leaving him still liable for her maintenance for ‘iddat’ and for the maintenance of the children by her, including wages for suckling if required. Fatwa-I-Alamgiri as rendered by Baillie first states that Khula and Mubarat cause every right to fall or cease which either party has against the other depending on marriage and then it is said that it signifies the release of dower and no other debts. Mulla says that when the aversion is mutual and both the sides desire a separation, the transaction is called “mubarat”. The offer may proceed from either side but once it is accepted, the dissolution is complete and it operates as a Talaq-I-Bain as in the case of Khula.

Sir Ronald Wilson, “Anglo-Mohammaden law”.

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In *Jani v. Muhammad Khan*[^218] it is said that ‘Mubarat’ signifies a mutual discharge and both sides desire separation. Thus it involves an element of consent on both sides.

**Independent Right of Divorce of the wife**

A Muslim wife can, entirely against the wishes of her husband claim a divorce as a right under the pure Mohammadan Law under the following circumstances:

(i) Li’an.

(ii) Impotency.

(iii) Insanity–Leprosy.

(iv) Cruelty, ill-treatment, desertion.

(v) Apostasy from Islam.

1. **Li’an**

   If a husband charges his wife with adultery or deny his having begotten the child then concaved in her or born of her, then the wife can go to Kazi who on proof thereof shall issue a decree of separation between the married couple.

   When a man charges his wife with adultery and intends to have the Li’an effected, it is required that the matter be brought before the judge or the person appointed by him for the purpose and the man should say four times, “I call God to witness that I am among the truth speakers in respect of what she is accused of”. After that he should say, “may the curse of God be upon me if I am among the liars”.

   Then the woman should say four times, “I call God to witness that he is among the liars with respect to what he has accused me of” and she should then say “May the wrath of God be upon me if he be among the truth speakers”.

   If the truth is established, the separation shall take place between them and they shall perpetually be unlawful to each other. If such slander is falsified then she will have the right to claim divorce.

   According to Muslim Personal Law the husband should be given an opportunity either to retract he charge or to confirm it by oath. (But now there is no obligation on the

courts to give the husband an opportunity to retract the charge in view of the Evidence Act, 1872 and the Indian Oaths Act, 1873). However the retraction must be honest and straight forwards so various case laws on Lian and its retraction are given below219:

**Tufail Ahmed v. Jamila Khatoon**220

It is a case of divorce on the ground of allegation of unchastity on the wife. The husband retracted the imputation of unchastity. It is sufficient ground for non-suiting the plaintiff.221

**Impotency**

Prior to the dissolution of Muslim Marriage Act, 1939 in order to obtain a divorce the wife had to prove that the husband was impotent at the time of the marriage, that such impotency continued since then and was permanent, that the marriage was not consummated and that the wife had no knowledge of it at the time of marriage.

In **Mt. Altafan v. Ibrahim,**222 There was discussion on impotency. An impotent person is defined by the Muslim Law as one who is unable to have connection with a woman though he has the natural organ; and a person who is able to have connection with an enjoyed woman but not with a virgin or with some women not with others, whether the disability be by reason of disease or weakness or original constitution or advanced age or enchantment, is still to be accounted impotent with respect to her with whom he cannot have connection. Thus the husband should be given a chance to satisfy the court. The decree is passed but shall be enforced after a year after the court is satisfied that the husband is still impotent.

**Insanity- Leprosy- Virulent Disease**

Under Hanbali School a spouse is entitled to the faskh when the other spouse suffer from insanity or other similar serious disease irrespective of the fact whether the


220 AIR 1962 All 570, Rahima Bibi v. Fazal, AIR 1927 All 56; Kaloo v. Mt. Imaman, AIR 1949 All 445; Shamsunessa Khatoon v. Mir Abdul Munaf, AIR 1940 Cal 95; Mussammat Fakhre Jehan Begam v. Muhammad Hamidullah Khan, AIR 1929 Oudh 16.

221 There is one case Jaun Bibi v. Beparee, (1865) 3 WR 93 where it is held that a charge of adultery does not of itself terminate the marriage. The marriage continues until the decree is passed. See also Khatija Bai v. Umar Saheb, AIR 1928 Bom 285.

222 AIR 1924 All 116.
disease was already present before the marriage or had appeared subsequently and irrespective of the fact whether marriage had or had not been consummated.

Under the Maliki School, the wife shall have the right to faskh irrespective of the fact as to whether the disease appears in the husband before or after the marriage and whether it is slight or has reached an advanced stage. The shafei School also speaks of faskh in case of husband’s infliction with serious disease. But in India under the Hanafi School, the wife had no such power to seek faskh on this ground. The Hanafi School is by far the most restrictive in this context. The only ground for faskh in classical law is husband’s inability physically to consummate marriage. However, it is said that the attitude of all four schools towards each other has been and is mutual toleration. Wherever, there is hardship in Hanafi School over a problem, solution can be sought under any other school such as Hanbali, Maliki or Shafei. Under that analogy a wife may seek faskh if the husband is suffering from such disease.

**Cruelty, Ill-treatment, Desertion**

The Hanafi law does not provide for the dissolution of marriage on the basis of ill-treatment of wife. The MalikiSchool requires that when the husband is guilty of ill-treatment even after admonition by the “Kazi”, it will be a ground for dissolution of her marriage after completion of certain formalities. Hanbali law speaks of continuous ill-treatment, if established the marriage can be dissolved. Hanafi Law does not allow dissolution of marriage on the ground of cruelty. The situation became so miserable that Muslim women started embracing Hinduism or Christianity. Now this ground is included in the Dissolution of Muslim Marriage Act.
**Apostasy from Islam**

Before the Dissolution of Muslim Marriage Act, 1939, apostasy from Islam of either party to a marriage operated as a complete and immediate dissolution of the marriage.\(^{225}\)

So the wife was not required to seek judicial divorce as the marriage *ipso facto* gets dissolved on apostasy from Islam.

Even the authorities on Islamic law speak in the same view.

Ameer Ali says, “Under the Mohammadan law if a Muslim husband or a Muslim wife apostatizes from Islam, the apostasy has the effect of dissolving the marriage between the parties. Apostasy from Islam by one of a married pair is a cancellation of their marriage.

In HEDAYA translated by Charles Hamilton it is said that if either husband or wife apostatise from the faith, separation takes place without divorce according to Haneefa and Abu Yussouf.

Sir Ronald Wilson says that it seems that the effect of either or both of the parties to a Mohammadan marriage renouncing the Mohammadan religion is that the marriage is dissolved *ipso facto*.\(^{226}\)

**Statutory Law on Christian divorce: Judicial View**

It has already been noted that the Divorce Act. 1869 is nothing else but a divorce-supplement to the Indian Christian Marriage Act, 1872. Both the Acts claim application to cases where only one of the parties is a Christian, besides those where both are followers of Christianity.

It has also been noted that both the laws mentioned above are timeworn laws. Indian legislature has modernised many other family laws on marriage and divorce, but has left these Christian laws untouched. As far back as 1968, the Supreme Court suggested


suitable amendment of the Indian Divorce Act\textsuperscript{227}. Madras High Court’s reminder in \textit{T.M. Bashiam v. M. Victor}\textsuperscript{228} also did not activate either the legislature or the Christian social philosophers up-till now. It is interesting to note that the legislature intended the Indian Courts to ‘act and give relief’ under the Divorce Act in conformity with ‘principles and rules’ followed by the courts for divorce and Matrimonial causes in England (vide s.7). But, then, the English Matrimonial Causes Act has since been overhauled quite a number of times. The principles currently followed by the English courts on the basis of their thoroughly amended laws cannot be fitted in with the aforementioned antiquated statutory laws of India. This sometimes gives rise to award situations. On this point the case of \textit{R. Hemlatha v. R. Satyanandam}\textsuperscript{229} may be cited. A Christian wife prayed for divorce in the district court of Warangal on the ground of the husband’s cruelty anti desertion. Almost all the modern statutes incorporated these grounds for obtaining divorce. The district court of Warangal also granted divorce on these grounds. The Special Bench of the A High Court pointed out that these two grounds entitled the wife to obtain a decree for judicial separation only and as such a decree for divorce could not be passed at all. On the other hand, in a similar case, \textit{Elveena v. Gopal}\textsuperscript{230}, a Christian wife obtained a decree on the ground of the husband’s adultery and cruelty. The full bench at Chandigarh simply confirmed the decree without making any discussion on the point contained in s. 10 of the Indian Divorce Act that the adultery \textit{simpliciter} by the husband would not entitle a wife to a dissolution of marriage, though this (adultery by the wife (is an important weapon in the hands of the husband to get the marriage dissolved.

Amending Act 51 of 2001 has not only changed the short title of the statute from “The Indian Divorce Act” to just “The Divorce Act”, but also brought about some important changes to update the law to suit present time.

\textbf{Divorce by the Husband:}

The wife has, since the solemnization of marriage, been guilty of adultery.

\textsuperscript{227} S.C. Selvaraj v. C. Mary (1968) 1 MLJ 289.
\textsuperscript{228} AIR 1970 Mad 12.
\textsuperscript{229} AIR 1979 AP 1.
\textsuperscript{230} AIR 1979 P&H 4.
Besides dissolution, a husband may claim damages from a person who commits adultery with the wife (s. 34). Damages may be claimed also in a proceeding for judicial separation or even independently.

**Divorce by the Wife:**

(i) the husband has exchanged is profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman;

(ii) the husband has been guilty-

a. of incestuous adultery; or

b. of bigamy with adultery; or

c. of marriage with another woman with adultery; or

d. of rape, sodomy or bestialities; or

e. of adultery coupled with such cruelty as without adultery would have entitled the wife to a divorce *a mensa et thoro* (from bed and board). The cruelty must be such as would entitle the wife to obtain a judicial separation even in the absence of any adultery by husband;

f. of adultery coupled with desertion without reasonable excuse for two years or upwards.

Originally, the Indian Divorce Act, 1869 did not provide for divorce by mutual consent.

The need for amending the provisions of the India Divorce Act and bringing them on a par with other matrimonial laws of the country had been strongly urged by the Law Commission and the Courts.\(^{231}\)

In *K. Swarna Kumari v. M. Chowdary*,\(^{232}\) P. Venkatarama Reddy and D.H. Nasir, J.J, have been constrained to observe: “However much we feel that it is a case of irretrievable breakdown of marital life, having regard to the state of law as it exists today, we are not in a position to dissolve the marriage. It is unfortunate that exhortations of the High Courts and the Supreme Court and the occasional protests of the public-spirited

\(^{231}\) See Jorden Diengden v. S.S. Chopra, AIR 1985 SC 935.

\(^{232}\) 1(1996) DMC 369 (DB).
people and Women’s Welfare Organisations to effect changes in the archaic law which has the potentiality of gender discrimination have not yielded any fruits so far. All the provisions of a century old Indian Divorce Act remain in fact to-day immune from sociological progression and egalitarian impact of the Constitution. If the mutual consent had been a ground for divorce, perhaps in this case, we would have brought about the result of dissolution by persuading the parties to agree to that course.”

Indeed, different courts as also the Apex Court have been consistently highlighting the defects and shortcomings of the Indian Divorce Act and urging on the concerned authorities to update the law, but up-till now, in vain. A few of such cases are as follows:

(i) **Sumathi Ammal v. D. Paul**\(^{233}\): Since the English statute is the parent law (vide s. 7 of the Indian Divorce Act), the Indian law has to keep pace with the English law.

(ii) **George Swamidass Joseph v. Harriet Sundari Edward**\(^{234}\): Since S. 7 of the Indian Divorce Act has been preserved by the Laws order Act of 1950, English law and practice could and should be applied.

(iii) **Solomon Devasahayam v. Chandira May**\(^{235}\): The Indian Divorce Act, 1869 is wholly out of date.

(iv) **Swapna Ghosh v. Sadananda Ghosh**\(^{236}\): Discriminating against the Christian spouses.

(v) **Reynold Rajaman v. Union of India**\(^{237}\): Absence of provisions on dissolution of marriage by mutual consent in the Indian Divorce Act causes hardship to the litigating parties.

(vi) **Ramish Francis Toppo v. Violet Francis Toppo**\(^{238}\): Discriminating against the Christian spouses on the ground of religion.

\(^{233}\) AIR 1936 Mad 324 (FB).

\(^{234}\) AIR 1955 Mad 341.

\(^{235}\) 1968 MLJ 289.

\(^{236}\) AIR 1989 Cal 1; II (1988) DMC 343.

\(^{237}\) AIR 1982 SC 1261.

An attempt was made by the Government of Kerala to amend the Indian Divorce Act and introduce a Bill as the Indian Divorce (Kerala Amendment) Bill in the State Assembly on December 16, 1999. Such Bill intended to delete provision on confirmation of the decree of the District Judge dissolving a marriage by the High Court. There is no such provision either in the Hindu Marriage Act or in the Special Marriage Act. Kerala High Court repeatedly commented that the Indian Divorce Act needed immediate amendment.

**Dissolution by mutual consent**

The provision of dissolution of marriage by mutual consent was unknown to the Indian Divorce Act, 1869. Amending Act 51 of 2001 has inserted section 10A which is largely comparable to section 13B of the Hindu Marriage Act or section 32B of the Parsi Marriage and Divorce Act or Section 28 of the Special Marriage Act. Of course, under the Divorce Act, the petition on this ground can be presented only after the parties lived separately at least for two years while in other statutes such period is only one year.

**Statutory Law on Parsi divorce: Judicial View**

The grounds as laid down in sections 31 and 32 as also under sections 32A and 32B are as follows:

1. Continuous absence of one spouse for 7 years not having been heard of as being alive;

2. No consumption within one year after solemnization of the marriage owing to wilful refusal by the defendant;

3. Defendant at the time of marriage was of unsound mind and has been habitually so up to the date of the suit, provided-

   i. The plaintiff was ignorant of it at the time of marriage; and

   ii. The suit has been filed within 3 years from the date of marriage;

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(4) Defendant has been incurably of unsound mind for two years or more immediately preceding the suit, or suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the plaintiff cannot reasonably be expected to live with him/her.

(5) Defendant (wife) was at the time of marriage pregnant by some person other than the plaintiff (husband); provided-

(a) Plaintiff (husband) was ignorant of it at the time of marriage;
(b) Suit has been filed within two years from the date of marriage; and
(c) After the plaintiff came to know the fact, no marital intercourse has taken place;

(6) After the marriage, the defendant committed adultery, or bigamy, or rape or an unnatural offence;

(7) Defendant treating the plaintiff with cruelty or behaving in such a way that the plaintiff should not be compelled to live with him/her, but the court may use discretion between divorce and judicial separation on this ground.

(8) Defendant voluntarily caused grievous hurt to the plaintiff (suit has been filled within two years), or

Has infected the plaintiff with venereal disease (suit has been filled within two years of the knowledge), or
Where the defendant (husband) has compelled the plaintiff (wife) to submit herself to prostitution (suit has been filled within two years after the last act of compulsory prostitution);

(9) Defendant is undergoing a sentence for 7 years or more for an offence as defined in the I.P.C. (the suit is to be filed at least one year after the defendant undergoes the imprisonment);

(10) Defendant deserted for at least 2 years;

(11) A magistrate awarded separate maintenance to the plaintiff, provided the parties have not had marital intercourse for one year or more since such order;
(12) Non-resumption of cohabitation for one year or more after a decree for judicial separation or restitution of conjugal rights was passed;

(13) Divorce by mutual consent; and

(14) Defendant has ceased to be a Parsi by conversion to another religion (the suit has to be filed within two years of the plaintiff’s knowledge.)

The Parsi Marriage and Divorce Act, 1936 did not provide for divorce by mutual consent. But 1988 amendment of the Act has incorporated this as an added mode to dissolve the marital tie. ‘Cruelty’ is another ground so added in 1988.

*Rohinton Panthkay vs. Armin R. Panthaky*\(^ {240} \)

Parsi Chief Matrimonial Court: Dealing as to whether in a suit under the Parsi Marriage & Divorce Act, 1936, the Court has the discretion to direct that evidence be recorded before a Commissioner under Order 18 Rule 4(2) of the Code of Civil Procedure, 1908, or must it only be recorded in Court with delegates (jury) present, a bench comprising of Gautam S. Patel, J ruled that the court has the discretion to direct that evidence can be recorded by a commissioner and it was not mandatory in every case that it should be recorded only before a court with the delegates or a jury present. The special court of delegates, which meets twice a year to hear Parsi matrimonial cases, is the only court in India to have a system of delegates or jury, the Court noted, that the system however had led to delays, and the matters at the special court had come to a standstill since 2012 as there had been no session with delegates.

The Court said that it was imperative to change with time and technological advances and stated that the special court could take safeguards and direct that delegates be present when the commissioner is recording evidence through video conferencing, or that an audio video recording of the proceedings before a commissioner could be watched by the delegates later. The Court rejected the claim, including by lawyers of Parsi Punchayat Funds and Properties which had intervened in the matter that any change in procedures was akin to tampering with a special law meant for a minority community. The

\(^ {240} \) Parsi Suit No. 20 of 2013, decided on April 3, 2014.
Court stated that a procedural reform was not a matter of faith or religion and belonging to any particular community was not a mantra for clinging to a system that ill serves its purpose or the interests of the community itself. The Court stated that no faith could possibly demand that its adherents be made to wait endlessly for their cases to be decided and achieving a fair and just result by and within law was no apostasy and directed that evidence can be recorded by a commissioner as it saves the Court's time.

**Willful refusal to consummate**

Under section 32 (a) willful refusals by the defendant to consummate the marriage is a ground for divorce. In *S v. S*241, the court held that these days medical science has so much advanced that physical impediments to a complete intercourse can be removed either by medicines or surgery. If the defendant declines to have medical treatment, it would amount to willful refusal to consummate marriage.

**Unsoundness of mind**

*Phiroz v. Shirinbhat*242

Under section 32 (b) the plaintiff may sue the defendant for divorce on the grounds that the defendant at the time of the marriage was of unsound mind and has been habitually so up to the date of the suit provided that divorce shall not be granted on this ground unless the plaintiff was ignorant of the fact at the time of the marriage, and has filed the suit within three years from the date of marriage.

*Sharda v. Dharmpal*243,

In case of respondent’s refusal to comply with such a direction, the court can draw an adverse inference against the respondent. The court’s direction, in such a case, to the respondent to undergo medical examination shall not be violative of right to personal liberty under Article 21 of the Constitution.

**Incurably of unsound mind or suffering continuously or intermittently from mental disorder**

Section 32 (bb), inserted by the 1988 Amendment, makes incurable unsound mind of the defendant for a period of two years or upwards immediately preceding the filling of the suit a ground for divorce. The plaintiff can also seek divorce on the ground that the

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241 (1954) All ER 756.
defendant has been continuously or intermittently suffering from mental disorder of a certain extent. The ‘mental disorder’ is explained in the section. There is difference between Cl. (b) and Cl. (bb). The former clause refers to the unsoundness of mind ‘at the time of marriage.’ But the latter clause is concerned with the supervening unsoundness of mind occurring after marriage.

**Pregnancy by a person other than the Plaintiff**

In order to get a decree or divorce under section 32 (c) the plaintiff has to prove:

1. That the defendant was pregnant by some person other than plaintiff at the time of marriage; and
2. That plaintiff was ignorant of that fact at that time;
3. That plaintiff had no marital intercourse with the defendant after he came to know of the fact; and
4. That the plaintiff has filed the suit within two years from the date of marriage.

**Adultery, fornication, bigamy, rape and unnatural offences**

**Adultery**

It means extra marital sexual intercourse. It is a voluntary sexual intercourse between a husband or a wife, with one of opposite sex, while the marriage subsist. Under the Parsi Marriage and Divorce Act, 1936 the language of the clause is different: defendant has since the marriage committed adultery, but under Parsi Law divorce will not be granted on the ground if the suit for divorce has been filed more than two years after the plaintiff came to know of the fact.

**Fornication**

Fornication is illicit sexual intercourse either between a married man and unmarried woman or between a married woman and an unmarried man and is a ground for divorce.

**Bigamy**

Where a man having a wife living marries another woman, and a woman having her husband living, remarries, it is bigamy and a ground for divorce under section 32 (d).
Rape

The word ‘rape’ has been the same meaning which is defined under section 375 of the Indian Penal Code, 1860.\textsuperscript{245}

Unnatural offence

Unnatural offence is not defined in the Act. The definition in section 377 of the Indian Penal Code (Act XLV of 1860) may be relied on. Unnatural offence consists in a carnal intercourse committed against the order of nature with any man, woman or animal.

Cruelty

Cruelty is made a ground for divorce by inserting section 32 (dd) by 1988 Amendment of the Act. The word cruelty has to be understood as legal cruelty. In \textit{Cowasji Nusserwanji Patuck v. Shehra Cowasji Patuck}\textsuperscript{246} cruelty in the legal sense noted not necessarily be physical violence either to the husband or to the wife. It may consist in a course of harsh conduct pursued by the husband towards his wife and/or their children and also vice versa by the wife. The safest criterion to ascertain whether there has been behavior which would render it improper to compel one party to live with the other under section 43 is to consider the course of the conduct of the parties towards each other during their married life.

In \textit{Hirabai v. Dhanjibhai},\textsuperscript{247} there is no doubt that the parties have not been living for a long time happily together as husband and wife, and there is considerable disagreement between them which has been the source of constant quarrels and bickering and general unpleasantness. The causes of disagreement are grave and weighty, and such as show an absolute impossibility that the duties of married life can be discharged. In determining what is moral impossibility feelings and customs of the Parsi community and bear in the mind the grave responsibility that rests on you not to permit the relaxation of the marriage bond further than the conscience of the community will approve. It will be our duty to uphold the sanctity of the married life, but to see at the same time that the provisions of law are not so narrowed down in their application as to lead to “barbarous results” and to compel a husband and wife to live together, when living together as such has become morally impossible.

\textsuperscript{245} See supra note. 146.
\textsuperscript{246} 39 Bom LR 1138: AIR 1938 Bom 81.
\textsuperscript{247} (1900) 2 Bom LR 845.
Mental cruelty

*Parveen Mehta v. Inderjit Mehta* 248

Mental cruelty is a state of mind and feelings and is, therefore, necessarily a matter of inference to be drawn from the facts and circumstances of the case. A person enjoying normal health being deprived of normal cohabitation by the spouse and thus undergoing anguish disappointment and frustration can be said to have been subjected to mental cruelty. Repeatedly causing embarrassment in social situation can amount to mental cruelty.

**Grievous Hurt, venereal disease or prostitution**

Section 32 (e) provides three different grounds. *Patuck v. Patuck* 249 it has been held by Bombay High Court that “grievous hurt” as defined in section 2 (4) of this Act, is the only kind of cruelty recognized as a ground for divorce. Therefore in applying the English law of the cruelty to Parsis the provisions of this section of the Act must never be lost sight off.

**Venereal disease**

That the defendant has infected the plaintiff with venereal disease is another ground for relief. The plaintiff should bring the suit within two years from the date of the knowledge of such infection. The moment a spouse apprehends infection of the venereal disease from the other party to marriage, law should help him or her it is unjust to wait till he or she falls a prey to this dreadful disease.

**Prostitution**

Divorce can be asked where the defendant has compelled the plaintiff to submit to prostitution. This ground of relief in section 32 (e) is open to the wife only. In this case, plaintiff has to bring the suit within two years from the date of the last act of such compulsory prostitution.

**Long Imprisonment**

When a spouse is imprisoned for seven years or more the life of the other spouse may become abnormal. If that spouse wishes to break the marital tie with prisoner so that

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249 39 Bom LR 1138: AIR 1938 Bom 81.
he or she may start new life, this provision facilitates him or her by obtaining divorce on this ground. Sentence of imprisonment must be for an offence defined under the Indian Penal Code, 1860 and no other piece of legislation; further the defendant should have undergone at least one year imprisonment out of the seven years.

**Desertion**

*Khorsheed Mancherji Kapadia v. Muncherji Sorabji Kapadia*\(^{250}\)

To make out ‘desertion’ under section 32 (g) of the Act it is necessary for the plaintiff to prove that she has been deserted without reasonable cause and without her consent or against her will and that the desertion has lasted for two years or more.

*Kaikhushroo Tantra v. Meherbai Tantra*\(^{251}\)

The period during which the defendant was confined in the lunatic asylum, if any, is not to be taken into consideration in computing the period of two years.

*Dina Dinshaw v. Dinshaw Ardeshir*\(^{252}\)

The question of law whether constructive desertion has to be decided by inference drawn from facts. The decision thus is on facts and is liable to be disposed of finally by delegates.

*Meher Rohinton Moos v. Rohinton Framroze Moos*\(^{253}\)

Withdrawal of a party from the marital home does not by itself constitute desertion by that party. It is the party who by his or her conduct brings cohabitation to an end who is guilty of desertion. Decrees for divorce on the ground of desertion can be passed in favour of both spouses. If in very special and peculiar facts and circumstances of a case, in granting relief to one spouse and refusing to the other, injustice would result the court should pronounce the decree in favour of both.

**Order for separate maintenance**

Under section 32 (h) where an order has been passed by a magistrate under section 125 of the Criminal Procedure Code, 1973 awarding separate maintenance to the plaintiff and from the date of such order the plaintiff and the defendant had not matrimonial intercourse for the period of one year or more, it entitles the plaintiff for divorce.

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\(^{250}\) AIR 1938 Bom 86: 30 Bom LR 1141.

\(^{251}\) 47 Bom LR 819: AIR 1946 Bom 211 (DB).

\(^{252}\) AIR 1970 Bom 341.

\(^{253}\) 79 Bom LR 131.
Ceased to be a Parsi

_Dhunbai Palkhiwala v. Sorabji Palkhiwala_254

In order to obtain divorce under section 32 (j) of the Act it is enough for one of the spouses to prove that the other spouse has ceased to be a Parsi Zoroastrian and the suit is filed within two years of the plaintiff’s knowledge of the fact. A mere doubt or suspicion on the part of the plaintiff that the defendant had ceased to be a Parsi will not suffice.

**Statutory Law on Jewish divorce: Judicial View**

The making and validity of a contract of marriage between Jews in India depends wholly on the religious usages of the Jewish faith and is unaffected by legislation. Marriage in Judaism may not be viewed as an “outward sign of inward and divine grace”, yet it is respected as a sacred institution. The Hebrew religion sees no conflict between man’s duty to his family and man’s duty to God and thereby the highest values of purity, sanctity and stability are vested in the Jewish family which has been the preservative of their religi-moral and socio-cultural treasures, thereby it become incumbent and significant that laws of the family should occupy an exalted status in the Jews Legal Corpus.

Since there is no legislation governing Jewish marriage and divorce we have to glance and flash through the religious scriptures which are the hidden treasure of serenity of Jewish family structure of making, sharing and breaking of marriage. Jewish religious ordinances, beginning with the Old Testament which includes the Mosaic Code as enunciated in the Pentateuch (the five books of Moses). The Old Testament was also called the written law. There was a volume of rabbinic traditions, time hardened customs and practices which were gathered together along with the Old Testament into an encyclopaedic work know as Talmud. All this post-Biblical literature became known as Oral law.

Jewish law does not regard divorce as a punishment or a crime but as a frank acknowledgment that a marriage is not successful. Since matrimony Judaism is not a sacrament but positively a religion moral and socio-economic expression, the rabbinic authorities, who believe in happiness and moral purity in marital life, did to put marriage

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254 (1937) 39 Bom LR 1143: AIR 1938 Bom 68.
into shackles so that amicable and harmonious living becomes difficult. But the Talmud proclaims poignantly: “He who divorcees the wife on his youth—even the temple altar sheds tears for him.” In Deuteronomy 24:1 it is said:

“when a man taketh a wife and marrieth her; and it cometh to pass that she find no favour in his eyes, because he Lath found some unseemly thing in her, that he write her a bill of divorcement (Sepher Kritut) and giveth it in her hand, and sendeth her out of his house and she departeth out of his house and goeth and becometh another man’s wife”.

The above cited concept indicates arbitrariness, unilateral in nature and exclusive prerogative of a man to divorce his wife. However, alter on, some restrictions were imposed. He has to tell the unseemly thing in her to justify his action. In Deuteronomy 22:19 many restrictions are spoken of. Talmudic scholars define “unseemly thing” as “things of indecency”, “a sexual immorality”, “and any case of incompatibility”.

Thus, in short, divorce on the basis of fault can be given either by the husband or the wife:-

**Grounds of Divorce for husband**

If the wife is found guilty of:

(i) Immoral deportment,
(ii) Apostasy,
(iii) Refusal to have marital intercourse,
(iv) Unjustified refusal to follow husband to another domicile,
(v) Violation of ritual law in the management of her household,
(vi) Incurable disease rendering cohabitation dangerous,
(vii) Insulting her husband or her father-in-law in the public,
(viii) Barrenness after ten years of marriage.

**Grounds of Divorce for wife**

The wife may sue for divorce on grounds of:-

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255 Gittin 90 b, Genesis 1:27 says, “Man shall cleave to his wife and they shall be one flesh.”
256 Gittin 9:10, Sotah 16b, Matthew 19:3-9, Ketuvot 4:9, Yevamot 14:1.
(i) Cruelty,
(ii) Apostasy,
(iii) Chronic disease rendering cohabitation dangerous,
(iv) Licentiousness,
(v) Repulsive occupation,
(vi) Refusal to support,
(vii) Refusal of marital intercourse,
(viii) Physical impotence.

By the Court against Wishes of the Parties

(i) in cases where the kiddushin took effect, but the marriage was forbidden by law,
(ii) incestuous union of the second degree\textsuperscript{257},
(iii) Marriage with a Mamzer\textsuperscript{258},
(iv) Marriage of Jew with a NON-JEW\textsuperscript{259},
(v) Marriage of an adulteress with her paramour\textsuperscript{260},
(vi) Any other justified cause\textsuperscript{261}.

Divorce by Mutual consent

Jewish law allows a “get” in the case of mutual agreement. If both the parties agreed to divorce it was to be granted and the court was not required to investigate or seek proof of any wrongful conduct or to condemn and party as the “offender” the court was concerned only that both parties should be acting with full knowledge and without fraud or duress; that minor children, if any, be provided for; that the property rights of the parties, especially the wife, fairly and honestly adjudged and that proper formalities be observed that no doubt could later be cast on the validity of divorce. Rabbine authorities

\textsuperscript{257} Rabbinical Incest.
\textsuperscript{258} M. Yevamot VIII, 3.
\textsuperscript{259} AVODAH ZARAH 36 b.
\textsuperscript{260} M. Yavamot II.8.
\textsuperscript{261} Forbidden alliances, incurable disease etc.
felt that. When marriage had become burdensome to both parties and divorce is based on free and mutual consent, the evils of hypocrisy, deceit, perjury, acrimony and even immorality are avoided. The principle behind is, “Contra bono mores”.  

**Alimony**

No doubt, Jews in India have no statutory law but are governed by their personal law but by what law they should be governed is a moot point. The Jews are scattered all over the world and wherever they are, they are governed either by their personal law or the law of the land, but when the matter comes before the court, it is the law of justice, equity and good conscience that prevails. In matrimonial law it is the reasonableness of the quantum which should be granted, looking to all the facts of the case and the surrounding circumstances to be taken into consideration.

It cannot be doubted that the court has power to order permanent alimony. The defendant is found to make provision for his wife after divorce and for his child and to pay the amount as specified in ketubah. In the matrimonial law, the issue of alimony will be decided by the “lex-fori”.

**Custody of Child**

Originally, the children of the divorce remained in her custody. The boys, however, could be claimed by the father after they had reached their sixth birthday. Later the whole matter of custody was left to the discretion of the court.

Furthermore, the question of custody of the child rests on the doctrine of “paramountcy of interest of the child” and it is now a universal declaration. After the International Conventions, convention of the right of the child 1959, and 1989, the law is, “the best interest of the child shall be the guiding principle”. Even the Universal Declaration of Human Right says, “Motherhood and childhood are entitled to special care and assistance”. Even in National policy for children, it is said, “existing laws should be amended so that in all legal matters whether between parents or institutions, the interests of children are given paramount consideration”. Thus the question of the custody

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263 Ketubot 65b, 102n, Even Haezer 82:7.
264 Article 25(2) of the Universal Declaration of Human Right.
265 Clause 3(xiv) of National policy for children.
of the child is left to the discretion of the court irrespective of personal law as in such cases the courts acts as a “parent” and not as court. To understand a brief outline of the Jewish law, some case law needs to be looked into.

**Rachel Benjamin v. Benjamin Solomon Benjamin**  

In this case following issues were involved:-

(i) Whether High Court could entertain suit between two Jews.

(ii) Whether Jewish law is to be applied.

(iii) When Jewish marriage can be dissolved by courts of state.

(iv) Can court pass *decree nisi* for dissolution of marriage.

(v) Whether court can pass order for grant of permanent alimony.

The High Court referred to various case laws on each subject and held:

(i) Clause 12 of letters patent gives the High Court jurisdiction to entertain a suit arising out of matrimonial dispute.

(ii) In deciding the Suit the Jewish law must be applied with such adaptations to the circumstances of the case as justice may require.

(iii) A ritual “get” or “bill of divorcement” executed by the husband is not necessary. A Jewish marriage can be dissolved by the courts of the State.

(iv) In proper case the court can pass a *decree nisi* for dissolution of marriage among Jews, and has power to order permanent alimony.

(v) The Jews in Bombay are generally speaking monogamous and cannot except in certain cases lawfully contract a second marriage. A divorce is allowed on the ground of adultery or cruelty *inter alia* amongst them.

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Paul Engel v. Edith Engel\(^\text{267}\)

In this case two issues arose:

(i) Whether High Court has jurisdiction

(ii) Whether decree absolute can be passed on the ground of adultery.

It was held as follows:

(i) Under clause 12 of letters patent the High Court has jurisdiction to order dissolution of Jewish marriage. Parties being domiciled in Bombay. Bombay High Court has jurisdiction in the matter.

(ii) Adultery is a ground for divorce by the personal law of the Jews. A divorce absolute can be passed in the first instance without a decree nisi. The court in this case refers to *Leviticus* xx: 10, *Deuteronomy* xxiv: 1-3 and said that adultery would be considered “some unseemliness” even in a wife not previously divorced, its penalty is death. The plaintiff even need not have come to the court and could get rid of his wife by “get” or “bill of divorcement”.

**Restrictions on Woman**

After divorce, a divorced woman was “*suis juris*”. She could remarry after three months of divorce. She was not permitted, however, to us a man who was suspected of having committed adultery with her, nor to the agent who delivered the “bill of divorcement” to her, nor to a Cohen or a member of priestly group, descending from Aaron.

However, now in Israel the position of woman is greatly enhanced by Act of 1951 i.e., “Women’s Equal Rights Law” which gives them status same as that of the man, in the eye of law. The state forbids polygamy. The legal marriage age is now seventeen years. There are no intermarriages or civil marriages in Israel but such marriages contracted abroad are recognized in Israel and are valid. However, in India the law of Marriage and Divorce of Jews is based on *Mosaic and Rabbinic* law and courts of the state have jurisdiction of deal with marital disputes both according to personal law as well as law of equity.

\(^{267}\) AIR 31 1944 Bom 15; Benjamin v. Benjamin, AIR 1926 Bom 169.