Chapter-1

MARRIAGE

1.1 INTRODUCTORY REMARKS

India is only country in the world which permits persons belonging to different religious to follow their own personal laws based on religion. Thus in respect of personal matters like marriage, divorce, succession and maintenance, different personal laws are followed, depending on the religion of the person. This gave rise to different marriage laws, succession laws and divorce laws, applicable to different religions like Hinduism, Islam, Christianity and Parsis.

Marriage is the very foundation of human civilization and civil society. The institution of marriage has been made sanctified and sacrosanct so much so under most of the systems that prevailed sometime or other in the world that it began to be adored and worshipped by their adherents who pushed its objective to the background in course of time. As a result, society in general and women in particular were hard hit. In the late eighteenth century, the French Revolution, the democratic ideas and industrialism came to drive the blow on the base of the very fetish character of this institution. Hereafter people began to raise doubt on the relevance and utility of marriage as an institution. Some sociologists attempted an empirical study to see if an alternative to marriage is at all possible. In this part of the Indian sub-continent four major communities, Hindus, Muslims, Christians and Parsis hold their respective system of marriage. In India, laws on marriage and divorce from part of the personal laws. In respect of these subjects each
community is governed by its own personal laws deriving sanctity from religion. In addition there exists a secular law providing for a civil form of marriage. It is the Special Marriage Act, 1954. This can be availed by the persons domiciled in India regardless of their faith. Besides, any existing religious marriage can be registered under the Special Marriage Act, 1954.

In India, different set of laws and rules are applied in respect of marriage depending on the religion followed and practiced by the individuals. Thus the Hindus are governed by the Hindu Marriage Act, 1955, the Muslims are governed by the tenets of Holy Quran and the Christians are governed by the Christian Marriage Act, 1872 and other laws.

Marriage is one of the most important of all Samaskaras under the Gryha Sutras. According to Apasthamba, “Marriage was meant for doing good deed and for attainment of Moksha”. Among the Hindu the marriage was considered as a sacrament. It was obligatory for every Hindu through which his well conducted life progresses to its appointed end. The rationale behind such sacramental character was to make the spouse physically, psychically and spiritually united. Thus marriage is an association for life here and hereafter, productive of full partnership with temporal and divine rights and duties. In Tikait v. Basant¹ it was held that marriage under Hindu law was a sacrament, an indissoluble union of flesh with flesh, bone with bone to be continued even in the next world. Wife is ardhangini, half of her husband.² It was held that the marriage was the last of ten sacraments enjoined by the

---

¹ ILR 28 Cal. 758
² Satpatha Brahmana v. 16. 10.
Hindu religion purifying the body from inherited taint. Thus marriage is a religious necessity rather than mere physical luxury. A Hindu has to marry for a son who alone can save him from *naraka* (hell) after death. It was also observed by the court that marriage was binding for life because a marriage performed by *saptapadi* before consecrated fire was a religious tie which could never be united.3

Now a relevant question arises whether Hindu marriage continues to be a sacrament even after the Hindu Marriage Act, 1955. Some of the judges are inferring that in the light of the changes effected by the Hindu Marriage Act, 1951 Hindu marriage is no longer a sacrament. For instance, Justice Saharya of the Delhi High Court quotes with approval in *Dhanjit Vadra v. Beena Vadra*4 the observations of a division bench of the Andhra Pradesh High Court:

"Section 13-B radically altered the legal basis of a Hindu marriage by treating it as an ordinary form of contract which competent parties can enter into and put an end to like any other contract by mutual consent."5

In view of the above *shastric* texts and judicial decisions, we can say that the sacramental marriage among Hindus has three main characteristics. First, it is a permanent union. That means, it cannot be dissolved on any ground whatsoever. Secondly, it is an eternal union (*Janma-janmantar bondhari*), extending to series of births. Its implication has been that widows' remarrriages, as a rule, were not recognized in Hindu law.6 Thirdly, it was a holy or sacrosanct union. This implies that such a marriage cannot take place without the

4 AIR 1990 Del. 146 at 151.
6 Paras Dewan, *Modern Hindu Law* (sixth ed.)
performance of sacred rites and ceremony.

It is now clear that the first characteristic of sacramental marriage has been affected by Hindu Marriage Act, 1955, for Hindu marriage can be dissolved on certain grounds specified under Section 13 of the Act. The second characteristic was wiped out with statutory recognition of widow marriage in 1856. 'Probably to some extent the third characteristic' is still retained'.\(^7\) In most of the Hindu marriages, a religious ceremony is still sine qua non. Viewed from this side, one may conclude that Hindu marriage has not remained purely a sacrament and at the same time it has become completely a contract. As Paras Diwan has observed:

> "It has semblance of both. It has a semblance of a contract as consent is of some importance; it has semblance of a sacrament as in most of marriages a sacramental ceremony is still necessary."\(^8\)

### 1.2 HINDU WOMEN AND MARRIAGE

The law relating to Hindu women and marriage can be better understood, if the position before the codification of Hindu laws is made clear.

(a) **Position before the Hindu Marriage Act, 1955**

Prior to 1955, that is before the enactment of the Hindu Marriage Act, 1955, the Hindu Marriage was considered purely to be a sacrament, by all the schools. There were eight forms of marriage among Hindus, out of which four were approved forms and the rest unapproved. The

---


\(^8\) Paras Dewan, Supra note 6.
approved forms of marriage were Brahma, Daiva, Arsha and Prajapathy. The unapproved marriages were Asura, Gandharva, Rakshasa and Paisacha. In due course of time only two forms remained in practice viz 'Brahma' in the approved form and 'Asura' in the unapproved form. In the former type, the women were given as a gift by her father to his son-in-law i.e. the husband of the women. In the latter type, it was considered as a sale by the father to the son-in-law, "Kanya Sulkam" was the consideration for such sale. Another difference was that in a Brahma form of marriage, when the woman died, her property devolved upon the legal heirs of the husband, in the absence of the husband and children. In 'Asura' form of marriage, on the death of the wife, in the absence of her husband & Children, her property devolved upon her parental side. Polygamy was an accepted practice and there was no limit on the number of women, a Hindu man could marry. Widow remarriage was prohibited till the reformers like Raja Rammohan Rai and Kandukuri Veereshalingam made some bold attempts to introduce them. Child marriages were rampant, inspite of sustained efforts by certain reformers.

(b) Position after the Hindu Marriage Act, 1955

The Hindu Marriage Act, 1955 was the first of the codified Hindu laws. The Act does not specifically provide for any form of marriage. It made the marriage more consensual and secular than religious. It no more considers the marriage as a 'Samskara' as considered by Dharma Sastras. The marriage is solemnized as per the customary ceremonies prevalent in the community to which the bride and bride groom belong:

The Hindu Marriage Act has made elaborate provisions as to the conditions for a Hindu marriage, ceremonies, registration, legitimacy of children, nullity of marriage and divorce etc. Even though almost all the provisions are equally applicable to the Hindu husband and wife, a few provisions may be discussed to understand the changed position of the Hindu woman after the Act came into force.

Section 5 of the Act lays down the conditions for a Valid Hindu Marriage. They are: i) Monogamy, ii) Sound mind, iii) a minimum age of 18 years for the girl (bride) and 21 years for the boy (bridegroom), iv) The parties are not within prohibited degrees of relationship, and v) The parties are not Sapindas to each other.

The last two conditions may be waived if there is a custom or usage governing each of the parties to the marriage permitting the same.

The Hindu Marriage Act, 1955 introduced radical changes in the marriage laws of Hindus. Section 5 has the effect of abolishing the prohibition on widow remarriage, child marriage and polygamy in one stroke. The woman stands on the same footing as the man in all these matters.

Before 1978, Section 6 of the Act provided that the consent of
Guardian was necessary for a bride, if she was below the age of 18 years i.e. minor. However the Child Marriage Restraint (Amendment) Act of 1978 deleted this section in view of the fact that the age of the bride should be at least 18 years at the time of marriage. Therefore when the bride has already completed 18 years of age, the question of consent of guardian would not arise as she would be a major.

A package of mutual rights and responsibilities emanates from marriage. Consortium is one of such important rights. In case one of the parties to marriage refuses to discharge his or her marital duties, the prejudiced has the right to get them enforced by resorting to the court of law.

Section 9 of the Hindu Marriage Act, 1955.

When either the husband or the wife has, without reasonable excuse, withdrawn from society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statement made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation- where a question arises whether there has been reasonable excuse for withdrawal from the society the burden of proving reasonable excuses shall be on the person who has withdrawn from the society.

The remedy for restitution of conjugal rights has been incorporated under Section 9 of the Hindu Marriage Act, 1955. Accordingly either spouse under the Act can claim the remedy by way of a petition to the
court. The aggrieved spouse has to prove that the other spouse has without reasonable cause withdrawn from the society of the petitioner. If the court is satisfied to the effect that the statements averred in the petition are true and no other legal ground exists to ignore the petitioner, it may pass the decree for restitution in favour of the petitioning spouse. This apart, under Section 9(2), the proper defences to assail the petition are laid down.\(^9\)

Restitution of Conjugal Right is a right available to both the spouses i.e. wife and Husband equally. This provision has been challenged as unconstitutional and as violative of Article 14 and 21 of the Constitution in *Sarita v. Venkatasubbaiah*.\(^10\) Justice P.A. Chowdhary of the A.P. High Court expressed the view that Section 9 of the Act offends Articles 14 and 21. The learned judge held that the effect of decree of restitution of conjugal rights is to coerce the unwilling party to have sex against that person's consent and free will thus allowing one's body to be used as a vehicle for another human being's creation. Section 9 was held to violate the right to privacy of the individual also.

However the Supreme Court overruled the above decision of the A.P. High Court recently in the case of *Saroj Rani v. Sudarshan* by holding that in the privacy of home and married life, neither Article 21 nor Article 14 has any place. It may be mentioned in this context that this remedy has been abolished in England by Section 20 of the Matrimonial Proceedings Act, 1970. However in India Section 9 affords a remedy to the aggrieved wife against the husband deserting her without any reasonable cause. If the court passes a decree in her

\(^9\) For details, Section 9(2), Hindu Marriage Act, 1955
\(^10\) AIR 1983 A.P. 356.
favour it can be executed as per the procedure contained in Civil Procedure Code.

Section 10 of the Hindu Marriage Act, 1955 declares the right of either spouse to a marriage for obtaining Judicial separation. This provision is a statutory recognition of the right to Judicial separation among Hindu spouses.

Section 10 of the Hindu Marriage Act, 1955 which contains the provisions runs as follows:

1. Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.

2. Where a decree for judicial separation has been passed it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petitions rescind the decree if it considers it just and reasonable to do so,

Section 10 of the Hindu Marriage Act, 1955 incorporates various grounds on which the remedy can be availed by the Hindu wives. It mentions the outcome of the decree and that such a decree can be rescinded by the court at the instance of either to the decree, if the
court feels satisfied to do so.

Under the new Hindu Marriage Act, judicial separation has been given a retrospective effect and the remedy was made available to either spouse. A petition for judicial separation by wife can succeed on any of the grounds mentioned in sub-section (1) and (2) of Section 13, while the husband can avail only those grounds incorporated in sub-section (1).

Besides Section 10 of the Hindu Marriage Act, 1955 Section 18 of the Hindu Adoptions and Maintenance Act, 1956 also entitles the Hindu wife to separate maintenance The grounds for maintenance under Section 18 of the Hindu Adoption and Maintenance Act are the same as have now been made available by the amendment of 1976 for judicial separation such as existence of another wife, his keeping a concubine, his conversion to another religion and any other cause which may justify his separate living.

While the scope for judicial separation under Hindu Marriage Act, 1955 has been kept limited, that of Section 18 of the Hindu Adoption and Maintenance Act has been a little too much. The latter extends to the Hindu wife the right to live separately on any justifiable ground. It has been observed that impact of this Act on the earlier enactment has been profound. It was held by the Punjab High Court that the measures taken by the legislature had laid down a new foundation of equality of husband and wife. However, inspite of the Hindu Marriage Act, the Hindu married women's position could not be emancipated. Therefore, the Indian Parliament has passed the Hindu Marriage Amendment Act,

1976, by virtue of which the provisions of divorce has been liberalized 'Now we have to wait and see how far these changes will help the Hindu women. ... Merely introducing changes by way of legislation will not improve the status of Hindu women. If we want to change the condition of woman there must be social change to improve their status.\(^{12}\)

A few relevant judicial pronouncements are referred below in order to assess the recent trends:

**Ishwar Kanta v. Om Parkash\(^{13}\)**

The appellant, Smt. Ishwar Kanta, was married to the respondent on April 13, 1976. A son was born to the couple on September 9, 1977. On September 29, 1981, the respondent husband filed a petition under Section 13 of the Hindu Marriage Act, 1955, alleging that the wife was guilty of cruelty and desertion for a period of more than two years immediately prior to the filing of the petition. He further alleged that she was suffering from schizophrenia of such a kind that it was not safe for him to stay with her. The learned trial court judge found that the present appellant was guilty of cruelty and desertion. Accordingly, on July 21, 1982 the learned trial court judge passed a decree for judicial separation. The appellant approached the High Court in an appeal which has been dismissed by the learned Single Judge. Aggrieved, the appellant has filed the present Letters Patent Appeal.

Another fact which deserves mention is that on March 13, 1982 the appellant filed a petition under Section 9 of the Act for restitution of

---

\(^{12}\) M.A. Qureshi, *marriage and Matrimonial Remedies*, (1978)

\(^{13}\) I(1994) DMC 39 (DB) P&H High Court.
conjugal rights. This petition was not contested by the respondent-husband. As a result an *ex parte* decree for restitution of conjugal rights was passed against him on May 28, 1982.

Upon this, the court held that it was the admitted position that the parties have not stayed altogether since July 7, 1979. Furthermore, it is also apparent that in spite of having obtained an *ex parte* decree for restitution of conjugal rights, the appellant had refused to stay with her husband. As such, it is clear that the marriage has irretrievably broken. Accordingly, the appeal was dismissed.

**Soururia Sanjey Karkhanis v. Sanjay Surendra Karkhatis**¹⁴

“It will be necessary to state at the outset that both the parties are well educated and employed. The husband first filed the petition seeking decree of divorce alleging cruelty on the part of the wife. He sought decree under Section 13(1) (ia) of the Hindu Marriage Act. The said petition was bearing No. 371 of 1989 and was filed on 1-2-1988. The husband filed another petition for decree of divorce on the ground of desertion i.e. Section 13 (1) (ib) of the Hindu Marriage Act. The said petition bearing no. 1185 of 1989 was filed on 21.8.89. In the said petition, the husband alleged, that the wife has left the matrimonial house without his consent on 2.5.87 and she does not intend and was not prepared to come back to the matrimonial house as she was interested only in service. Two years have passed prior to the filing of the petition she was staying separately and therefore he was entitled to get the said decree.”

The petition filed by the husband seeking divorce on the ground of cruelty came to be dismissed in which it was held that the husband had failed to establish those allegations. Thus petition seeking decree of divorce on the ground of desertion came to be allowed partly and

---

¹⁴ I(1994) DMC 100 (DB) Bombay High Court
instead of decree of divorce, the learned Judge granted the decree for judicial separation by exercising under Section 13-A of the Hindu Marriage Act.

_Sudeskna Kar v. Dr. Abhijit Kar_15

“In this case the wife was living separately and there was no genuine attempt on the part of the husband to bring back his wife to matrimonial home. It was held that the wife having good reason for leaving her matrimonial home specially in view of the fact that her fine sentiments and susceptibilities as educated and cultured lady was mortally wounded by the acts of her husband’s parents and specially the mother-in-law and in the absence of accompanying intention to bring cohabitation permanently to an end the cruelty, as alleged, cannot be said to have been proved. There is no sufficient material on record to hold that the wife misbehaved or quarreled with her husband or member of his family. Those allegations have not also been proved”.

The court in this case was hesitant to grant a decree for divorce on the ground of irretrievably break down of marriage as the party seeking divorce failed to prove those grounds strictly. The court instead granted judicial separation.

On the question of custody of the minor child the court held at the same time that for the proper welfare and the education of the child, the child should be allowed to stay with her mother. The husband holds a transferable job and as such it will not be beneficial for the child to stay with his father, that is, petitioner.

_Hilda Basant Lal v. Lt. Col. Basant Lal_16

---

15 I(1995) DMC 401 (DB) Calcutta High Court
16 I(1994) DMC 185 Delhi High Court
In the petition under Sections 22 and 23 of the Indian Divorce Act, the petitioner (wife) has prayed for judicial separation and also for grant of permanent alimony under Section 37 of the Act to the extent of Rs.60 lakhs which would be about half of the respondent's income. Along with the petition under Sections 22 and 23 of the said Act, the petitioner has also filed the present application under Sections 27 and 28 of the Act seeking restraint order against the respondent husband from selling, renting out or alienating in matter of the property No. X-37, Green Park, New Delhi. On 01-10-1992 when the matrimonial reference and the present application came up for preliminary hearing, this court passed the following order:

“In the meanwhile, the respondent is restrained from alienating or transferring in any manner property bearing No. X-37 Green Park, New Delhi. The respondent will also not interfere in the use and occupation of the said property by the petitioner”.

Smt. K. Vinayamani v. K. Subramanyam

"This is an appeal filed by the wife challenging the order of the second Additional Judge, City Civil Court, Hyderabad dissolving the marriage between the parties by granting a decree of divorce. The husband filed an application under Section 13(1-A) (i) of the Hindu Marriage Act, 1955 seeking dissolution of marriage between the parties by a decree of divorce. He stated in his application that marriage between the parties was solemnized according to the Hindu Custom on 09-08-1974 and the same was consummated immediately. Later on a son was born during the wedlock on 22-7-1975 who was aged 7 years by the time of

17 II (1995) DMC 320 (DB) A.P. High Court
the filing of application. The husband alleged that the wife deserted and living away from him in her parents' house. According to him ever since 1977 she never returned to the house. The wife herself filed O.P. 25/86 on the file of the said court seeking judicial separation on the ground of desertion by the husband. In the said proceeding the husband remained *ex parte* and did not contest it with a view that better sense would prevail on her and on her parents and also for facilitating reconciliation between the parties. In the said O.P.25/86 a decree for judicial separation was passed in favour of the wife on 25-4-1986. Alleging that there was no resumption of cohabitation or reconciliation after the passing of the decree for judicial separation on 25-4-1986 the said application has been filed. The husband also referred to the fact that far from any reconciliation between the parties, the wife filed suit O.S. No. 1177 of 1986 on the file of the Second Additional Judge, City Civil Court, Hyderabad, against him for her maintenance and maintenance of her minor son. The filing of the suit indicates that there was no possibility of the parties coming together and leading a marital life and, therefore, the application was filed stating that the statutorily required period has elapsed and that he is entitled to a decree for divorce.

Held: When once a decree for judicial separation was passed under Section 10 either party to a marriage can present a petition for dissolution of marriage by a decree of divorce on the ground that there has been no resumption of cohabitation between the parties to the marriage for a period of two years or upwards after the passing of a decree for judicial separation. Therefore, a plain reading on the section indicates that either party to the marriage, irrespective of the fact as to
who is the successful party in the earlier application for judicial separation, can approach the court under Section 13(1-A) for a decree of divorce on the ground that there was no resumption of cohabitation between the parties to the marriage for a period of two years or upwards after the passing of the decree for judicial separation. The section does not say that a successful party in the earlier proceeding for judicial separation alone is entitled to file the application under Section 13(1-A). This is clear indication of legislative intendment even though a person suffers a decree for judicial separation, yet that party also can approach the court under Section 13(1-A) seeking a decree for divorce. It is also well settled that a decree passed for judicial separation or for restitution of conjugal rights etc. against a party cannot be treated as "wrong" or "disability" within the meaning of Section 23 (l)(a) of the Act as against the said party. It is also well-settled that Section 13(1-A) is subject to Section 23(l)(a) of the Act."

And, therefore, the appeal was dismissed:

The case study in the preceding pages shows that the courts are gradually freeing themselves from the snare of male obsession. The interests of wife and welfare of children are receiving ardent attention of the courts. This is surely a firm and positive step towards achievement of woman's higher status in the society where gender justice was a dream and women were used to receiving the bottom rock priority down the ages.

The Supreme Court has explained the consequences of Judicial separation in *Jeet Singh v. State of UP*.\(^\text{18}\) The Judicial sanction of

\(^{18}\) *Jeet Singh v. State of UP* (1993) 1 SCC 325
separation creates many rights and obligations. A decree or an order for Judicial separation permits the parties to live apart. There would be no obligation for either party to cohabit with the other. Mutual rights and obligations arising out of a marriage are suspended. The decree however, does not sever or dissolve the marriage. It affords an opportunity for reconciliation and adjustment. Though Judicial separation after a certain period may become a ground for divorce, it is not necessary and the parties are not bound to have recourse to that remedy and the parties can live separately keeping their status of wife and husband till their lifetime.

The grounds for Judicial separation for both the husband and wife are the same as the grounds for divorce contained in Section 13 (1) of the Act. They are Adultery, cruelty, desertion, conversion, unsound mind, veneral diseases, incurable leprosy, renunciation of the world, presumptipn of death and failure to comply with a decree of restitution of conjugal rights etc. All these grounds are available equally to the husband and wife.

Apart from the grounds aforementioned, a Hindu wife may invoke any of the following grounds exclusively available to her. viz.,

(a) Remarriage by Husband

(b) Husband found guilty of rape sodomy or bestiality

(c) Non-resumption of co-habitation inspite of a decree for aintenance of wife and

(d) option of puberty i.e. at the option of the wife if her marriage was performed before her 15 years of age and she repudiates the
marriage after attaining the age of 15 years but before the reaches 18 years of age.

These special grounds have been provided for Hindu wife exclusively by the Marriage Laws (Amendment) Act, 1976 which amended Section 10 and 13 of the Act. The object of this provision is mainly to give time to the spouses for rapprochement and reconciliation. Thus a wife can proceed against the husband on more special grounds than are available to both the spouses. This provision no doubt places the Hindu wife on a better pedestal compared to the Muslim and Christian wives.

The belief of the ancient Hindu clergymen in an absolute indissolubility of marital role of tyaga, might have been based on a misreading of the holy Dharma shastras. For this reason and for adapting the law to the demands of time, it could have been inevitable for the reformers of Hindu law to open up the doors of divorce. So the divorce was first legalized by customs here and there and then locally by regional laws and or the whole country by parliamentary legislation. Thus the Hindu Marriage Act, 1955 was the first central enactment which revolutionized the matrimonial reliefs under various circumstances. Divorce, therefore, could be obtained by either party on grounds of adulterous life, conversion, incurable unsoundness of mind, virulent and incurable leprosy, communicable venereal disease and renunciation of the world by entering any religious order, of the other party. A petition for divorce could also be made if the respondent had not been heard of as being alive for a period of seven years or more by

---

19 In Bombay, Madras, Saurashtra, UP, Baroda and Mysore.
20 Tahir Mahmood, Personal Law in Crisis, New Delhi (1986).
those persons who would naturally have heard of it had he or she been alive. Besides these, non-resumption of cohabitation after a decree of judicial separation and failure to comply with a decree of restitution of conjugal rights, for a period of two years (which has been reduced to one year by the amendment of 1976) or upwards also gave a right to the decree holder to apply for a divorce. Apart from these grounds, which were available both to the husband as well as to the wife, the wife was given additional grounds to present a petition for the dissolution of her marriage. These grounds were: pre-Act bigamous marriage of the husband (provided the other wife was alive at the time of the petition) and acts of sodomy, rape or bestiality on the part of the husband. [The Marriage Laws (Amendment) Act, 1976 has added two more grounds to this.] Thus, we see that the grounds available for divorce were predominantly based on fault of the other party whether it was voluntary, accidental or natural. The presence of break down grounds, however, could not be wholly denied. For instance, divorce on the ground that the other party had not been heard of as being alive for seven years or more showed an element of break down rather than fault of any party. Moreover, within a decade of passing of the Hindu marriage Act, 1955, amendments started trickling in thereby making divorce more easy and liberal. Mention may be made of an Amendment made in 1964 to section 13(1) of the Act.

Thus the result was that whereas before 1964 only the decree holder could apply for a divorce on the ground of non-resumption of cohabitation for a period of two years or more after obtaining a decree of judicial separation or restitution of conjugal rights, after the Amendment of 1964 even the party against whom the decree was made
could apply for divorce. The idea behind this amendment was to end stalemate, since, quite, often a party might simply keep quiet after obtaining a decree. He or she might choose to neither comply with the decree nor obtain a divorce. Thus, the other spouse was faced with a difficult situation, he had no *locus standi* to apply for divorce and obtain freedom.

A perusal of the statement of objects and reasons\(^{21}\) would show that a deliberate beginning, though in a limited way, was made in 1964 towards the introduction of break down theory of divorce. The basis of such ground, however, still rested on faults.

A further step towards the recognition of the principle of break down as a ground for divorce and further liberalization of the divorce law was taken up in 1976 when divorce by mutual consent was inserted into the Hindu Marriage Act.

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

The Law Commission at last in its seventy-first Report has recommended the introduction of matrimonial break down as a ground for divorce. Accordingly it has suggested that a separation of three years with no hopes of reconciliation should be as a proof of the break

down and hence a decree of divorce should be available on this ground.\textsuperscript{22}

The Commission recommends some safeguards regarding the welfare of children, wherein it suggests that unless the court is satisfied that adequate provision for maintenance of children has been made which is consistent with financial capacity of the parties, it should not give a decree of divorce.

Yet another recommendation by the Commission is that where the wife is the respondent and there is an irretrievable break down of the marriage, the court should still have the discretion to refuse a decree if they feel that it will cause grave financial hardship to the respondent, and that in all the circumstances it would be wrong to dissolve the marriage.

It is submitted that social justice and public interest demand that irretrievable break down of marriage be a ground for divorce.

Section 13 of the Act provides several grounds for obtaining divorce by either party to the marriage whether solemnised before or after the commencement of the Act. Unless there is a custom in vogue, no divorce can be obtained by a Hindu couple without approaching a court of law.

The grounds common to both the Husband and wife are mentioned in Section 13 (1). They are

(a) other spouse living in adultery

(b) cruelty of the other spouse  
(c) desertion by the other spouse  
(d) conversion by the other spouse to other religion  
(e) unsound mind of the other spouse  
(f) virulent and incurable form of leprosy to other spouse  
(g) other spouse suffering from venereal diseases  
(h) renunciation of the world by the other spouse and  
(i) presumption of death of the other spouse.  

To these grounds, two more grounds common to both the husband and wife were added by an amendment made in 1964,²³ in the form of Section 13 (1-A). They are:  

(i) non-resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation and  

(ii) no restitution of conjugal rights as between the parties for a period of one year upwards, after passing of decree for restitution of conjugal rights. These grounds could be invoked by either the Husband or the wife for the purpose of obtaining divorce.  

There are four grounds mentioned in Section 13 (2) which are available only to a wife, for the purpose of obtaining divorce. These last two grounds were added by the Marriage Laws (Amendment) Act, 1976 (68 of 1976). Even though these grounds were added in 1976, they can be availed by a wife whether her marriage was solemnized

²³ Inserted by Act 44 of 1964, Section 2.
before or after 1976. These grounds are.

In the case of any marriage solemnized before the commencement of the Act, if the husband had married again before such commencement or if such other wife was alive at the time of marriage of the petitioner, it would be an exclusive ground for the petition of such divorce. Obviously the right to apply for divorce is available only to the first wife.

Thus, in the case of a petition for divorce by the first wife on the ground that her husband had married a second wife, the fact that the husband divorced his second wife after filing the petition, is no ground to disentitle the first wife for the relief.24

This provision enables the wife to obtain divorce where the husband has since the solemnization of the marriage been guilty of rape, sodomy or bestiality as understood under Section 375 and 377 of the, Indian Penal Code, 1860.

Where a wife obtains a decree or order for maintenance either under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 or under Section 125 of Cr. P.C., 1973 and if cohabitation between the parties had not been resumed for one year or upwards after the decree, she can invoke that non-resumption of cohabitation as a ground for obtaining divorce.

Where a Hindu girl's marriage was solemnized before she attains the age of 15 years and she repudiates the marriage after 15 years but before attaining 18 years, she can apply for divorce whether the

marriage is consummated or not. In this context, the repudiation must be a valid repudiation. However certain authors are doubtful whether any repudiation of marriage done by a wife below the age of 18 years is valid because it amounts to repudiation by minor.\(^{25}\)

It may be seen that similar right is given to a Muslim wife married during her minority in the form of "Khyar-ul-Bulugh" (option of Puberty).

Section 13-B of the Act, added by Act 78 of 1976 provides for divorce by mutual consent. Thus when there total break-down of the matrimonial relationship and the spouses are living separately for a period of one, year or more on the mutual agreement between the parties, divorce can be obtained from a court of law.

This provision is a progressive law as it treats the Hindu wife or equal footing with the Hindu husband.

The Act makes no provision that bars the remarriage by a divorced wife or husband, provided the divorce becomes final (Section 15). It does not attach any stigma to a Hindu woman divorcee and she is free to contract a fresh marriage.

According to Section 23-A of the Act,\(^{26}\) any proceeding for divorce or judicial separation or restitution of conjugal rights may not only oppose the relief sought by the petitioner but the respondent may also make a counter claim on the grounds of petitioner's adultery, cruelty or desertion. This provision appears to be an effort to avoid filing of two petitions by the two spouses.

\(^{25}\) See Mayne's Hindu Law and Usage (13\textsuperscript{th} Ed.) p. 255.

\(^{26}\) Added by Section 17 of the Marriage Laws (Amendment) Act, 1976.
In any proceedings under the Act like the petition for restitution of conjugal rights, judicial separation or divorce where the respondent spouse has no independent income, sufficient for self support and also for paying the necessary expenses, the other spouse may be directed by the court to provide maintenance and legal expenses. The quantum of maintenance depends on the petitioner's own income and that of the respondent. This provision helps the spouse in financial distress to face the legal proceedings initiated by the other spouse. This provision is, only temporary and lasts till the disposal of the legal proceedings. However the maintenance awarded to a wife under Section 24 of the Act is independent and different from the proceedings under Section 125 Cr. P.C. which is a secular and social welfare provision applicable to all the religions.

The Indian Divorce Act 1869, The Parsi Marriage and Divorce Act 1936 and the Special Marriage Act 1954, provide for permanent alimony and maintenance in favour of the spouses. Section 25 of the Act makes a similar provision. Under this provision the court is empowered to grant permanent maintenance to either spouse, at the time of passing the decree or any time thereafter at the instance of a spouse who is not able to maintain himself or herself.

However, if the petition of the husband filed under the provisions of Section 9 to 14 of the Hindu Marriage Act, for a decree of restitution of conjugal rights, judicial separation for divorce is dismissed, no alimony can be granted to the wife under Section 25 of the Hindu Marriage Act. However maintenance can be claimed by her under Section 18(1) of the Hindu Adoptions and Maintenance Act or under
Section 125 Cr.PC.\textsuperscript{27}

The award and quantum of maintenance depends on the conduct and status of the party seeking such relief. This provision is a boost to the Hindu wife who is in financial distress and not able to maintain herself during the legal proceedings.

A Hindu wife whether living with the husband or not, whether divorced or not is equally entitled to the custody of her minor children, of course subject to the satisfaction of the court by virtue of Section 26 of the Act. Even though there are no certain guidelines as to the right to custody of the minor children, the courts held that the custody of a child below 5 years of age shall be with the mother unless special circumstances injurious to the child's interest are shown.\textsuperscript{28} Similarly the court may not be influenced by the fact of re-marriage of the mother.\textsuperscript{29}

Thus it could be seen that in relation to the marriage and other related aspects, the Hindu Marriage Act, 1955 has introduced radical and progressive changes which go a long way in rendering gender justice. They also provide certain special rights and privileges to the Hindu woman apart from conferring equal rights on par with the Hindu men.

Apart from trying to abolish certain unequal and evil practices like polygamy, child marriage, sati and restriction on widow remarriage etc., the Modern Hindu Law has also not barred any inter-caste marriages. Thus as long as both the parties are Hindus they can get married under the provisions of the Act of 1955 irrespective of their

\textsuperscript{27} Chand Dhawan v. Jawaharlal Dhawan, (1993) 3 SCC 406

caste.

1.3 MUSLIM WOMEN AND MARRIAGE

Islam does not distinguish between the two halves of the sphere of humanity. In order to affect perfect male-female equilibrium in the human society, the Quran speaks in numerous verses of women especially. It even promulgates a special chapter under the title "The Woman" (Surah-al-Nisa), major parts of Surah-al-Nisa deal with women and the family. Scattered over many chapters of the Quran also are special exhortations, precepts and commands concerning all stages of female life – childhood, marital life and old age.

In *Abdul Qadir v. Salima*\(^{30}\) the court had to make a number of observations of which the nature of Muslim marriage received pre-eminence. Mr. Justice Mahmood, referring to *Munshi Buzlur Kuheem v. Shamsoonnisa*\(^{31}\) (1867) decided by Privy Council, drawing inspiration from the Tagore Law Lecture\(^{32}\) by Sarkar, and basing his support from Hamilton's Translation of Hedaya observed that 'Marriage among Muhammadans is not a sacrament, but purely a civil contract, \(^{33}\), with *ejab-o-kabool* as 'declaration and consent, both expressed in *preterit*,\(^{34}\) and dower partaking of consideration for the connubial intercourse\(^{35}\) in gross disregard of the religious aspect of marriage, although its social aspect has not been lost sight of by him when he mentions that 'it was also instituted for the solace of life, one

\(^{30}\) (1886) 8 All 149
\(^{31}\) (1867) 11 MIA 551, 615.
\(^{33}\) Baillie
\(^{34}\) Hamilton, *Hedaya*
\(^{35}\) *Abdul Qadir v. Salima* (1867) 11 MIA 551, 615
of the prime or original necessities of man. Mahmood, J., also set up an analogy of sale of goods with wife married to her Muslim husband in a limited sense.

Subsequently, the 'purely civil contract' doctrine of Justice Mahmood came under fire in the writings of Ameer Ali, J., Abdur Rahim, J., and particularly in the judgment of Sir Sulaiman, J., of the same Allahabad High Court in context of Ants Begum v. Tefa. In his poignant observation, the Justice criticized the doctrine in the following terms:

"The line of reasoning based on the analogy of sale has naturally been very severely criticized at pages 148 and 149 in Wajid Ali Khan's case by the Oudh Bench, and so also by Mr. Ameer Ali in his Mohommadan Law, vol. II, pages 459 and 460. No doubt, the Muslim commentators have, by way of illustration, applied certain principles governing a contract of sale of goods to contract of marriage, but that was by way of analogy only. The similarity cannot be pushed too far, nor can be principles governing the sale of goods applied in all their details. Indeed, if one were to pursue the analogy far enough there would be a reductio ad absurdium. The contract of the sale of goods can be cancelled if a portion of the price has not been paid. Even if the goods have been once delivered they may in such event be returned. But if the consummation of marriage has taken place and the part of the dower remains unpaid, it would be absurd to suppose that the marriage could be cancelled by the wife at her will."

He went on observing that:

"It may not be out of place to mention here that Maulvi Samiullah collected some authorities showing that marriage is not regarded as a mere civil contract, but as a religious sacrament."

36 Ibid.
37 Ibid
38 Anis Begum v. Muhammad Istafa (1933) 55 All 743, 756.
The deprecation by Chief Justice Sulaiman for equating marriage with mercantile transaction and his protestation in strongest terms despite, the courts in India have till date been possessed with the 'Civil Contract' doctrine formulated by Justice Mahmood. In effect, it changed the very basis of determining legal principles in the whole gamut of Islamic matrimonial relation,\(^\text{39}\) erroneously justifying the application of the Transfer of Property Act, Indian Contract Act, Sale of Goods. Act. the Registration Act, Specific Relief Act, so on and so forth, supplanting the relevant Islamic legal principles in its place.\(^\text{40}\) To illustrate the point, a decision relating to dower by Mr. Justice Mitra of Calcutta High Court may be drawn to attention. On the face of the argument that dower being incidental to marriage under Muslim law and hence, calling for treatment of Muslim personal law he was of the view that:

"The marriage under Mohammadan Law is a Civil Contract of sale. Sale is a transfer of property for a price in contract of marriage; the wife is the property and dower is price."\(^\text{41}\)

Hereupon, he upheld the application of the British law palpably in defiance of objective assessment of the problem.

Marriage under Islamic law is neither a 'Samaskara' (purificatory ceremony) as in the classical Hindu law, nor a sacrament in its pristine form as among Roman Catholics.\(^\text{42}\) It is far from the modern notion of 'non-marital cohabitation' and 'one-parent family' of the West.\(^\text{43}\) Under

\(^{39}\) Dr. M. Shabbir, Muslim Personal Law and Judiciary (1988) 14.
\(^{40}\) Ibid.
\(^{43}\) Tahir Mahmood, Personal Law in Islamic Countries (1987) 268.
Islamic law, marriage is an over-emphasized and strongly enjoined Sunnah of the Holy Prophet to be whole-heartedly and universally exercisable by the generality of his following. The Qur'anic projection of matrimonial concept is a sacred covenant, a solemn pact, *Mithaq-i-ghalid* with a pious purpose of raising a blissful family life, and having off springs in their trail. Looked at superficially, it seemingly assumes the form of ordinary contract. But an in-depth and penetrating probe bursts forth its true nature in the reflection of a highly imaginative researcher:

"However it is palpably wrong to say that in Islam marriage is nothing but a civil contract. In fact marriage in Islam is contractual only at the formative stage. Once a marriage is solemnized, it is much more than, and much different from a civil contract. Islam does not require a ceremonial solemnization of marriage. An intended marriage is to be proposed by or on behalf of one of the parties. This is *ijab*— the proposal. It is then to be accepted by or on behalf of the other party. This is *qubul*— acceptance. *Ijab* and *qubul*, when made in the legally prescribed manner, results into a binding marriage—a relationship of sacred partnership between the husband and wife, which the Qur'an calls a sacred covenant and a "protective fortress." To the strict legal requirements of *ijab* and *qubul* and some procedural requirements, e.g., presence of witnesses, the Muslim society has added the extra-legal practice of recitation of the *khutba-e-nikah* (marriage sermon) and the finale of *du'a-e-khayr* (praying for the couple). These are superfluous so far as the legal theory is concerned, but have great social significance and add an aroma of solemnity to the occasion and to the newly created relationship between the two individuals and their families.

---

44 The Holy Qur’an IV: 21
45 AA Mandudi, Huquq Al-Zawjayn (6th ed. 1968, Delhi)
Most certainly, thus, marriage in Islam is much more than a “contract for production of children”. The contractual element in marriage is, in fact, introduced by Islam exclusively for the benefit of the parties so that they may enter into a life-partnership, as far as permissible by Shanaat on their own mutually agreed terms and conditions. This element is aimed at giving greater freedom to the parties in respect of the style of their life and thus strengthens the marriage bond in its own way. In no way does it detract from the sanctity of the marriage. If properly used, it is in fact a great boon for the parties to an intended marriage.46

As quality of civilization and cultural consciousness of men enhances, man's relationship with outside world registers a movement from status to contract.47 Muslim law relating to marriage testifies this development with transition of the world from Ahme-jahilia (the Dark Age) to the age of enlightenment. (Early 5eventh century A.D. which almost provides a water-shed in the World History coincides with revelation of the Holy Qur’an). On objective analysis, it is not strictly a contract in the commercial sense of the term. It carries with it the major essentials and appellation of a contract. On intensive appreciation, it brings out itself to be a covenant. Offer, acceptance, mahr, consent of the parties, presence of witnesses, reasonable interference of the guardian, legal consequences etc.— all by way of formation of a contract—present the best form and modalities of marriage solemnization that a civilized society can contemplate of. Needless to say the Arabian society with advent of Prophet displayed all principal characteristics and vital potentialities of a great civilized48

47 Anson’s, Law of Contract.
48 For details, P.K. Hitti, History of Arabs; MN Roy, Historical role of Islam; Mohammad Qutb, Islam the Misunderstood Religion.
society, particularly considered from the contributions made and the basic socio-economic infrastructural network it laid for the emancipation of slave and women who constitute a major segment of the population. The form of marriage incidentally touches certain element of contract of commercial nature. However, the analogy, as we have seen, is by no means conclusive. Justice Mahmood with all respects to his eminent person, did not apply his mind independently while pointing out its nature. He heavily banked on the observation made in the illustrious Tagore law Lecture (1873). However to substantiate his point Justice Mahmood desperately fell back upon Hamilton's Translation of the Hidayat to project ‘ejab-o-kabul’ as a qualifying element for marriage solemnization to reach out for the level of contract. Sarkar, the author of the Lecture, whose mind was consciously or unconsciously directed to the pre-Islamic Arab women on the pages of history, was allured to develop the idea as Women in that era were often subject to sale during their conjugal alliance.\textsuperscript{49} From Mahmood J., the doctrine found its way into the later judicial decisions by the Indian courts that were ceaselessly haunted by the ghost let loose by the former. The triumph continued despite cautions pronounced by Amer All, Abdur Rahim, Sir Sulaiman JJ. and the like whose pre-eminence in Indian Judiciary was no less than Justice Mahmood's. Thus basic tenets of Islamic matrimonial jurisprudence were pushed to the background giving rise to a distorted concept in man-woman equation in matrimony. It left a disastrous impact on Muslim wives who came to be meted out a bottom-rock priority in the scheme of distribution of Justice in course of their continued degenerating process. Thus it is submitted with due respect that the

\textsuperscript{49} Abdur Rahim, \textit{Muhammedan Jurisprudence}. 
Indian Judiciary cannot disown the share of responsibility in the downward trends of women's status in this part of the hemisphere. The relegation of matrimonial concept from the altruistic 'Sacred Covenant' to a temporal 'civil contract' has undone a lot so far as spiritual and social values are concerned. Sociological experience has revealed that irregular and random secularization within a religion-oriented society promotes process of dehumanization. Such attitude has evermore encouraged the whimsical Muslim husband to abruptly dismiss his wife without any rhyme and reason or on any pretext. It is unfortunate that multitude of Qur'anic verses seeking elevation of woman's status escaped the notice of the judicial intelligentsia. Instead, woman, to their estimation, has grotesquely emerged as an object of sale. And, therefore, it will not be surprising, if, to the unscrupulous Muslim husband, the reminder served by the Prophet in his Farewell Address goes unheeded:

'People! your wives have certain rights over you and you have certain rights over them. ... Do treat your women well and be kind to them, for they are your partners and committed helpers. Remember that you have taken them as your wives and enjoyed their flesh only under God's trust and with his permission.'

Therefore, it may be observed that marriage (nikah) among the Muslims is a "solemn pact" (………………..) between man and a woman, soliciting each other's life-companionship, which in law takes the form of a contract (aqd).

---

50 Regulation IV of 1793 saved the application of the Muslim Personal Law. However a purely civil contract doctrine in Abdul Qadir v. Salima brought about a sweeping change in the dispensation of legal culture of India. Regulation IV of 1V o read, Inter alia, as follows:

In suits regarding succession, inheritance, marriage, caste and all religious institutions, the Mohammadan law with respect to Mohammadans — as the general rules by which die judges are to form their decisions" (Sec. 15).

51 Haykal, The Life of Muammad, 486-87 (1976)
There is a popular misconception that no religious significance or social solemnity is attached to a Muslim marriage which is a “mere civil contract”. However, on examination, it reveals that although it is not a sacrament in the sense that the Hindus take their marriage, Muslim marriage (nikah) is strictly a sunnah of the highest order enjoined by the Prophet himself. Even the Qur'an does not deem the marriage as an ordinary contract. In fact, it is only the form of Muslim marriage that is contractual and non-ceremonial; marriage, as a concept, is not merely a contract. Rather it is ebadat (service to God) and muamlat (social dealings).\textsuperscript{52}

Muslim marriage is regarded as a contract between a Muslim man and woman which has for its object procreation and legitimization of children.\textsuperscript{53} Once a marriage comes into existence, it is treated with all the essential attributes of a sacred covenant (mithag-i-ghalid). The contractual element attaches to it only at the formative stage; and there it is§ meant for the mutual benefit Office parties. A man and woman intending to become life partners can, at the very inception mutually, settle down their own terms for the entire duration of the intended partnership and in respect of all its aspects and phases. Perhaps the confusion about the Muslim marriage is compounded by the absence of a codified law in that regard and the varying practices followed by various schools.

Marriage of every Muslim, whether male or female, is permissible in law provided the following conditions are satisfied.

\textsuperscript{52} Tahir Mahmood, Muslim Law of India (1980), also Abdur Rahim, The Principles of Muhammadan Jurisprudence, Lahore (1958).

\textsuperscript{53} D.R. Mulla, Principles of Mohammedan Law, Section 20 (Bombay, 18th Ed. 1977).
(a) Sound mind and
(b) Puberty (bulugh).

As regards puberty, it is to be understood as a physical phenomenon to be ascertained by evidence and in the absence of evidence to the contrary, it is generally presumed that a person who has completed the fifteenth year of age, has attained puberty. Text book writers maintain that the earliest age of puberty for a boy is, generally twelve years and for a girl it is nine years. Thus even a minor Muslim girl also can marry if the consent of a "marriage-guardian" is obtained for that purpose.

As regards those persons (both male and female) who are neither minors nor insane, the rules of Muslim law are as follows.

(i) under all schools of Muslim law, such a boy can freely marry, personally and without any body else.

(ii) under the hanafi and Ithna Ashari Laws (but not under shafei and Ismaili school), such a girl can freely marry personally and without the consent of any one else.

As regards those people’s male and female who are incompetent to contract their own marriage due to insanity or minority, the Muslim law lays down as under.

(i) under none of the schools of Muslim law, can an insane person (male or female) or a minor contract a marriage without the consent and intervention of his or her "marriage-guardian".

---

(ii) Under Shafei law a girl, though not a minor or insane, cannot contract her first marriage without the consent of her marriage-guardian; but where she is marrying for the first time, this rule does not apply. The same principle applies to Ismaili Law.

Thus it could be seen that there is no uniform practice as to the marriage of a Muslim either male or female even though he or she is a major and of sound mind. It depends on the school to which the person belongs to.

The authority of a person to contract the marriage of another who is incompetent to contract his or her own marriage is called “marriage-guardianship” (Witlyat-e-nikah). The person having such authority is called marriage-guardian (Wali-e-nikah). Only those persons who can contract their own marriage can act as marriage guardian for another person.

There is no uniformity as to the persons who can act as marriage-guardians. Different Schools of Muslim law follow different practices in this regard. Eg: In Hanafi law, there are 18 relatives of the bride/bride groom who can act as "marriage-guardians" they include father, father's father, father's father's father, brother (first full, then consanguineous) etc., one after the other. At the shafei, Ithna Ashari, and Ismaili laws, the entitlement to marriage-guardianship is extremely restricted. Only the father, or the father's father of a minor can act as the marriage guardian.

However, there is no "Kanyadan" or the "ceremonial giving" of the bride in marriage, as the guardian in marriage acts only as a mediator.
(iii) The Indian Majority Act, 1875 does not affect the roles of Muslim law relating to minor's marriage.\(^{55}\)

However, the rules of Muslim law relating to minor's marriage do conflict with the provisions of the Child Marriage Restraint Act, 1929 (Popularly known as Sarada Act) which is applicable equally to all Indians including Muslims. Under the provisions of this Act, every man below the age of 21 years, as also every girl below the age of 18 years is a "Child", every person under the age of 18 years is a "minor" and every marriage either party to which is a child is a "child marriage". As Muslims do not enjoy an exemption from any of the aforesaid provisions of the Act of 1929, when a Muslim marriage is a "child marriage" under the Act takes place, various persons responsible for it including the bride groom not being a "child", the "marriage-guardian", if any may be prosecuted. However there is nothing in the Act which suggests that a marriage in violation of its provisions will be invalid.

(iv) As a Muslim marriage partakes the character of ‘Civil Contract’, there is always a proposal (\textit{ijab}) by either party or acceptance (\textit{Qubul}) by the other party. If the parties to the intending marriage are not competent to contract their own marriage then the proposal and acceptance can be made by their respective marriage guardians. The proposal and acceptance can be made either personally, or through a representative. Most of the Muslim schools like Hanafi and Shafei insist on the presence of witnesses (Gawah) when the contract takes place.

(v) In Pre-Islamic Arabia, unlimited polygamy was prevailing. After

\(^{55}\) See Section 2(a) of the Act, 1875, which specifically states that the Act shall not affect the marriage, dower, divorce or adoption of any person governed by personal laws.
the advent of Islam, the prophet introduced limited polygamy which fixed the limit of four wives. A Mohammedan male may have four wives at the same time. However it may be remembered that it is only a permission given by the Holy Quran to contract a polygamous marriage and it is not a compulsion. A Muslim male can marry more than one woman subject to a maximum of four, only when he can deal with them justly and equitably.

Though limited polygamy has been recognized by Islam, it is - tolerated only under certain, circumstances. In the case of *Moonshee Byzloor Raheem v. Shamsonnisra Begum*, the Privy Council observed:

"Mohammedan law enforced in India has considered polygamy as an institution to be tolerated but not encouraged and has not enforced upon the husband any fundamental right to compel the first wife to share his consortium with another woman in all circumstances"

Now after passing of the Dissolution of Muslim Marriage Act, 1939, a Mohammedan wife can file a suit for divorce against the husband, on the ground that her husband, having more than one wife, is not treating her equitably.

If a Muslim male contracts a fifth marriage when his first four marriages are intact, such marriage is void (*Batil*) as per Shia law but is only irregular (*Fasid*) as per the Sunni law.

(vi) A Muslim woman is not allowed to have at a time more than one husband. If she marries again during the life-time of her husband, she will be guilty of committing the offence of Bigamy under Section 494 of Indian Penal Code. The children born to bigamous

---

56 11 MIA 551.
marriages are illegitimate.

(vii) There are three kinds of prohibitions of impediments to a Muslim marriage.

(1) A marriage between two Muslims is absolutely prohibited.

(i) on the ground of polyandry of the woman.

(ii) the ground of consanguinity (blood relationship)

(iii) on the ground of affinity (through earlier marriage) and

(iv) on the ground of fosterage...

A marriage performed or contracted disregarding these impediments are void (Batil) and it does not give rise to any marital rights or obligations.

(2) A marriage between two Muslims is not absolutely prohibited:

(i) on the ground of unlawful conjunction

(ii) on the ground of polygamy

(iii) on the ground Iddat period

(iv) on the ground Difference of Religion

(v) on the ground absence of witnesses and

(vi) on the ground of Divorce (where the divorced female is sought to be remarried by the husband).

Thus in the case of unlawful conjunction i.e. where a Mohammedan male of Sunni is prohibited to marry at the same time two wives who are so related each other by blood relationship, affinity or fosterage
that if one of them were a male they could have been lawfully married if the husband divorces one, the marriage with the other is valid.

Similarly a Mohammedan male is prohibited to marry a woman who is undergoing "Iddat" period after the dissolution of her first/earlier marriage. Here the "iddat period" varies depending on the cause of dissolution viz. death of husband or divorce etc. A Mohammedan female is prohibited to marry a non-Mohammedan. These impediments are only temporary and can be removed by a subsequent supervening development like divorcing one of the wives, expiry of iddat period and conversion to Islam etc. Any Muslim marriage contracted ignoring these impediments are irregular (Fasid) which can be regularized by certain actions or developments.

(viii) A Muslim wife is also entitled to dower (mahr) from her husband. Dower or mahr is a sum of money or other property which the wife is entitled to receive from the husband in "consideration of marriage".58 It is inherent in the concept of marriage under Mohammedan law. It is a sort of deterrented to the husband's absolute power of pronouncing divorce on his wife, so the main object of dower is to offer protection to wife against such arbitrary power.59 However some of the Mohammedan Law commentators do not agree with the idea of identifying mahr as consideration for marriage, but they consider it as an obligation imposed upon a husband as mark of respect for the wife.60

58 Mulla, Principles of Mohammedan Law, 17th Ed. p. 277
59 Abdur Kadir v. Salima ILR 8 All. 149.
60 Abdur Rahim, “Mohammedan Jurisprudence” p. 334.
The Dower may be Prompt Dower which is payable at the time of marriage or Deferred Dower which may be paid at the time of death of the husband or on the dissolution of marriage. The Quantum of dower depends on the status of the husband and wife.

(ix) In Muslim Law, the Shia law recognizes 'muta' marriages but according to Sunni law, such marriages are void. Among the Shias also the "Ithna ashari School" only permits such marriages.

The literal meaning of the word 'muta' is enjoyment, use. Thus a muta marriage is a contract marriage for a certain period of time as agreed by the parties.

A Mohammedan male of Ithna Ashari sect of the Shias may contract any number of muta marriages, with a female belonging to Islam, Christianity, or Jewish religion. However a female of Ithna Ashari sect of the Shias has capacity to contract a valid muta marriage only with a Mohammedan and nobody else of other religion. A major Shia female of Ithna ashari School has capacity to contract a valid muta marriage without the consent of her guardian but if she is a minor, she can do so only with the consent of her guardian. The violation of this condition by a minor girl will render the marriage unlawful.

In a Muta Marriage, the period of cohabitation and the amount of dower must be specified. The condition of proposal and acceptance should be fulfilled along with the use of the word 'tazwig' or 'nikah' or 'muta'.

61 Baillie, I, 18; The Hedaya, 33.
The following are the consequences of a valid *muta* marriage.

1. The parties to a *muta* marriage will be called the *muta* husband and the *muta* wife.

2. A *muta* marriage does not give rise to mutual rights of inheritance between the rights to inheritance between the *muta* husband and the *muta* wife. However this practice -can be overridden by an agreement to the contrary.

3. A *muta* wife is not entitled to any maintenance from the husband.

4. In a *muta* marriage, the children born out of this union are legitimate and capable of inheriting from both the parents in the same manner as the off springs of a permanent marriage.

5. If the *muta* marriage is dissolved by the death of the husband, the *muta* widow must observe the period of *iddat* for 4 months and 10 days or till the delivery in the case of pregnancy and.

6. Dower or *mahr* must, be specified in a *muta* marriage.

Thus the status of a *muta* wife is very low and insecure, as compared to that of a Muslim wife in a permanent marriage.

On the basis of above discussion amply makes it clear that in a Muslim marriage, the female plays an important and almost an equal role as compared to the males. However she enjoys a very fragile marital life as the Muslim husband is vested with an almost absolute right to divorce the wife at any time by resorting to Triple Talaq' method. It is not to say that every Muslim husband is invoking his
right to divorce his wife indiscriminately but only to point out the possibility of its misuse. The law relating to Divorce among Muslims and the position of the Muslim wife papoose to it, has been discussed in detail elsewhere in this work.

1.4 CHRISTIAN WOMEN AND MARRIAGE

English Law from the very beginning subscribed to the notion of spousal consent to the marriage. The ecclesiastical was of the view that though in its formation marriage was a contract, it was a sacrament in its consequence. With the advent of Reformation, the Protestant World came out with the notion that marriage was a civil contract and matrimonial matters were subject to the jurisdiction of civil courts, ecclesiastical court having no jurisdiction over them. The marriage thereafter also came to be regarded as a dissoluble union. Thus the Reformation caused a fundamental change of attitude towards marriage among the Protestants, The Catholics continued to uphold and follow the ecclesiastical doctrinaire view of sacra-mentality and indissolubility of marriage, while the Protestants became liberated and propounded the concept of contractually and dissolubility of marriage. They regarded marriage as essentially man-made in sharp contrast to the Catholic view that marriage was made in heaven.\(^6\)

Still, the Protestant though regarded their marriage as contract, regarded it as a special contract. It was not equated with commercial contract. They asserted that marriage being a social institution, there was social interest in its preservation and protection.

\(^6\) Friedman, *law in a Changing Society* (1970), 174; also A.A. Maududi (Supra note, 24) who has attributed this changed view of the protestant to the interaction of Christianity with the Islamic East on the Reformation eve.
Among the Indian Christians, marriage is regarded as a civil contract, though it is usually solemnized by a Minister of religion licensed under the Christian Marriage Act, 1872. It can also be solemnized by Registrar of Marriages.63

Every marriage between Indian Christians may be solemnized provided the bride is 18 years of age and the bride groom 21 years. Polygamy is prohibited among the Christians. For the contract of marriage among Christians, the free and intelligent consent of the parties is indispensable. As the Christian do not have a personal law, the law of marriage with special exceptions is codified in the Indian Christian Marriage Act, and Indian Divorce Act.

There are number of enactments in India that deal with the Christian marriages and matrimonial causes. They are the Indian Christian Marriage Act, 1872, the Marriage's Validation Act, 1892,

The Cochin Christian Civil Marriage Act, 1905, The Indian Matrimonial causes (War Marriages) Act," 1948. The convert's Marriage Dissolution Act, 1866 and The Indian Divorce Act, 1869 etc. However many lawyers and jurists are of the opinion that the law relating to Christian marriage is deficient and that it lacks coherency.

The Indian Christian Marriage Act, 1872 deals with a Christian marriage in India. This Act lays down various provisions dealing with the marriage registrar, time and place of marriage registration of marriages and the grant of marriage certificates etc. A perusal of various legislations on the topic makes it amply clear that a Christian marriage has the right to maintenances during marriage to restitution

63 Section 4 of the Christian Marriage Act, 1872.
of conjugal rights, to judicial separation and divorce. Every Christian marriage may be solemnized by complying with certain preliminary procedural formalities like notices of the intended marriage, publication of such notice and declaration by one of the parties. Registration such marriage is compulsory. A marriage between the Indian Christians may be solemnized without the preliminary procedural formalities of notice etc. by any person licensed to solemnize such marriages.

The Christian women enjoy equal rights in her marital life along with her husband. There is no polygamy permitted among the Christians similarly to Christians cannot marry each other, if they are within the prohibited degrees of relationships. The Child Marriage Restraint Act, 1929 is applicable to the Christian also. It is clear that a Christian wife enjoys co-equal rights with Hindu and Muslim wife even though her status and rights are not governed by a single law.

1.5 PARSI WOMEN AND MARRIAGE

Among the Parsis, marriage, as it stands now, is regarded as a contract. In Parsi marriage though a religious ceremony called *ashirbad* is mandatory for its validity, it is essentially regarded as contract. Consent is essential in marriage. A Parsi priest solemnizes the marriage amid ceremony of *ashirbad* in the presence of two witnesses. *Ashirbad* is a prayer or exhortation to the parties for observance of their marital obligations.

It is notable, therefore, that a Hindu husband takes wife in the presence

---


65 Section 3(b) of the Parsi Marriage and Divorce Act, 1936
of consecrated fire, a Muslim husband takes her under God's trust and with His permission, a Christian husband unites with his wife with all holiness of the Church and a Parsi husband takes wife in the presence of a priest under a solemn vow. While under Hindu and Christian system of marriage, the bond between husband and wife are sought to be strengthened through a concept of sacrament, under Islamic marriage the same object is sought to be achieved by declaring marriage as *Sunnah* of highest order ordained by the Prophet and as *ibadat* i.e. service to God and devotional act.

A marriage under the Parsi Marriage and Divorce Act, 1936 is nullity, if (1) the parties are within the prohibited degrees of consanguinity or affinity (Section 3), (2) necessary formalities of marriage are not performed (Section 3), (3) party/parties to marriage is/are less than 21 years and the marriage solemnized without guardian's consent (Section 30), and (4) either party was impotent (Section 30).

Section 34 of the Parsi Marriage and Divorce Act, 1936 which contains the provision runs as follows:

> Any married person may sue for judicial separation on any of the grounds for which such person could have filed a suit for divorce, or on the ground that the defendant has been guilty of such cruelty to him or her or their children, or has used such personal violence, or has behaved in such a way as to render it in the judgment of the court improper to compel him or her to live with defendant.

It may be observed that the provisions of the Hindu Marriage Act and the Special Marriage Act are more or less comprehensive; the provisions under the Indian Divorce Act are most inadequate. The grounds provided under the Parsi law leave room for rationalization as
the Act has incorporated certain grounds which should normally have been grounds for nullity. In addition to those nine grounds, Hindu Marriage Act, 1955 incorporates a few more additional grounds for wife alone.66

Section 36 of the Parsi Marriage and Divorce Act, 1936 also delineates the circumstances in which a suit for conjugal rights can be lodged. Section 38 of the Act says that no suit is to be filed to enforce marriage or contract arising thereof in those cases where the husband is below sixteen years or the wife below fourteen. According to Section 15 of the Act, the provision of the Code of Civil Procedure, 1908 shall so far as the same may be applicable, apply to proceedings in suits instituted under this Act including proceedings in execution and orders subsequent to a decree.

Section 36 of the Act says where a husband shall have deserted or without lawful cause ceased to cohabit with his wife, or where a wife shall have deserted or without lawful cause ceased to cohabit with her husband, the party so deserted or with whom cohabitation shall have so ceased may sue for the restitution of his or her conjugal rights and the court, if satisfied of the truth of the allegations contained in the plaint, and that there is no just ground why relief should not be granted, may proceed to decree such restitution of conjugal rights accordingly.

The words of this Section are same as used in Section 32 of the Indian Divorce Act with this difference that the expression used there is "without reasonable cause" whereas it is "ceasing to cohabit without lawful or just cause". The two expressions, says histice S.C.

---
Manchanda, mean the same thing.\textsuperscript{67} Therefore, for the correct interpretation of these words reference may be made to the Section 32 of the Indian Divorce Act. The question as to what would be a lawful or just cause, among the Parsis, for a refusal to cohabit, is one of fact to be decided by the delegates. In \textit{Hirabai v. Dhanjibai}\textsuperscript{68} it was held that the grounds for refusal to cohabit must be grave and weighty so as to make the due performance of the marital obligation a moral impossibility.

A defence to restitution petition under Parsi law is the same as under Section 33 of the Indian Divorce Act. It was held in \textit{Kawasji v. Sirinbai}\textsuperscript{69} that an agreement to live separate is as good a defence to a suit for restitution among the Parsis as it is under the Indian Divorce Act.

It is observed that Act of 1936 deletes the penal clause which existed in Section 36 of the Act of 1865. Under the Act, 1865 a failure to obey a decree for restitution rendered the defaulting party liable to imprisonment for a term which right extend to one month or with fine or with both.\textsuperscript{70} But under the Act, 1936 a decree for restitution is enforceable only in the manner provided for in the Code of Civil Procedure. Apart from this remedy, the plaintiff has been conferred a statutory right lo apply for a divorce on the ground of refusal to comply with a decree for a year.

The object of the Section 37 is to avoid multiplicity of suit between the same parties. This Section provides that the respondent need not file a

\textsuperscript{67} SC Manchanda, \textit{The Law and Practice of Divorce} (4\textsuperscript{th} ed.) 1973
\textsuperscript{68} (1900) 2 Bom. LR 845
\textsuperscript{69} 23 Bom. 279.
\textsuperscript{70} \textit{Ardesar v. Arabai}, 9 Bom. H. C. Rep. (ACJ) 290.
separate suit in order to obtain relief. It is enough for him or her to counter-charge in his or her answer to the petition and the court will then grant him such relief to which he is entitled as if he or she had presented a cross-petition. In this respect it differs essentially from Section 15 of the Indian Divorce Act which provides relief to the respondent in case of opposition on certain specific ground only. This Section therefore has the merit of completely avoiding multiplicity of suits and the defendant need never file a separate petition for any relief under the Act that he may desire to obtain.

It may be submitted that the restitution of conjugal rights as a matrimonial remedy under Section 36 of the Parsi Marriage and Divorce Act, 1936 has never been tested on the constitutional touchstone of the judiciary as was done with respect to the remedy under Section 9 of the Hindu Marriage Act, 1955. And issues involving the restitution of conjugal rights incorporated under Parsi law does not materially differ from those under Hindu law which was framed in the backdrop of similar social facts so far as women's interests are concerned. As already stated Parsi community like Christians forms an infinitesimal fraction of our populace.