

Chapter- V

THE CHANGES IN THE LAW OF DIVORCE- UNDER HINDU LAW

This chapter deals with the changes made in the Hindu law of divorce including the historical background of divorce and its origin through legislation. And legislative modifications in the Hindu law of divorce and effects of such legislations and modifications. This chapter deals with relief of judicial separation and remedy of divorce. Under the uncodified Hindu law, divorce was not recognized, unless it was allowed by custom. The reason was that, a Hindu marriage was an indissoluble tie between the husband and the wife¹. However painful cohabitation may be, divorce was not accepted by the old law. In some communities, such customs fulfilled the requisites of a valid custom.²

The term 'divorce' comes from the Latin word 'divortium' which means 'to turn aside', 'to separate'. Divorce is the legal cessation of a matrimonial bond.

Divorce puts the marriage to an end, and the parties revert back to their unmarried status and are once again free to marry.³ All rights and mutual obligations of husband and wife ceases. In other words, after a decree of dissolution of marriage, the marriage comes to an end and the parties cease to be husband and wife, and are free to go their own ways. There remain no bonds between them except in relation to Section 25⁴ and Section 26⁵ of Hindu Marriage Act, 1955.

Matrimonial causes (i.e., legal action in respect of marriages) in their real sense did not exist in Hindu law before 1955, although some reliefs in respect of marriage could be obtained under general law. Thus, a suit for a declaration that a marriage is null and void could be filed under Section 9 C.P.C⁶. read with Section 34 of the Specific Relief Act, 1963⁷.

¹. B.M. Gandhi- Hindu Law, 3rd edn. 2008, p.297, Eastern Book Company, Lucknow.

². Sankaralingam v. Suan, 1894 ILR Mad 479; Premanbai v. Channoolal AIR 1963 MP 57; Shivalingaiah v. Chowdamma AIR 1956 Mys 17; cf: R.C. Nagpal- Modern Hindu Law, p. 62.

³. Dr. Paras Diwan- Modern Hindu Law, 18th edn. 2007, p.128, Allahabad Law Agency, Faridabad (Haryana).

⁴. Permanent alimony and maintenance.

⁵. Custody, maintenance and education of minor children.

⁶. Section 9 of C.P.C. reads as under:

“The court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

⁷. Section 34 of the Specific Relief Act deals with declaratory decrees. A declaratory decree is a decree declaratory of a right which is doubtful or which requires to be cleared. Section 34 of the Specific Relief, 1963 lays down the circumstances under which, a declaratory decree may be passed. It provides:

The modern matrimonial law in India has been greatly influenced by and based upon English matrimonial law. In England, the Matrimonial Causes Act, 1857 for the first time permitted divorce by judicial process. Before 1857, divorce could be obtained only by a private Act of parliament and only very rich could afford this luxury. Under the Act, the husband could file a petition for divorce on the ground of wife's adultery (single act was enough), but a wife had to prove adultery coupled with either incest, bigamy, cruelty or two years desertion or alternatively, rape or any other unnatural offence. This was the typical mid-Victorian attitude to sexual morality.⁸

The Matrimonial Causes Act, 1923 put both spouses at par and wife could also sue for divorce on the ground of adultery simpliciter. The Matrimonial Causes Act, 1937 added three more grounds; cruelty, three years desertion and supervening incurable insanity.⁹ After the Second World War, a movement developed for the reform of divorce law which accepts the break down of marriage as the basic principle of divorce. Later, the Matrimonial Causes Act, 1973 was passed which is a consolidating statute and retains the breakdown of marriage as the basic ground of divorce.

The Indian matrimonial law has closely followed the development in English law. The Converts Marriage Dissolution Act, 1866 was passed to provide facility of divorce to those native converts to Christianity whose spouses refused to cohabit with them on account of their conversion. But the first divorce statute was passed in 1869.

The Indian Divorce Act, 1869 is based on the Matrimonial Causes Act, 1857 and lays down the same grounds of divorce. At the time when the statute was passed, it applied only to Christian marriages. The Indian Divorce Act was extended to marriages performed under the Special Marriage Act 1872. This Act

“any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the court may in its discretion, make therein a declaration that he is so entitled, and the plaintiff need not in such suit, ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so”.

⁸. Dr. Paras Diwan- Family Law, 6th edn. 2001, p.124, Allahabad Law Agency, Faridabad (Haryana).

⁹. Section 2 and 3.

was repealed by the Special Marriage Act, 1954. The Special Marriage Act was passed in 1954 and the Hindu Marriage Act, 1955.¹⁰ Some States introduced divorce by legislation.¹¹

Section 13 of the Hindu Marriage Act, 1955 has introduced a revolutionary amendment to the shastric Hindu law. It provides for the dissolution of marriage. Under the Hindu law, divorce does not take place unless it has been granted by a court. Before passing of the Marriage Laws (Amendment) Act, 1976, the grounds for judicial separation and divorce were different. The Marriage Laws (Amendment) Act, 1976 makes the grounds of divorce and judicial separation common. An aggrieved party may sue for divorce or judicial separation.

In 1964, Section 13 (1-A) has been inserted containing 2 clauses under which, non-resumption of cohabitation for 2 years or upwards after the decree of judicial separation or restitution of conjugal rights was made a ground of divorce. This is a modification of clauses (viii) and (ix) of Section 13 of the Hindu Marriage Act, 1955. After the amendment, either party to the marriage can prefer such petitions. However, this facility is not available to the cases where the decrees of judicial separation and restitution of conjugal rights were obtained prior to the passing of the Amendment of 1964. The Marriage Laws (Amendment) Act, 1976 reduced the time limits from two years to one year.¹² Section 13 (1-A) introduced Break-down theory in the Hindu Marriage Act, 1955.

The Hindu Marriage Act, 1955 permitted divorce to all the Hindus on certain reasonable grounds. Perhaps this permission was given for the first time in the history of Hindu law. The Act of 1955 also saved the customs and special legislation granting the dissolution of marriage before its time.

Under *Shastric* Hindu law, wedlock was unbreakable and the marital bond existed even after the death of a party to marriage. Divorce was known only as a matter of exception in certain tribes and communities which were regarded

¹⁰. Dr. Paras Diwan- Family Law, 6th edn. 2001, p.124, Allahabad Law Agency, Faridabad (Haryana).

¹¹. Bombay Hindu Divorce Act, 1947; Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 Saurashtra Hindu Divorce Act, 1952.

¹². Prof. G.C.V. Subba Rao- Family Law in India, 8th edn. 2005, p.205, S. Gogia & Company, Hyderabad.

uncivilized by the Hindu elite. The courts recognized it in these communities due to the binding force of custom. But the general Hindu law did not recognize it.¹³

The provisions regarding divorce have been twice amended since the passing of the Hindu Marriage Act, 1955; i) by the Hindu Marriage (Amendment) Act, 1964 and ii) by the Marriage Laws (Amendment) Act, 1976.¹⁴ The original provisions of the Hindu Marriage Act regarding divorce have been liberalized by the Marriage Laws (Amendment) Act, 1976. It also added a new ground namely divorce by mutual consent of the parties has been made available as a matrimonial relief under the Hindu Marriage Act, 1955.

1. Relief of Judicial Separation:

Section 10 of the Hindu Marriage Act, 1955 deals with judicial separation. This Section lays down that-

Section 10 (1) - ¹⁵[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 13¹⁶ and in 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 petition, rescind the decree if it considers it just and reasonable to do so.”

Section 10 provides that either party to marriage may present a petition praying for a decree of judicial separation on any of the grounds specified in sub-Section (1) of Section 13 and in case of wife also on any of the grounds specified

¹³. Swarajya Lakshmi v. Padma Rao AIR 1974 SC 165.

¹⁴. Ramesh Chandra Nagpal- Modern Hindu Law, 1st edn. 1983, p.144, Eastern Book Company, Lucknow.

¹⁵. Subs. by Act. No. 68 of 1976.

¹⁶. See grounds of divorce under Section 13.

in sub-Section (2) thereof, as grounds on which a petition for divorce might have been presented.¹⁷ After passing of a decree of judicial separation, the parties are not bound to cohabit with each other. During the continuance of separation, the parties are entitled to separate from each other and all basic marital obligations remain suspended. Mutual rights and obligations of living with each other and marital intercourse no longer remain enforceable; marital obligations and rights are not available to the parties. Nonetheless, marriage subsists.¹⁸

During the course of judicial separation, either party may be entitled to get maintenance from the other if the situation so warrants. It is temporary suspension of marital rights between the spouses.¹⁹ The parties remain husband and wife. If any of them remarries, he or she will be guilty of bigamy. In the event of one of the parties dying, the other party will inherit the property of the deceased spouse.²⁰ Judicial separation can be allowed only if the marriage is valid. If the parties want to resume cohabitation, an order of the court rescinding the decree will be necessary. Generally the court will rescind the decree whenever parties ask for it. If the cohabitation is not resumed for a period of one year or more after the passing of decree of judicial separation, any party may apply for divorce under Section 13 (1-A) (i) of the Hindu Marriage Act, 1955.

Before passing of the Marriage Laws (Amendment) Act, 1976, the grounds for divorce are more serious than those for judicial separation. After the amendment of 1976, Section 10 has been completely recast. The various grounds for judicial separation mentioned in the old Section 10 have been omitted. It is provide that the petitioner may apply for judicial separation on precisely the same grounds that can support a petition for divorce.

¹⁷. R.K. Agarwala- Hindu Law, 21st edn. 2003, p.59, Central Law Agency, Allahabad.

¹⁸. Dr. Paras Diwan- Modern Hindu Law, 18th edn. 2007, p.125, Allahabad Law Agency, Faridabad (Haryana).

¹⁹. R.K. Agarwala- Hindu Law, 21st edn. 2003, p.58, Central Law Agency, Allahabad.

²⁰. Narasimha Reddy and others v. M. Boosamma AIR 1976 AP 77.

The Marriage Laws (Amendment) Act, 1976 has inserted a new Section 13-A in the Hindu Marriage Act, 1955 to give statutory recognition to the judiciary evolved law. Section 13-A runs as under:

“In any proceedings under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-Section (1) of Section 13²¹, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.”

Hence if a petition for divorce is filed on the ground of change of religion, renunciation of the world or presumption of death, the court has no power to pass a decree of judicial separation in place of decree for divorce. Under Section 14, no petition for divorce can be presented within one year of marriage. For the lesser remedy of judicial separation, there is no such restriction.

2. Remedy of divorce:

Although Hindu law does not contemplate divorce, yet it has been held that it is recognized as an established custom.²² In Bombay, Madras and Saurashtra, it was permitted by legislation.²³ In the absence of a custom to the contrary, there can be no divorce between a Hindu husband and his wife, who by their marriage, had entered into a sacred and indissoluble union and neither conversion nor degradation nor loss of caste nor the violation of an agreement against polygamy dissolves the marriage tie.²⁴ Among the Sikh Jats of Amritsar,

²¹. See grounds of divorce under Section 13.

²². The custom of divorce existed among the lower castes such as Sudras among the Hindus of Manipur. Divorce at the pleasure of either party was permissive.

²³. Bombay Hindu Divorce Act, 1947 and the Madras Hindu (Bigamy Prevention and Divorce) Act 1949, and the Saurashtra Hindu Divorce Act, 1952. All these Acts have been repealed by the Hindu Marriage Act, 1955.

²⁴. R.K. Agarwala- Hindu Law, 21st edn. 2003, p.73, Central Law Agency, Allahabad.

there is a custom of the husband dissolving a marriage out of court preferably by written instrument which is saved by Section 29 (2)²⁵ of the Act.²⁶

The Bombay High Court condemned a custom allowing divorce as a matter of course on payment of a fine fixed by the caste.²⁷ But the Madras High Court holds a custom valid which enables either spouse to divorce the other with the latter's consent.²⁸ According to Kautilya's Arthashastra, marriage might be dissolved by mutual consent in the case of the unapproved form of marriage. Manu does not believe in discontinuance of the marriage relationship. He declares, "Let mutual fidelity continue till death; this in brief may be understood to be the highest dharma of husband and wife". The duty of a wife continues even after her death. She can never have a second husband.²⁹

It was only by the Native Converts Marriage Dissolution Act, 1866, which provided that where a Hindu became a convert to Christianity and in consequence of such conversion, the husband or wife of the convert deserted or repudiated the convert, the court might, on a petition presented by the convert, pass a decree dissolving the marriage, and the parties might then marry again as if the prior marriage had been dissolved by death.³⁰ Conversion does not operate per se as dissolution of marriage.

The Hindu Marriage Act, 1955 originally based divorce on the fault theory and enshrined 9 fault grounds in Section 13 (1) on which, either the husband or the wife could sue for divorce. Section 13 has undergone a substantial change by reason of subsequent amendments. The grounds mentioned in sub-Section (1) and (1-A) are available to both the husband and wife; while the grounds

²⁵. Section 29 deals with Savings: Section 29 (2) "Nothing contained in this Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act."

²⁶. Balwinder Singh v. Smt. Gurupal Kaur AIR 1985 Delhi 14.

²⁷. Keshav v. Gandhi 39 Bom 588; cf: R.K. Agarwala- Hindu Law, 21st edn. 2003, p.73, Central Law Agency, Allahabad.

²⁸. Thangamma01 v. Gangayammal (1945)1 MLJ 229; cf: R.K. Agarwala- Hindu Law, 21st edn. 2003, p.73, Central Law Agency, Allahabad.

²⁹. R.K. Agarwala- Hindu Law, 21st edn. 2003, p.73, Central Law Agency, Allahabad.

³⁰. Ibid.

mentioned under sub-Section (2) are available only to the wife.³¹ In 1964, Section 13 (1-A) has been inserted containing two clauses under which, non resumption of cohabitation for two years or upwards after the decree of judicial separation or restitution of conjugal rights was made a ground of divorce. This is a modification of clauses (viii) and (ix)³² of Section 13 of the Hindu Marriage Act, 1955. By the Marriage Laws (Amendment) Act 1976, the period of two years is reduced to one year. Section 13 (1-A) introduced an element of Break-down theory in the Hindu Marriage Act 1955.³³

Prior to the amendments the petition for divorce could be filed on the grounds of non-resumption of cohabitation after the decree of judicial separation and restitution of conjugal rights only by the petitioner. After the amendments, either party to the marriage can prefer such petitions. However, this is not applicable to in the cases where the decrees of judicial separation and restitution of conjugal rights were obtained prior to the passing of the Hindu Marriage (Amendment) Act, 1964. If the decrees are obtained after 1964, the respondent also can take advantage of the new Section.³⁴

The Hindu Marriage Act, 1955 originally contained two fault grounds in Section 13 (2) on which, a Hindu wife alone could sue for divorce. The Marriage Laws (Amendment) Act 1976 has inserted two additional fault grounds of divorce for wife³⁵ and a new Section 13-B under which, divorce by mutual consent has been made available as a matrimonial relief. Thus, in the modern Hindu law, the position is that all the three theories of divorce are recognized and divorce can be obtained on the basis of any one of them. Further, the customary mode of divorce is also retained.³⁶

³¹. Mayne's -Hindu Law & Usage, 13th edn. 1995, p.218, Bharat Law House, New Delhi.

³². See grounds of divorce under Section 13.

³³. Prof. G.C.V. Subba Rao- Family Law in India, 8th edn. 2005, p.205, S. Gogia & Company, Hyderabad.

³⁴. Ibid.

³⁵. Section 13 (2) (iii) and (iv).

³⁶. Dr. Paras Diwan- Modern Hindu Law, 18th edn. 2007, p.129, Allahabad Law Agency, Faridabad (Haryana).

The Marriage Laws (Amendment) Act, 1976 has introduced certain changes of far-reaching consequences, which have materially affected the sacramental character of marriage. The relief of divorce may be obtained in respect of any marriage whether solemnized before or after the commencement of this Act. Thus, Section 13 is retrospective as well as prospective operation.

Section 13 runs as follows:

1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party:

³⁷[(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

(ii) has ceased to be a Hindu by conversion to another religion; or

³⁸[(iii) 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;

Explanation:-- 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;

³⁷. Subs. by Act 68 of 1976 for the words “is living in adultery”.

³⁸. Subs. by Act 68 of 1976 for “has been incurably of unsound mind for a continuous period of not less than three years, immediately preceding the presentation of the petition.

b) the expression “psychopathic disorder” means a persistent disorder or disability of mind (whether or not including sub-normality 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]

(iv) has, ³⁹[xxx] been suffering from virulent and incurable form of leprosy; or

(v) has, ⁴⁰[xxx] been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) 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, ⁴¹[xxx]

(viii) ⁴²[xxx]

(ix) ⁴³[xxx]

⁴⁴[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 willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.]

³⁹. The words “for a period of not less than three years immediately preceding the presentation of the petition” omitted by Act No. 68 of 1976.

⁴⁰. Omitted *ibid*.

⁴¹. The word “or” at the end of clause (vii) and clause (viii) and (ix) omitted by the Hindu Marriage (Amendment) Act, 1964.

⁴². Omitted *ibid*. omitted sub-clauses were as follows:

(viii) has not resumed cohabitation for a space of period of years or upwards after the passing of a decree for judicial separation against that party, or

(ix) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.

⁴³. Omitted by Act 44 of 1964.

⁴⁴. Ins. By Act 68 of 1976.

⁴⁵[1-A. Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition, for the dissolution of the marriage by a decree of divorce on the ground,--

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of ⁴⁶[one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of ⁴⁷[one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,--

(i) 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 the 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

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

⁴⁸[(iii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973 (or under the corresponding Section 488 of the Code of Criminal Procedure, 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding

⁴⁵. Sub-Sec. (1-A) ins. by Act 44 of 1964.

⁴⁶. Subs. by Act No. 68 of 1976 for the words "two years".

⁴⁷. Subs. by Act No. 68 of 1976 for the words "two years".

⁴⁸. Ins. by Act No. 68 of 1976.

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; or

(iv) 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.

Section 13 lays down three types of grounds for divorce, which may be classified as follows:

- 1) Nine grounds based on the "fault-disability" theory of divorce which only the 'aggrieved spouse' may avail. These are laid down in sub-Section (1).
- 2) Two grounds based on the "Break down" theory of divorce which either the 'aggrieved' or the 'guilty' spouse may avail.
- 3) Four special grounds, which only a wife can avail. These are laid down in sub-Section (2).

In all, there are 15 grounds for divorce. This Section has, since its initial enactment in 1955, been amended twice- first in 1964 and then, drastically in 1976.⁴⁹

1. Fault grounds of divorce:

(i) Extra-Marital Sex: (Adultery)

Adultery is extra-marital sex. It is consensual sexual intercourse between a married person and a person of the opposite sex not being the other spouse,

⁴⁹. Dr. Tahir Mahmood- Hindu Law, 2nd edn. 1986, p.444, The Law Book Company (p) Ltd. Allahabad.

during the subsistence of the former's marriage.⁵⁰ Where the other party has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse, a divorce petition can be filed.

Section 497 of the Indian Penal Code defines adultery: "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man without the consent or connivance of that man such intercourse not amounting to the offence of rape is guilty of the offence of adultery".

The criminal action is filed not against the wife but against the adulterer. The wife is not guilty of offence, not even as an abettor. In the matrimonial court, when a petition is filed for the matrimonial relief of divorce or judicial separation on the ground of adultery, the main relief is sought against the spouse and not against the adulterer. The adulterer or the adulteress is made merely a co-respondent, and that too is not always necessary. It is in this aspect, that the matrimonial offence of adultery is different from the criminal offence.⁵¹

It is also essential to establish in the matrimonial offence of adultery, that the sexual intercourse was willingly indulged into by the respondents. If the wife can establish that she was raped by the co-respondent, then the husband would not be entitled to divorce. Further, in a petition for dissolution of marriage, it is not necessary to prove that the co-respondent had knowledge or reason to believe that the respondent was the wife or husband of the petitioner. It seems difficult for a man to establish that he was forced. But if he can establish that in fact he was forced, the court would not grant the relief to the wife.⁵²

If the wife is raped, she is not guilty of adultery. It is a complete defence to the charge of adultery if the respondent wife was raped. If a person lacks mental capacity to consent, such as a minor or person of unsound mind, the intercourse

⁵⁰. B.M. Gandhi- Hindu Law, 3rd edn. 2008, p. 299, Eastern Book Company, Lucknow.

⁵¹. Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.771. Orient Publishing Co., Allahabad.

⁵². Ibid.

will not be voluntary. Thus, a girl aged 12 years who is, in law, not capable of consenting to sexual intercourse, cannot be guilty of adultery.⁵³ Similarly, a woman who had been administered drinks and thus got drunk and then had sexual act, is not guilty of adultery. But if has got drunk voluntarily, with the knowledge that it is likely to inflame her passions, she would be guilty of adultery if she indulges in sexual intercourse, even if at the time of the act, she was so drunk as to be incapable of giving her consent.⁵⁴ The same would apply to taking of drugs.⁵⁵

Before passing of the Marriage Laws (Amendment) Act 1976, in order to obtain divorce on this ground, the petitioner had to prove that the other party was living in adultery which would cover more or less continuous and habitual course of action. An isolated act of immorality was not sufficient. But after the passing of the Act of 1976, even a single and isolated act of infidelity would be a sufficient ground to obtain divorce.⁵⁶

The actual penetration need not be proved it can be proved by preponderance of probabilities. Sexual intercourse contemplated by the clause is an intercourse with a third person, i.e., non-spouse. Thus, intercourse with the wives of pre-Act polygamous marriage will not amount to extra-marital intercourse. But if the second marriage is void, then intercourse with the second wife will amount to extra-marital intercourse within the meaning of the clause.⁵⁷

Where a married man contracts a bigamous marriage after the commencement of the Act, his first wife can file a petition for divorce under this provision. This is because the second marriage is void and its consummation

⁵³. Barnett v. Barnett (1957)1 All ER 388; cf: Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.772. Orient Publishing Co., Allahabad

⁵⁴. Goshawk v. Gushawk (1965) 109 SJ 290; cf: Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.771. Orient Publishing Co., Allahabad.

⁵⁵. Benton v. Benton 1958 P 12; cited ibid.

⁵⁶. B.M. Gandhi- Hindu Law, 3rd edn. 2008, p. 300, Eastern Book Company, Lucknow.

⁵⁷. Clause (i) of Sub-Section (1) of Section 13; cf: Dr. Paras Diwan- Modern Hindu Law, 18th edn. 2007, p.158, Allahabad Law Agency, Faridabad (Haryana).

amounts to extramarital sex. In *Veena Kalia v. Jatinder Nath Kalia*⁵⁸, the husband after marriage went abroad for studies leaving his two minor daughters and his wife in India. He did not try to take his wife with him and left her. For twenty three years, they lived apart and the husband contracted a second marriage there. He had three children out of the second marriage. He was thus, guilty of cruelty, desertion and adultery. The wife got divorce on these grounds and the husband was ordered to pay her maintenance of Rs. 10,000 per month. The court also ordered him to deposit Rs. 10 lacs in the court towards the expenses of his daughters' marriages.

In *Subbaramma v. Saraswati*,⁵⁹ the Madras High Court held that "the unwritten taboos and rules of social morality in this country and particularly in village areas must necessarily be taken into account. If an unrelated person is found alone with a young wife after midnight, in her bedroom in an actual physical juxtaposition, unless there is some explanation forthcoming for this which is compatible with an innocent interpretation, the only interpretation that a court of law can draw must be that two were committing an act of adultery together".

In *Dr. Ashok Kumar Aggarwal v. Smt. Anju Raje*,⁶⁰ the court held that, mere suspicion of husband cannot be a proof of adultery, especially when husband had not seen wife in company of any male member, nor he could name any one, he was not entitled to divorce.

In both the criminal and matrimonial offence of adultery, proof of marriage is required. Proof of adultery by direct evidence is rare and it would be unreasonable to expect direct evidence of adultery.⁶¹ More over, the nature of this act is such that direct evidence is not possible.⁶² Courts therefore expect

⁵⁸. AIR 1996 Del 54.

⁵⁹. AIR 1967 Mad 85.

⁶⁰. AIR 2010 (NOC) 442 (P & H).

⁶¹. Pushpa Devi v. Radhey Shyam AIR 1972 Raj 360.

⁶². Patayee Ammal v. Manickam AIR 1967 Mad 254.

circumstantial evidence.⁶³ In *H.T. Veera Reddi v. Kistamma*⁶⁴, it was held that the birth of a child after four hundred and two days of separation from the husband is a clear evidence of adultery, because no child can be born of the lien of the husband after so long a separation.

If the adulterers are proved to be in such juxtaposition or associating in such circumstances that the sexual act may be inferred, the court will usually be satisfied that adultery has occurred. In *Swapna Ghose v. Sadananda Ghose*,⁶⁵ the wife found her husband and the adulteress to be lying on the same bed at night and further evidence of the neighbours that the husband was living with the adulteress as husband and wife is sufficient evidence of adultery. The fact of the matter is that direct proof of adultery is very rare. Even when the direct proof of adultery is produced, the court would look upon it with suspicion, as it is very highly improbable that any person could be a witness of such acts which are, by their very nature, performed in utmost secrecy.⁶⁶

In *Patta Dhanalakshmi v. Patta Ramachandra Rao*,⁶⁷ the wife was living in her parents house and became pregnant without resumption of cohabitation. She averred that the husband used to visit her and stayed in the nights. But she failed to examine her parents or any other person to support her version. In these circumstances the court granted divorce on the ground of adultery.

Man and woman observe utmost secrecy about their meetings even when it is lawful. When it is unlawful, they take extra care. This makes direct evidence of adultery extremely difficult. Therefore, if law insists on direct evidence, few cases will be proved amongst hundreds and thousands. The result will be that the security of the marital right against 'adultery' will be reduced to a nullity.

⁶³. *Imarta Devi v. Deep Chand* (2004)1 HLR 387.

⁶⁴. AIR 1969 Mad 235.

⁶⁵. AIR 1979 Cal 1.

⁶⁶. *Lakra v. Bakla* (1932) 140 IC 561; *Sita Devi v. Gopal Sharan* AIR 1928 Pat 375; cf: Dr. Paras Diwan on Hindu Law- 2nd edn. 2005, p.777, Orient Publishing Co., Allahabad.

⁶⁷. AIR 1998 AP 341.

Adultery is proved by circumstantial evidence. If circumstantial evidence of adultery is to be admitted, proof of penetration has to be dispensed with.

i-a) Cruelty:

Before passing of the Marriage Laws (Amendment) Act 1976, cruelty was a ground only for judicial separation⁶⁸ and the petitioner was required to prove that the respondent had treated him or her with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party.

The Marriage Laws (Amendment) Act, 1976 which makes cruelty also a ground for divorce, has changed the wording of the clause thus: “respondent has treated the petitioner with cruelty”.⁶⁹ The change in the definition of cruelty will signify that an act or omission or conduct which constitutes cruelty is a ground for judicial separation or divorce. Even if it causes no apprehension of any sort in the mind of the petitioner.

Cruelty can be of both kinds: physical and mental. It is physical when the body is injured. It is mental when feeling and sentiments are wounded. The petitioner may be meted with cruelty of either or both types. However, cruelty has to be distinguished from the ordinary wear and tear of family life. It can not be decided on the basis of sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other.⁷⁰ A few stray instances indicating a short tempered nature and some what erratic behaviour are not sufficient to prove cruelty for the purpose of this Section.

⁶⁸. Section 10 (1) (b) of Hindu Marriage Act, 1955. judicial separation is a lesser remedy when compared to divorce. Where a decree for judicial separation has been passed, it shall no longer be obligatory for the parties to cohabit with each other. Mutual obligations and rights are not available to the parties. Nonetheless marriage subsists. At any time they can resume cohabitation. If the cohabitation is not resumed for a period of one year or more after the passing of judicial separation, any party may apply for divorce under Section 13 (1-A) (i) of the Hindu Marriage Act, 1955.

⁶⁹. Section 13 (1) (i-a) of the Hindu Marriage Act, 1955.

⁷⁰. Savitri Pandey v. Premchandre Pandey AIR 2002 SC 591.

In *Shobha Rani v. Madhukar Reddi*,⁷¹ the Supreme Court held that the word 'cruelty' used in Section 13 (1) (i-a) of the Act is with reference to human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact and degree. If it is mental, the inquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. In this Case, the Supreme Court considerably enlarged the concept of cruelty and held that the demand for dowry, which is prohibited under law, amounts to cruelty entitling the wife to get a decree for dissolution of marriage.

A new dimension has been given to the concept of cruelty. Explanation to Section 498-A of I.P.C. 1860 provides that any willful conduct which is of such a nature as is likely to drive a woman to commit suicide would constitute cruelty. Such willful conduct which is likely to cause grave injury or danger to life, limb or health (whether mental or physical of the woman) would also amount to cruelty. Harassment of the woman with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security would also constitute cruelty.

In *A. Jayachandra v. Aneel Kaur*,⁷² considering the question of mental cruelty, the Supreme Court observed that it has to be considered in the light of the social status of the parties, their education, physical and mental conditions, and customs and traditions. On these things, the court has to draw inference and decide on the basis of the probabilities of the case having regard to the effect on the mind of the complainant spouse because of the acts or omission of the other spouse. However, where the conduct complained is bad enough in itself and per se unlawful or illegal, the impact or injurious effect on the other spouse need not be considered. To constitute cruelty, the conduct complained of should be "grave

⁷¹. AIR 1988 SC 121.

⁷². AIR 2005 SC 534.

and weighty” whereupon it can be concluded that the petitioner spouse cannot reasonably be expected to live with the other spouse. It must be something more serious than “ordinary wear and tear of married life”.

In *Madan Lal v. Sudesh Kumari*,⁷³ it was held that where the wife gave birth to an illegitimate child, the child being born only six months after the marriage with the full development, it has been held to be cruelty to the husband and entitled to divorce notwithstanding that on same facts, he could have availed remedy of decree of nullity under Section 12 (1) (d)⁷⁴ of the Hindu Marriage Act, 1955.

In *Smt. Arati Mondal v. Bhupati Mondal*,⁷⁵ the Calcutta High Court held cruelty need not be intentional. Act of deprivation of conjugal right on the part of the wife toward her husband is worst form of cruelty.

In *Smt. Mamata Dubey v. Rajesh Dubey*,⁷⁶ the court held that, constantly accusing the husband of having adulterous relationship with others which proved later to be false and sending the family members to jail under Section 498-A of I.P.C. amounts to cruelty.

In *Rajiv Dinesh Gadkari v. Smt. Nilangi Rajiv Gadkari*,⁷⁷ husband residing in U.S.A. and forcing his wife to adopt American life. The court held that asking the wife to wear particular type of dress or compelling her to drink wine or alcohol amounts to cruelty and entitle to divorce.

In *Rattan Singh v. Mrs. Manjit Kaur*,⁷⁸ the court held that, the act of the wife in not allowing the husband to live in the matrimonial home certainly is an act which constitutes both physical and mental cruelty. It is settled law that even

⁷³. AIR 1988 Del 93.

⁷⁴. Section 12 deals with voidable marriages: Section 12 (1) “Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely-

(d) that the respondent was at the time of the marriage, pregnant by some person other than the petitioner.

⁷⁵. AIR 2009 Cal 200.

⁷⁶. AIR 2009 All 141.

⁷⁷. AIR 2010 (1) Bom R 45.

⁷⁸. AIR 2010 P&H 72. paras 44, 47.

one act of cruelty is sufficient to grant decree of dissolution of marriage. The fact of not allowing the appellant to enter the matrimonial home is one such act. And it was held that the wife has treated the husband with cruelty.

In *Manisha Tyagi v. Deepak Kumar*,⁷⁹ the court held that, to establish cruelty, it is not necessary that physical violence should be used. However, continued ill-treatment, cessation of marital intercourse, indifference of one spouse to the other may lead to an inference of cruelty.

In *Debal Kumar Bakshi v. Smt. Bithi Bakshi*,⁸⁰ a complaint was made by wife against husband and mother-in-law. Husband and mother-in-law called at police station. Ultimately, allegations made by wife proved to be false. Therefore, such baseless allegations amounts to cruelty and afford ground of divorce.

In *Smt. Anita Jain v. Raendra Kumar Jain*,⁸¹ wife not only instituted a number of cases against husband and his family members; but also made allegations against husband regarding illicit relations with his Bhabhi and niece. She also admitted these allegations to be untrue. Held, the conduct of the wife clearly amounts to cruelty to husband.

In view of the fact that the parties have been living separately for a number of years and a large number of cases have been instituted by one party against the other party, it is clear that the marriage between the parties has broken down irretrievably and there is no chance of their coming together or living together again. Husband is entitled to a decree of divorce.

In *Mrs. Flora Bose v. Suproti Bose*,⁸² a petition was filed on the ground of cruelty by husband. In this case, the husband remained unemployed during his stay with his wife. He started spending money on liquor indiscriminately. He used to come home late at night, gave physical beatings as well as mentally tortured

⁷⁹. AIR 2010 SC 1042.

⁸⁰. AIR 2010 (NOC) 437 (Cal).

⁸¹. AIR 2010 Raj 56.

⁸². AIR 2011 Delhi 5.

wife. He also demanded share in her flat. Ms. Aruna Suresh, j. held that the conduct of husband can be construed as cruelty. Divorce was granted to wife.

In *Shashi Kumar v. Smt. Neelam*,⁸³ a divorce petition was filed by husband on the round of mental cruelty by wife. In this case, the wife not allowed her husband to consummate marriage. He was subjected to abuse, locked out of his room and kicked out of bed. She also abused her mother-in-law and did not perform any household work. The court held that, husband who has been insulted, humiliated and denied sexual access cannot be expected to make his predicament public and was entitled to divorce on ground of cruelty.

In *Kamma Damodar Rao v. Kamma Anuradha*,⁸⁴ a divorce petition was filed under Section 13 (1) (i-a) on the ground of mental cruelty by husband. Husband was addicted to vices like alcoholism and drugs and in said mental and physical state, he was abusing his wife in filthy language and was beating her rudely. He was moving with people of low class in state of drunkenness and was staying in hotel, causing nuisance to inmates of hotel. It was held that, facts of husband spending time in hotels without paying bills would prove disrespect of husband to family and wife. It amounts to causing mental agony, which can be treated as mental cruelty and the wife was entitled to decree of divorce.

Cases wherein there was no cruelty:

1. Persuading and pressing on unwilling wife to accompany the husband to his place.⁸⁵
2. Solitary and or occasional beating of the wife by the husband.⁸⁶
3. Petty quarrels and troubles.⁸⁷
4. Beating of the child and quarrel between the couple.⁸⁸

⁸³. AIR 2011 HP 1.

⁸⁴. AIR 2011 Andhra Pradesh 23.

⁸⁵. Anna Saheb v. Tarabai AIR 1970 MP 36.

⁸⁶. Tulsa v. Pannalal AIR 1963 MP 5.

⁸⁷. J.L. Nanda v. Veena Nanda 1988 SCC 122.

5. Refusal to give treatment and diet as prescribed by a doctor, because that was beyond the means of the husband.⁸⁹
6. Mere consumption of alcohol by the husband unaccompanied by abuses, insults and violence.⁹⁰
7. Mere filing of an FIR. u/S. 498-A, IPC⁹¹. by wife against the husband.⁹²
8. To live with a wife who is a victim of gang rape.⁹³
9. Initiation of legal proceedings u/S. 498-A, and 323 IPC⁹⁴. against the husband, which failed.⁹⁵
10. Wife going to her parents' house without husband's permission.⁹⁶
11. Husband negligent about wife's health, not visiting her even after she gave birth to a child.⁹⁷

i-b). Desertion:

Desertion means withdrawing from the matrimonial obligation, i.e., not permitting or allowing and facilitating the cohabitation between the parties. It 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 willful neglect of the petitioner by the other party to the marriage.⁹⁸

⁸⁸. Harpal Sharma v. Triptani (1994)1 HLR 151 (P&H).

⁸⁹. Shyamlal v. Saraswati Bai AIR 1967 MP 204.

⁹⁰. Harjit Kaur v. Roop Lal (2004)1 HLR 143 (P&H).

⁹¹. "Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine".

⁹². Virender Kumar v. Santro Devi (2003)2 HLR 401 (P&H).

⁹³. Rajesh Kumar Singh v. Rekha Singh (2005)1 HLR 759 (All DB.); cf: B.M. Gandhi, Hindu Law, 3rd edn. 2008, p. 318, Eastern Book Company, Lucknow.

⁹⁴. "Whoever, except in the case provided for by Section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both".

⁹⁵. Radha Rani v. Har Bhagwan (2004)1 HLR 50 (P&H).

⁹⁶. Kamlesh v. Prem Prakash (1989)1 HLR 554 (Raj).

⁹⁷. Rajinder Prasad Jain v. Rama Jain 1980 HLR 122 (P&H).

⁹⁸. R.K. Agarwala- Hindu Law, 21st edn. 2003, p.86, Central Law Agency, Allahabad.

The deserting spouse should be proved that there is-

1. *factum of separation*; i.e., living apart and away from the deserted spouse, and
2. *animus deserendi*; i.e., an intention to bring cohabitation to an end permanently. Further, it should be proved that on the part of the deserted spouse, there was-
 - a. absence of consent to the separation, and
 - b. absence of conduct giving reasonable cause to the spouse to leave the matrimonial home.⁹⁹

In matrimonial law, desertion means continual absence from cohabitation contrary to the will or without the consent of the party charging it, and without reasonable cause. Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. The party who intends to bring the cohabitation to an end and whose conduct in reality caused its termination commits the act of desertion.¹⁰⁰

Desertion was a ground only for judicial separation under Hindu Marriage Act, 1955.¹⁰¹ However, after passing of the Act of 1976, this is a ground for both divorce as well as judicial separation under Section 13 (1) (i-b).

The formulation of “desertion” is contained in explanation of Section 13 (1) which runs as under:

“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 willful

⁹⁹. Prof. G.C.V. Subba Rao- Family Law in India, 8th edn. 2005, p.178, S. Gogia & Company, Hyderabad.

¹⁰⁰. Ramanatha Aiyar- The Law Lexicon, 1990, p.323, Wadhwa and Company Law Publishers, Nagpur.

¹⁰¹. Sec. 10 (1) (a) of the Hindu Marriage Act, 1955.

neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly".¹⁰²

Desertion for the purpose of seeking divorce under the Act means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words, it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place, but from a state of things. Desertion is not a single act complete in itself; it is a continuous cause of conduct to be determined under the facts and circumstances of each case.¹⁰³

Desertion may be actual or constructive. Constructive desertion may contain the characteristics of cruelty. In actual desertion, there is forsaking of the matrimonial home while in constructive desertion, there is forsaking of the matrimonial relationship. This forsaking of the matrimonial relationship must be accompanied by the animus deserendi. It is the neglecting spouse that is solely responsible for constructive desertion.¹⁰⁴

If by words or conduct, a spouse makes it impossible for the other spouse to live in his or her company and as a result, the other spouse leaves the matrimonial home, the other spouse cannot be said to be the deserter. On the other hand, the spouse who makes it impossible for other spouse to continue matrimonial relations would be the deserter.

If the wife leaves her matrimonial home and lives apart this would be desertion by her. But if she shows that there was cruelty on the part of the husband and so she had quit the matrimonial home, there would be no legal desertion by her. On the contrary, it would be treated a desertion by the husband who had driven her out. So the question of legal desertion cannot be established merely by showing who left the matrimonial home. Thus desertion

¹⁰². Dr. Paras Diwan on Hindu Law, 2nd edn. 2005, p.787. Orient Publishing Co., Allahabad.

¹⁰³. Kusum- Family Law Lectures, 2003, p.55, Lexis Nexis, New Delhi.

¹⁰⁴. B.M. Gandhi- Hindu Law, 3rd edn. 2008, p. 327, Eastern Book Company, Lucknow

has to be inferred from the state of things. This is known as constructive desertion.¹⁰⁵

To constitute a ground for judicial separation or divorce, desertion must be for a continuous period of two years preceding the date of presentation of the petition.

In *Durga Prasanna Tripathy v. Arundhati Tripathy*,¹⁰⁶ the wife had deserted the husband after seven months of marriage and the parties were living separate since a period of fourteen years. Wife was not willing to live with husband in spite of all efforts. Better part of their lives was wasted in litigation and the parties disliked each other. There was irretrievable breakdown of marriage. Therefore, to put an end to litigation and to put an end to the bitterness between the parties, divorce on the ground of desertion can be granted.

Termination of desertion:

Desertion is a continuing offence. It is possible to bring the state of desertion to an end by some act or conduct on the part of deserting spouse. It may come to an end in the following ways:

- a) Resumption of cohabitation.
- b). Resumption of marital intercourse.
- c) Supervening animus revertendi, or offer of reconciliation.

In *Gagandeep Gupta v. Dr. Sonika Gupta*,¹⁰⁷ husband filed a petition for divorce on the ground of desertion by wife. There was no cohabitation between the parties since they separated. Wife continued to remain in matrimonial home by asserting her right of residence in spite of matrimonial discord. Wife had deserted husband without any reasonable cause for more than two years

¹⁰⁵. Mayne's- Hindu Law & Usage, 13th edn. 1995, p.329, Bharat Law House, New Delhi.

¹⁰⁶. AIR 2005 SC 3297.

¹⁰⁷. AIR 2010 (NOC) 543 (P&H).

preceding presentation of petition. The court held that the husband would be entitled to decree of divorce.

In *Vinod v. Smt. Sangeeta*,¹⁰⁸ husband filed a petition for divorce on the ground of desertion by wife. In this case, husband and his family members were convicted on complaint filed u/S. 498-A and 406, I.P.C. The court held that circumstances which led to such filing of complaint and even conviction at hands of trial court may give sufficient reason to wife to even leave matrimonial home to save her life and acquire peace from harassment. Such leaving of matrimonial home cannot amount to desertion for furnishing ground of divorce under the Hindu Marriage Act, 1955. And held that the husband was not entitled to decree of divorce¹⁰⁹.

In *Smt. Sunita v. Ramesh Kumar*,¹¹⁰ a petition was filed on the grounds of desertion and cruelty by wife. In this case, after marriage, the parties lived together only for about a week. Wife thereafter joined the company of husband nearly after six months and stayed there for about five days only. She involved husband and his family members in number of criminal as well as civil cases. Though Panchayat had settled matter of separation, no effort was made by wife to join matrimonial home. In most of criminal cases, she was not able to substantiate claim made by her. The court held that, in such cases, grant of divorce on ground of desertion and cruelty would be proper.

In *Smt. Rajna Choudhary v. Sh. Raghubir Singh*,¹¹¹ divorce petition was filed on the grounds of desertion and cruelty by wife. Wife made allegations against husband that he was having illicit relationship with his brother's wife in complaint lodged to Deputy Commissioner. The said allegation proved to be false. Leveling such false allegations amounts to cruelty. Wife also did not allow husband to have sexual access. Wife left matrimonial home on her own. The

¹⁰⁸. AIR 2010 Raj 68.

¹⁰⁹. Paras 8 and 10.

¹¹⁰. AIR 2011 P&H 20.

¹¹¹. AIR 2011 HP 27.

court held that the husband was entitled to divorce on grounds of desertion and cruelty.

ii) Conversion:

Under Section 13 (1) (ii) of the Hindu Marriage Act, 1955 if the spouse has ceased to be a Hindu by conversion to another religion, divorce may be obtained. Originally, this ground was not available for judicial separation in Section 10 of the Hindu Marriage Act, 1955. By an Amendment of Section 10 in 1964, it was made a ground for judicial separation. Subsequently in 1976, the grounds for judicial separation were omitted in Section 10 and were incorporated with slight modifications in Section 13, and is therefore a ground for divorce under Section 13 (1) (ii).¹¹²

When one spouse voluntarily relinquishes one's religion and adopts another distinctive religion after formal ceremonies, it is conversion on his part. Thus, one should adopt some other religion which cannot be regarded as Hindu religion. If a Hindu person who is a Jain adopts Buddhism, he is still a Hindu¹¹³. He cannot be said to have changed his religion.¹¹⁴

Change from one faith of Hinduism to another does not amount to conversion. Conversion does not of itself result in divorce; a petition under this Section is to be made to the court for divorce. Under the ancient Hindu law, the marriage being a sanskar, it subsisted even though one of the spouses has

¹¹². Mayne's- Hindu Law & Usage, 13th edn. 1995, p.246, Bharat Law House, New Delhi.

¹¹³. Though the Jains may not be Hindus by religion (Jainism is a distinctive religion) they would be governed by the same law as the Hindus. Section 2 of the Hindu Marriage Act, 1955 deals with Application of the Act. It lays down a list of persons who would be governed by this Act. These persons can be brought under the following following three main groups.

1) Persons who are Hindus by religion- Section 2 (1) (a).

2) Persons who are Buddhists, Jains and Sikhs by religion- Section 2 (1) (b).

3) any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion- Section 2 (1) (c). B.M. Gandhi- Hindu Law, 3rd edn. 2008, p. 257, Eastern Book Company, Lucknow.

¹¹⁴. B.S. Mohankumar v. B.K. Nirmala (2005)1 HLR 117 (Kant DB).

changed his religion. But under the codified law, the other spouse who continues to be a Hindu gets a right under this Section to obtain divorce.¹¹⁵

If one spouse ceases to be a Hindu, the marriage continues to be governed by Hindu law and it can be dissolved only under the provisions of the Hindu Marriage Act, 1955. However, if both the spouses change their religion and cease to be Hindus, none of them can invoke the aid of this Section. The remedy of dissolution of marriage on the ground of conversion is not available to the converting spouse. It is the other spouse who remains a Hindu that can avail of this ground if he or she so desires.¹¹⁶

Conversion of the respondent to a non-Hindu faith does not amount to automatic dissolution of marriage. The petitioner has to file a petition to obtain a decree of divorce. If the petitioner chooses to continue to live with the spouse who has converted to another religion, there is nothing to debar him or her from doing so.¹¹⁷

iii) Unsound mind:

Before passing of the Marriage Laws (Amendment) Act, 1976 the position of insanity as ground of divorce or judicial separation was as follows:

- i) Insanity (whether curable or incurable) - lasting for not less than two years ending with the filing of the petition was a ground for judicial separation;¹¹⁸
- ii) Incurable insanity- lasting for at least three years immediately preceding the filing of the petition was a ground for divorce.¹¹⁹

In 1974, the law commission recommended abolition of the duration for the purpose of treating it as a ground for divorce.¹²⁰ In 1976, while unifying the

¹¹⁵. B.M. Gandhi- Hindu Law, 3rd edn. 2008, p. 327, Eastern Book Company, Lucknow

¹¹⁶. Ibid. p.328.

¹¹⁷. Dr. Paras Diwan- Modern Hindu Law, 18th edn. 2007, p.162, Allahabad Law Agency, Faridabad (Haryana).

¹¹⁸. Section 10 (1) (e) - repealed in 1976.

¹¹⁹. Section 13 (1) (iii) as it stood before the 1976 amendment.

grounds for judicial separation and divorce, the legislature not only accepted the said recommendation, it also went further to explain and expand the concept of insanity under Section 13. This was done in the light of the commission's general observations regarding insanity.¹²¹

Now the Act refers to two distinct mental conditions, namely:

1. Unsoundness of mind, and
2. Mental disorder.

The conditions attached to each of these two are:

1. Unsoundness of mind must be incurable; and
2. Mental disorder (whether continuous or intermittent) must be 'of such a kind and to such an extent that the petitioner can not reasonably be expected to live with the respondent'.¹²²

After passing of the Marriage Laws (Amendment) Act 1976, incurable unsoundness of mind or continuous or intermittent mental disorder of such a nature as to disable the petitioner to live reasonably with the respondent makes the petitioner eligible to get a decree of divorce. The term "mental disorder" has been widely interpreted so as to include mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia.¹²³

In *Smt. Alka Sharma v. Abhinesh Chandra Sharma*,¹²⁴ it was found that the wife was so cold and frigid and nervous on first night of marriage as not to be able to co-operate in sexual act. She was found unable to handle domestic appliances. She failed to explain the conduct of urinating in the presence of all

¹²⁰. 59th Report 1974, p. 110.

¹²¹. 59th Report 1974, pp. 42-50; cf: Dr. Tahir Mahmood- Hindu Law, 2nd edn. 1986, p. 456, The Law Book Co. (P) Ltd. Allahabad.

¹²². Section 13 (1) (iii).

¹²³. R.K. Agarwala- Hindu Law, 21st edn. 2003, p.91, Central Law Agency, Allahabad.

¹²⁴. AIR 1991 MP 205.

family members. The court held that she was suffering from schizophrenia, and the husband was held to be entitled for nullity of marriage.

Schizophrenia is a mental disease wherein the patient's personality appears to be divided and this personality disintegration which characterizes schizophrenia may be of varying degrees.¹²⁵

In *Harmanjit Kaur v. Bhupinder Singh Gill*,¹²⁶ the appellant was suffering from mental disorder (Schizophrenia) since before her marriage; that this fact was not disclosed to the respondent; that according to the medical advice the disease is incurable and she might become a danger to the husband and also to the child. Therefore the court granted divorce.

In *Sona v. Karambir*,¹²⁷ a board of doctors gave the opinion that the wife suffered from moderate range of mental retardation; that her mental unsoundness was incurable; she could not discharge her marital obligations; she gave totally incorrect and irrational answers to the questions posed to her. It was held that her case fell under Section 13 (1) (iii) of the Hindu Marriage Act, 1955.

iv) Leprosy:

Before passing of the Marriage Laws (Amendment) Act, 1976 the position of ground of leprosy for divorce was as follows: "the other party has for a period of not less than one year immediately preceding the presentation of the petition, been suffering from a virulent form of leprosy"¹²⁸, it was a ground for judicial separation.

If it was virulent¹²⁹ and incurable, it was a ground for divorce, where it lasted for three years ending with the filing of the petition. The Marriage Laws

¹²⁵. B.M. Gandhi- Hindu Law, 3rd edn. 2008, p. 329, Eastern Book Company, Lucknow.

¹²⁶. (2003) 2 HLR 661 (P&H) cf: Ramesh Chandra Nagpal- Modern Hindu Law, 2nd edn. 2008, p.223, Eastern Book Company, Lucknow.

¹²⁷. 1995 Marriage Law Journal 425; cf: Ramesh Chandra Nagpal- Modern Hindu Law, 2nd edn. 2008, p.224, Eastern Book Company, Lucknow.

¹²⁸. Sec. 10 (1) (c) of the Hindu Marriage Act, 1955.

¹²⁹. 'Virulent' means highly poisonous or malignant, venomous or acrimonious.

(Amendment) Act 1976 has made leprosy, a ground for both judicial separation and divorce. It omitted the period of three years. Under this clause, the petitioner is required to show that the respondent has been suffering from virulent and incurable leprosy.

Clause (iv) of Section 13 (1) of the Hindu Marriage Act, 1955 lays down that the divorce can be obtained by a spouse if the other party has been suffering from a virulent and incurable form of leprosy.

There are various types of leprosy. They are classified under:

- a) Lepromatous leprosy,
- b) Tuberculoid leprosy,
- c) Maculoan aesthetic leprosy,
- d) Polyneuritic leprosy,
- e) Borderline leprosy and
- f) Indeterminate leprosy.

Of these, Lepromatous leprosy at present, is the most dangerous and aggravated form of leprosy. In this leprosy, the person suffering from it has low resistance and mycobacterium leproe multiply very fast, almost in astronomical number. It is in malignant form and highly contagious. It is incurable and there are hardly any chances of self arrest and regression.¹³⁰

Probably border line leprosy and indeterminate leprosy are not contagious and can not be contracted from another by mere physical contact. Lepromatous leprosy which is malignant and contagious and in which prognosis is usually grave is virulent leprosy.¹³¹ Malignant or venomous leprosy is called virulent leprosy. A mild type of leprosy which is capable of treatment is neither a ground

¹³⁰. Dr. Paras Diwan on Hindu Law- 2nd edn. 2005, p.867, Orient Publishing Co., Allahabad.

¹³¹. Annapurna Devi v. Nabakishore Singh, AIR 1965 Ori 72.

for divorce nor for judicial separation¹³². Some forms of leprosy are slight, uncontagious and non-virulent. Thus leucoderma, wrongly called leprosy, is not envisaged as a type of leprosy constituting ground of divorce or judicial separation under any of matrimonial law of India.

In *Swarajya Lakshmi v. G.G. Padma Rao*,¹³³ the Supreme Court explained the propriety of divorce on this ground. It said that though a person suffering from leprosy deserves all sympathy because it is 'simply another disorder that requires medical attention'. Yet this does not provide a justification for compelling a person to live intimately with the patient and run the risk of contracting the disease. In this case the court was concerned with lepromatous leprosy which is recognized by all medical authorities as malignant and contagious and therefore, virulent.

v) Venereal disease:

Venereal disease is a ground both for judicial separation and divorce. Originally under the Hindu Marriage Act 1955, the requirement for judicial separation was as follows:

"Respondent has for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner"¹³⁴. Clause (v) of Section 13 of the Hindu Marriage Act 1955 which contains the venereal disease as a ground of divorce lays down that a spouse may present a petition for dissolution of marriage on the ground that the other spouse has been suffering from venereal disease in a communicable form.

The Marriage Laws (Amendment) Act, 1976 has simplified this ground. Prior to amendment, the disease was required to be of three years duration. The amendment has done away with the period. Now under the Hindu Marriage Act,

¹³². Dr. Paras Diwan on Hindu Law- 2nd edn. 2005, p.869, Orient Publishing Co., Allahabad.

¹³³. (1974)1 SCC 58; AIR 1974 SC 165.

¹³⁴. Section 10 (1) (d) of the Hindu Marriage Act, 1955.

1955 the venereal disease to be a ground of judicial separation or divorce, should be in a communicable form.

Venereal diseases comprise a number of contagious diseases that are most commonly acquired in a destroyer of life (syphilis) and a preventer of life (gonorrhoea). The group includes at least three other diseases; chancroid, lymphogranuloma venereum and granuloma inguinale. These five are linked not because of similarity of causative agents, tissue reactions and symptoms produced, but because of the principal means of spread of each disease is by sexual intercourse especially promiscuous sexual intercourse, as implied by their group name, venereal which is derived from the name of goddess of love, 'Venus'. Not only are the causative agents different morphologically but they also represent five distinct classes of micro-organisms: Spirochets; bacilli; viruses and Donovan body (perhaps a bacterium)¹³⁵.

The most common form of venereal diseases are Syphilis and Gonorrhoea; and of these two, former is considered to be more dangerous. Gonorrhoea is considered to be more treatable and in most of the cases, complete cure can be obtained. Syphilis in early stage is also now curable. Congenital syphilis is not a disease in a communicable form and is thus not considered to be ground of divorce.¹³⁶

It is immaterial that the disease incurable or was contracted innocently. The duration of the disease is not mentioned. Therefore, it may be of any duration. The Hindu Marriage Act, 1955 does not say that the disease should not have been contracted from the petitioner. If the disease is contracted from the petitioner, under the Hindu Marriage Act, 1955 by virtue of Section 23 (1) (a), the decree cannot be passed as it would amount to 'taking advantage of one's own wrong'.

¹³⁵. Dr. Paras Diwan on Hindu Law- 2nd edn. 2005, p.870, Orient Publishing Co., Allahabad.

¹³⁶. Ibid.

In *Mr. X v. Hospital Z*,¹³⁷ though it is a case under Art. 21 of the Constitution of India i.e., right to Privacy where the question was as to the disclosure of a person being HIV Positive by the hospital is violative of Article 21? In the context of marriage it was held that the basis of this institution is a healthy body and moral ethics. Since as law provides Venereal disease as a ground for divorce it implies that a person suffering from Venereal disease prior to marriage must be enjoined from entering into marriage so as to prevent him from spoiling the health and consequently the life of an innocent spouse.

vi) Renunciation of world:

Clause (vi) of Section 13 (1) lays down that a spouse may seek divorce if the other has renounced the world by entering into any religious order. Thus the requirements of the clause are:

- a) the other party has renounced the world, and
- b) has entered into a holy order.

Hindus recognize Sanyasa Ashrama as the last of the four Ashramas into which, the life of a Hindu is organized. According to Hindu religion, every Hindu is required to enter the last ashrama in his old age. Entering into this ashrama amounts to civil death. For taking sanyas, a person has to perform eight shradhas (including his own sradha) and has to give up his matrimonial life and property.¹³⁸

A Hindu can according to his religion, renounce the world and take up sanyas or vanaprastha ashram. Such a person is known as sanyasi, yati, vanaprastha or perpetual brahmachari, can not any more attend to his worldly obligations. Therefore, law treats sanyas etc., as civil death.¹³⁹

¹³⁷. AIR 1999 SC 945.

¹³⁸. R.C. Nagpal- Modern Hindu Law, edn. 1983, p.170, Eastern Book Co., Lucknow.

¹³⁹. Dr. Tahir Mahmood- Hindu Law, 2nd edn. 1986, p.460, The Law Book Company (p) Ltd. Allahabad.

The sanyasi gives up his name and assumes a new name. In other words, entering into a sanyasa ashram means not merely renunciation of the world and worldly things, but also renunciation or rather an end of one's worldly life led in grihasth ashrama or the life led in the vanaprastha ashrama.

Entering into the sanyasa ashrama in the old age is in accordance with Hindu religion. A person may enter into a holy order even at the young age and it is not contrary to Hindu religion. But it becomes a ground for divorce. The reason seems to be that one can follow the religious faith or belief one has, but it should not amount to hardship to one's spouse. And when one spouse leaves the other, even by becoming a sanyasi, it prima facie causes hardship to the other party. Looked at from this angle, to become a sanyasi is no hope that the sanyasi spouse will ever return to resume cohabitation. This seems to be the reason for making it a ground for divorce.¹⁴⁰

Mere declaration by a person that he or she has renounced the world can have no value. Renunciation of the world must be the effect of entering a religious order; and entering any religious order must be in accordance with the procedure meant there for.

To become a ground for divorce, both conditions must be satisfied. If a person renounces the world, such as when he ceases to take any interest in worldly affairs or retires to a single room or ceases to take any interest in cohabitation or takes a vow of celibacy or becomes a mauni (i.e., takes a vow that he will not talk) or, in short, he or she ceases to have any social intercourse, yet he does not join a holy order, it would not be covered under the clause as the second condition has not been fulfilled. Just because a person has become a chela does not mean that he has joined a holy order.¹⁴¹

¹⁴⁰. Dr. Paras Diwan- Modern Hindu Law, 18th edn. 2007, p.162, Allahabad Law Agency, Faridabad (Haryana).

¹⁴¹. Govind Dass and others v. Kuldeep Singh AIR 1971 Del 151.

A person enters into holy or religious order when he undergoes the ceremonies and rites prescribed by the order which he enters.¹⁴² Unless these ceremonies are undergone, it would not amount to entering into holy order. But if a person enters into a holy order, yet comes home, and resumes cohabitation or after entering into the holy order, continues to cohabit then also the ground will not be available, because though he has entered a religious order, he has not renounced the world.¹⁴³

Celebration of religious ceremonies is necessary for taking sanyasa. Nobody becomes a sanyasi simply because he calls himself a sanyasi or wears saffron coloured clothes or has got his head shaved or leaves the homestead or people address him as sanyasi.¹⁴⁴

vii) Presumption of death:

Clause (vii) of Section 13 (1) of the Hindu Marriage Act, 1955 which lays down that a spouse may file a petition for divorce on the ground that the other spouse has not been heard of 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.

Under Section 108 of the Indian Evidence Act, 1872, a person is presumed to be dead if he is not heard of as alive for seven years or more by those who would have normally heard from him or about him had he been alive.

Under matrimonial law, the other spouse on the basis of presumption of death, by assuming that he or she has become a widower or widow, contracts a second marriage and after some time, the missing spouse re-appears, then the second marriage is void under Section 11 and the spouse can also be prosecuted for bigamy.¹⁴⁵

¹⁴². Satyanarayana v. Hindu Religious Endowment Board, Madras 1957 AP 824.

¹⁴³. Dr. Paras Diwan- Modern Hindu Law, 18th edn. 2007, p.163, Allahabad Law Agency, Faridabad (Haryana).

¹⁴⁴. R.C. Nagpal- Modern Hindu Law, edn. 1983, p.170, Eastern Book Co., Lucknow.

¹⁴⁵. Section 494 of I.P.C, 1860.

To avoid the risk of missing spouse re-appearing, rendering the second marriage void, Clause (vii) of Section 13 (1) provides that a petitioner may obtain a decree of dissolution of marriage on this ground. Once the marriage is dissolved, the petitioner is free to marry again and even if the missing spouse returns the next day of the passing of the decree or much before the second wedding, he can do nothing.¹⁴⁶ He or she as the case may be is not entitled to the restitution of conjugal rights with the petitioner (who has obtained divorce). The remarriage of the decree holder is not violative of Section 5 (i) of the Hindu Marriage Act, 1955 and hence is not bigamy.

A court may under Section 108 of the Indian Evidence Act, 1872 draw the presumption in the above circumstances that the person is dead. Though the Hindu Marriage Act, 1955 does not draw this presumption, but it seems that it is based on the above presumption. As it is not a presumption of the death of the respondent, the petitioner cannot take it for granted that his or her marriage is ipso facto dissolved as in the case of the actual death of the respondent.

2. Section 13 (1-A):

In 1964, Section 13 (1-A) was inserted which contains second type of divorce based on the 'Break down' theory. Thus the two grounds mentioned in sub-Section (1-A) are available to both the husband and wife. The two clauses under which, non resumption of cohabitation for two years or upwards after the decree of judicial separation or restitution of conjugal rights was made a ground of divorce. This is a modification of clauses (viii) and (ix) of Section 13 (1) of the Hindu Marriage Act, 1955. By the Marriage Laws (Amendment) Act, 1976 the period of two years is reduced to one year. Section 13 (1-A) introduced an element of Break-down theory in the Hindu Marriage Act, 1955.¹⁴⁷

¹⁴⁶. Dr. Paras Diwan- Modern Hindu Law, 18th edn. 2007, p.163, Allahabad Law Agency, Faridabad (Haryana).

¹⁴⁷. Prof. G.C.V. Subba Rao- Family Law in India, 8th edn. 2005, p.205, S. Gogia & Company, Hyderabad.

Trace of the breakdown principle is evident in Section 13 (1-A) of the Hindu Marriage Act, 1955. However, for passing of the decree, either a decree of judicial separation or that of restitution of conjugal rights, court is invariable required to go into the question of marital offence or withdrawal by one spouse from the society of other spouse without reasonable cause, respectively. The necessary implication is that the consideration of fault is brought in though indirectly.¹⁴⁸

But according to the Law Commission of India, this is not purely a case of breakdown of marriage. A petition for divorce under Section 13 (1-A) must be preceded by a decree for judicial or a decree of for the restitution of conjugal rights. A decree for judicial separation, in its turn, could not have been passed unless circumstances which prove what may be called marital offence or marital disability were established. In this sense, a petition for divorce under Section 13 (1-A) indirectly brings in a consideration of fault or disability.

Similarly, a decree for the restitution of conjugal rights could not have been passed unless it has been proved that the respondent had “without reasonable excuse” withdrawn from the society of the other. Thus, a petition under Section 13 (1-A), in so far as it is based on a prior decree of restitution, also involves consideration of fault.¹⁴⁹

The two clauses under Section 13 (1-A) are:

¹⁵⁰[1-A. Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition, for the dissolution of the marriage by a decree of divorce on the ground,--

¹⁴⁸. An article published in the Journal of Indian Bar Review, Vol. XXXVI (1to 4) 2009, p. 130, by Divya Tyagi, Faculty, Hidayatullah National Law University, Raipur, Chhattisgarh.

¹⁴⁹. Law Commission of India, Seventy-first Report, 1978, p. 71.9.

¹⁵⁰. Sub-Sec. (1-A) ins. by Act 44 of 1964.

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of ¹⁵¹[one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of ¹⁵²[one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

Prior to the amendments the petition for divorce could be filed on the grounds of non-resumption of cohabitation after the decree of judicial separation and restitution of conjugal rights only by the petitioner. After the amendments, either party to the marriage can prefer such petitions. However, this is not applicable to in the cases where the decrees of judicial separation and restitution of conjugal rights were obtained prior to the passing of the Hindu Marriage (Amendment) Act 1964. If the decrees are obtained after 1964, the respondent also can take advantage of the new Section.

The present provision has come into existence after two amendments in the original provision. The original provision under Section 13 (1) (viii) and (ix) was that a party to marriage may petition for divorce if the other party (i) has not resumed cohabitation for a period of two years or upwards after the passing of a decree for judicial separation against that party,¹⁵³ or (ii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after passing of that decree.¹⁵⁴ It was judicially held that, only the decree holder could obtain divorce on the basis of the decree for judicial separation or as the case may be, for the restitution of conjugal rights. The reason given was that a decree is passed for the benefit of the decree holder. If the judgment debtor were given the right to divorce on the ground of that decree, it will mean that he is allowed to benefit himself from his own wrong. That will be violative of Section 23

¹⁵¹. Subs. by Act No. 68 of 1976 for the words “two years”.

¹⁵². Subs. by Act No. 68 of 1976 for the words “two years”.

¹⁵³. Section 13 (1) viii) of the H. M. Act, 1955.

¹⁵⁴. Section 13 (1) (ix) of the H. M. Act, 1955.

(1) (a) of the H.M. Act, 1955, which provides that no one will be permitted to benefit oneself from one's own wrong or disability.¹⁵⁵

It means that one who was found guilty of some matrimonial wrong or disability for the purpose of either of the decrees can benefit oneself from that decree. That will be violative of Section 23 (1) (a) of the Hindu Marriage Act 1955, which provides that no one will be permitted to benefit oneself from one's own wrong or disability. Apparently there seems conflict between the provisions of Section 13 (1-A) and the provision of Section 23 (1) (a).

O.P. Mehta v. Smt. Saroj Mehta,¹⁵⁶ is a case illustrating the application of Section 23 (1) (a) to the irretrievable breakdown ground. In this case, the husband obtained a decree for restitution of conjugal rights. Then he filed a petition for divorce on the ground of wife's adultery about 6 months after he had obtained a decree for restitution of conjugal rights.

While the petition for divorce was pending, one year period was completed from the date of the decree of restitution of conjugal rights and so he petitioned for divorce under Section 13 (1-A) (ii). The husband was probably in a hurry, and he wanted to obtain divorce on whatever ground he could lay hand at. The wife pleaded that in view of the pendency of the petition for divorce, she could not comply with the decree for restitution of conjugal rights. The husband who had alleged adultery and filed the petition for divorce cannot claim the benefit of Section 13 (1-A) (ii). So his petition under that sub-clause was dismissed.

In *Bimla Devi v. Singh Raj*,¹⁵⁷ it was held that before 1964, matrimonial relief was based on the concept of wrong-disability. The wronged spouse under this theory can sue for relief while the wrong-doer is disabled from claiming any relief. Section 23 (1) (a) provided that relief cannot be granted to a spouse taking advantage of his or her own wrong. After 1964, the wrong disability concept has

¹⁵⁵. R.C. Nagpal- Modern Hindu Law, 2nd edn. 2008, p.234, Eastern Book Co., Lucknow.

¹⁵⁶. AIR 1986 Del 327.

¹⁵⁷. AIR 1977 P&H 167.

given way to the concept of broken-down of marriage. According to the latter theory, irrespective of wrong or disability, when it is demonstrated that the marriage has irreparably broken down, there is eligibility for matrimonial relief. Section 13 (1-A) and Section 13-B are based on this latter theory. Section 23 (1) (a) based on the older theory is inapplicable to proceedings under Section 13 (1-A) and Section 13-B.

In *Meera Bai v. Rajinder Kumar*,¹⁵⁸ the husband allowed an ex parte decree to be passed against him in favour of the wife. After one year, he filed a petition for divorce under Section 13 (1-A) (ii). But it was proved that he had taken a second wife and never cared to comply with the decree for restitution of conjugal rights. The court held that he could not take advantage of his own wrong and his petition was rejected.

In *Kharak Singh Dhapola v. Mrs. Sarojini Dhapola*,¹⁵⁹ husband filed a petition for divorce on the ground of desertion by wife. In this case, husband disallowed wife to live with him. Wife started living in separate room in the same house. They are living separately for many years. She was living in father-in-law's house. Held, wife cannot be said to have deserted her husband. Decree of divorce cannot be granted on the ground of irretrievable breakdown of marriage.

In *Tajinder Kaur v. Nirmaljeet Singh*,¹⁶⁰ wife filed a petition for divorce under Section 13 (1-A) (ii). Decree of restitution of conjugal rights was not executed. The parties had not cohabited for a period of one year after passing of decree. It was held that the wife was entitled to a decree of divorce.

In *Smt. Neelima Verma v. Manish Kumar*,¹⁶¹ parties were not living together for years and there was no evidence on record to show that husband was in any manner responsible for keeping wife out of matrimonial home. Affection between parties had turned into total hatred and there had been

¹⁵⁸. AIR 1986 Del 136.

¹⁵⁹. AIR 2009 (NOC) 2157 (UTR).

¹⁶⁰. AIR 2010 (NOC) 545 (P&H).

¹⁶¹. AIR 2009 (NOC) 2411 (HP).

continuous separation between parties which had rendered their living together as a mere fiction. In circumstances, marriage was dissolved by the court.

In *Smt. Meena Singh v. Mithlesh Kumar Singh*,¹⁶² parties living separately for more than eighteen years. No possibility of any reconciliation. Held, continuation of unworkable marriage would only result in adding miseries to life of both spouses. Following principle of 'live and let live' it is desirable and expedient in the interest of justice, to grant decree of divorce on the principle of irretrievable breakdown of marriage. Lumpsum alimony of Rs. 2, 25, 000 also granted to wife.

In *Vishnu Dutt Sharma v. Manju Sharma*,¹⁶³ a divorce petition was filed on the ground of irretrievable breakdown of marriage. In this case, the husband who was treating his wife with cruelty by severely beating her, approached the court with a prayer to dissolve the marriage on the ground of its irretrievable breakdown. The Supreme Court held that under Section 13 of the Hindu Marriage Act, 1955, no such ground of irretrievable breakdown of the marriage has been mentioned for granting divorce. On a bare reading of Section 13 of the Act, it is crystal clear that no such ground of irretrievable breakdown of marriage is provided by the legislature for granting a decree of divorce. The court said that "We cannot add such a ground to section 13 of the Act as that would be amending the Act, which is a function of the legislature".

The Supreme Court further held that, "the cases which are decide on the ground of irretrievable breakdown of marriage, have not taken into consideration, the legal position which we have mentioned above, and hence they are not precedents. If we grant divorce on the ground of irretrievable breakdown, then we shall, by judicial verdict, be adding a clause to section 13 of the Act to the effect that irretrievable breakdown of marriage is also a ground for divorce. This can be done by the legislature and not by the court. It is for the parliament to enact or amend the law and not for the courts"¹⁶⁴.

¹⁶². AIR 2009 (NOC) 1891 (All).

¹⁶³. AIR 2009 SC 2254.

¹⁶⁴. Para 11, 12.

in *Subhash Chander Sharma v. Anjali Sharma*,¹⁶⁵ *Kailash Gambhir, j.* held that, irretrievable breakdown of marriage is not a ground of divorce under the Hindu Marriage Act, 1955. High court in exercise of its inherent power, cannot grant divorce on ground of irretrievable breakdown of marriage.

In *Vijay Prakash Chaturvedi v. Preeti Chaturvedi*,¹⁶⁶ *K.K. Lahoti and Abhay M. Naik. jj.* Held that, provision of Hindu Marriage Act, 1955. do not provide for divorce merely on ground of broken marriage independent of sub-sections (1), (1-A) or (2) of Section 13 of said Act. A person seeking divorce is under an obligation to prove any of grounds enumerated in law. If any of grounds is proved, fact that marriage between parties is irretrievably broken provides additional support to grant of decree of divorce.

3. Additional grounds of divorce for wife:

In addition to the above mentioned grounds, Sub- Section (2) of Section 13 of Hindu Marriage Act, 1955 provides four additional grounds to the women for obtaining divorce from her husband.

Originally, Section 13 (2) of the Hindu Marriage Act, 1955 provided only for two special grounds on which, a Hindu wife alone could seek divorce. Later, the Marriage Laws (Amendment) Act, 1976 has added two more grounds. Thus, a wife may file a petition for divorce on any one of the following four grounds:

i) 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 the 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

¹⁶⁵. AIR 2011 (NOC) 38 (DEL).

¹⁶⁶. AIR 2011 (NOC) 43 (MP).

ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

¹⁶⁷[iii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973, (or under the corresponding Section 488 of the Code of Criminal Procedure 1898, a decree or 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; or

iv) 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.

Section 13 (2) (i): deals with bigamous marriage.

Before passing of the Hindu Marriage Act, 1955 a Hindu male can marry as many wives as he liked and no limit to the number of wives. Later, It is provided by Section 13 (2) (i) that if a man had married more than one wife before the Hindu Marriage Act, 1955 came into force, then every wife was given a right to seek divorce from the husband on the ground of his pre-Act remarriage. The first wife on the plea that her husband married again during her life time and the second wife on the plea that her husband married her when he already possessed a wife.¹⁶⁸

But if there is only judicial separation between the two or one has withdrawn from the society of the other, Section 13 (2) can be invoked for divorce

¹⁶⁷. Ins. by Act No. 68 of 1976.

¹⁶⁸. R.C. Nagpal- Modern Hindu Law, edn. 1983, p.178, Eastern Book Co., Lucknow.

because in these cases, the other wife has the matrimonial relation unbroken with the respondent. Under this clause, it can happen that all the wives may present a petition for divorce and may obtain a decree of divorce, since the requirement is that, at the time of the presentation of the petition, one more wife should be alive.

A petition for divorce is barred if no other wife is alive due to death or divorce. But if once a petition is made, the death or divorce of the other wife does not bar the decreeing of divorce.¹⁶⁹

Section 13 (2) (ii) provides three additional grounds of divorce to a Hindu wife. They are Rape, Sodomy and Bestiality committed by the husband after the marriage.

According to Section 375 of Indian Penal Code 1860, rape is a sexual intercourse by a man with a woman against her desire or without her consent. Exception to Section 375 says that the sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape. The Indian Penal Code specifically lays down that if wife is not under fifteen years, it is not a rape. But if the wife is below the age of 15 years and the husband forces sexual intercourse on her, he could be guilty of rape and his wife can sue him for divorce¹⁷⁰.

If a person rapes a woman who is not his wife, he is guilty of rape and his wife can sue for divorce. It is immaterial as to whether the woman is related to him or not. The age of the woman raped is also immaterial. A mere attempt of rape will not be sufficient.¹⁷¹

Further, Section 376-A provides punishment to a husband having intercourse with his wife during separation.

¹⁶⁹. R.C. Nagpal- Modern Hindu Law, edn. 1983, p.179, Eastern Book Co., Lucknow

¹⁷⁰. Dr. Paras Diwan on Hindu Law- 2nd edn. 2005, p.876, Orient Publishing Co., Allahabad.

¹⁷¹. Ibid.

Rape is a criminal offence under Section 375 of Indian Penal Code and a person guilty of these offences can be prosecuted in a criminal court. However, under the Hindu law, these are recognized as special grounds of divorce for the wife.

'Sodomy' is anal intercourse by a man with his wife or with another woman or with a man.¹⁷² The age and consent of the victim is irrelevant.¹⁷³ If a man commits sodomy on his own wife without her consent, then it would amount to the matrimonial offence of sodomy within the meaning of the clause.¹⁷⁴

Where the accused forcibly open a child's mouth and put his private parts and proceeded to a completion of his lust, it was held that this did not constitute the offence of sodomy.¹⁷⁵ This decision proceeded upon a special statute which punished the crime of buggery. Under the Indian Penal Code, such an act comes under the provisions of this Section.¹⁷⁶

In *Brother John Anthony v. State of Tamilnadu*,¹⁷⁷ the petitioner, a warden of a boarding house was found to have committed on the inmates of the boarding school, following unnatural offences, viz.,

- i) inserted the penis into the mouth of the victim and did the act of incarnal intercourse leading to ejaculation of semen into the mouth; and
- ii) holding the penis in the hand of the victim, making the manipulated movements of the penis and withdrawal up to the point of ejaculation of semen.

¹⁷². Section 377 IPC, 1860.

¹⁷³. Dr. Tahir Mahmood- Hindu Law, 2nd edn. 1986, p.467, The Law Book Company (p) Ltd. Allahabad.

¹⁷⁴. C v. C 22 TLR 26; Bampton v. Bampton (1952)2. All ER 766; cf: Dr. Paras Diwan- Modern Hindu Law, 18th edn. 2007, p.165, Allahabad Law Agency, Faridabad (Haryana).

¹⁷⁵. Jacob's Case (1870) Russ & Ry 331. cf: Ratanlal and Dhirajlal's Law of Crimes- 23rd edn. 1988, p.1419, Bharat Law House Pvt. Ltd., New Delhi.

¹⁷⁶. Lohana Vasantlal Devchand (1968) Cr LJ 1277; AIR 1868 Guj 252; Ratanlal Dhirajlal's Law of Crimes, 23rd edn. 1988, p.1419, Bharat Law House Pvt. Ltd., New Delhi.

¹⁷⁷. K.D. Gaur- A Text Book on The Indian Penal Code, 3rd edn. 2004, p.618, Universal Law Publishing Co. Pvt. Ltd., Delhi.

While holding the petitioner liable under Section 377 I.P.C. for committing unnatural offences, the Madras High Court held that:

“Manipulation and movement of the penis of the accused whilst being held by the victim in such way as to create orifice (an opening of a small mouth of a large hole) like thing for making manipulated movement of insertion and withdrawal till ejaculation of semen will fall within the sweep of unnatural carnal offence”.

In *T v. T*,¹⁷⁸ the husband and wife were aged 24 years and 18 years respectively. The husband told his wife that she should permit him to have sexual intercourse in her anus, as it was the normal thing between spouses and several of his friends were engaged in doing so. He also said that it was wife’s duty to submit to his request. The wife agreed and allowed her husband to use her anus on three occasions. The wife hated it but allowed her husband to do as she did not consider it wrong. The husband also honestly believed that what he demanded was not wrong but natural.

On wife’s petition for divorce, the court allowing the same, observed that wife’s consent in permitting her husband to have sodomy with her was not real consent, as real consent required the knowledge of right and wrong and knowledge of relevant factors. Obviously, the wife did not understand the implication of the act; in that sense, she merely yielded to her husband’s persuasion. It was observed that, it did not matter that she did not protest or that the husband honestly believed that it was the normal thing among married people.

Mere expression of desire for sodomy is not a ground for divorce.¹⁷⁹

‘Bestiality’ means sexual intercourse with an animal.¹⁸⁰

¹⁷⁸. (1963)2 All ER 646; cf. Dr. Paras Diwan on Hindu Law- 2nd edn. 2005, p.878, Orient Publishing Co., Allahabad.

¹⁷⁹. R.C. Nagpal- Modern Hindu Law, 2nd edn. 2008, p.244, Eastern Book Co., Lucknow.

¹⁸⁰. Section 377 of IPC.

When a wife files a petition for divorce on the grounds of rape, sodomy or bestiality, it is not necessary for her to show that he was prosecuted or convicted for the offence. Even if the husband has been acquitted by the criminal court, she can in divorce proceedings, establish his guilt and obtain relief. On the other hand, even if the husband has been convicted by a criminal court, the wife will have to prove the offence de novo in the matrimonial proceedings, then alone she will be entitled to the decree of divorce.¹⁸¹

The Section is wide enough to include a woman as well. Hence a woman is also liable for committing unnatural offence under this Section. However, this Section is not attracted if the act is done either by a man or a woman with an inanimate object.

Section 13 (2) (iii) lays down that, 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 the Code of Criminal Procedure, 1973 if cohabitation between the parties had not been resumed for one year or upwards after the decree, can avail herself of this provision for obtaining divorce, not withstanding that she was living apart.¹⁸²

Where a decree under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 or under Section 125 of the Code of Criminal Procedure, 1973 is passed in favour of the wife, it becomes the duty of her husband to pay maintenance to her and he must resume cohabitation within one year. If he fails to do so, the wife can seek divorce.¹⁸³

Section 13 (2) (iv) lays down that a wife who was married before she had attained the age of 15 years, and who had repudiated the marriage after attaining that age but before attaining the age of 18 years, may bring a petition for

¹⁸¹. Dr. Paras Diwan- Modern Hindu Law, 18th edn. 2007, p.165, Allahabad Law Agency, Faridabad (Haryana).

¹⁸². Mayne's- Hindu Law & Usage- 13th edn. 1995, p.254, Bharat Law House, New Delhi.

¹⁸³. B.M. Gandhi- Hindu Law- 3rd edn. 2008, p. 333, Eastern Book Company, Lucknow.

divorce.¹⁸⁴ Consummation of marriage is immaterial. The Act or the Section does not prescribe any procedure for repudiation of marriage. Therefore, the fact of repudiation has to be proved by the wife.¹⁸⁵ No such relief is provided for a male who is married below the age of fifteen or eighteen or twenty one years.

She can apply for divorce whether her marriage was consummated or not. The explanation to this clause states that this clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976. It is sufficient if she repudiates the marriage before completion of 18 years and it is not necessary that she should file a petition under Section 13 (2) (iv) before that date. She could file it even after that date.¹⁸⁶ Where the wife declined to go to her husband before attaining the age of 18 years, it was held that it amounted to repudiation by conduct.¹⁸⁷

In a case where there was no averment in the petition that she repudiated the marriage before attaining the age of 18 years, and it was advanced in the stage of arguments, it was held that she was not entitled.¹⁸⁸

3). *Divorce by Mutual Consent:*

Divorce by mutual consent is not new to Hindus and it was recognized through legislation and customs by some states and communities¹⁸⁹. But there was no provision of divorce by mutual consent under Hindu Marriage Act, 1955. Section 13-B was added by the Marriage Laws (Amendment) Act, 1976 where the parties can now obtain divorce by mutual consent. This provision is

¹⁸⁴. Dr. Paras Diwan- Modern Hindu Law, 18th edn. 2007, p.166, Allahabad Law Agency, Faridabad (Haryana).

¹⁸⁵. B.M. Gandhi- Hindu Law, 3rd edn. 2008, p. 333, Eastern Book Company, Lucknow.

¹⁸⁶. Kamlesh v. Chamel Singh (1986)2 HLR 464. (P&H);cf: Mayne's Hindu Law & Usage- 13th edn. 1995, p.255, Bharat Law House, New Delhi.

¹⁸⁷. Seethal Das v. Bijay Kumari (1988)2 HLR 359 (P&H); cited *ibid*.

¹⁸⁸. Durgabai v. Kedarmal Sharma 1980 HLR 166; cf: Mayne's Hindu Law & Usage- 13th edn. 1995, p.255, Bharat Law House, New Delhi.

¹⁸⁹. It was permitted by the Travancore Exhara Act, 1100 (1925 BC). The Travancore Act, 1925 (Reg. III of 1100), the Cochin Marumakkattayam Act, 1133 (1938 BC) and the Cochin Nayar Act, 1113 (1938 BC). In certain communities, it was provided by custom (*Jina Magan Pakhali v. Rai Jethi* AIR 1941 Bom 298; ILR 1941 Bom 535; cf: B.M. Gandhi- Hindu Law, 3rd edn. 2008, p. 335, Eastern Book Company, Lucknow.

retrospective as well as prospective. Hence, parties to a marriage whether solemnized before or after that Amending Act can avail themselves of this provision. If both the parties have agreed to dissolve their marriage, they may do so in a more civilized and cultured way than by quarrelling between themselves in a court. They may petition together under Section 13-B in a District court that they may be granted a decree of divorce.

The court can allow the parties to amend a petition for divorce under Section 13-B to be converted into a petition for divorce by mutual consent. This is possible even at the appellate stage. When a decree of divorce under Section 13-B is passed on such an amended petition, the effect is that all the past allegations and cross-allegations made by the parties against each other during the hearing of the petition under Section 13-B are quashed.

Section 13-B: reads as follows:

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, 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 mutually agreed that the marriage should be dissolved.

2) on the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effects from the date of the decree.¹⁹⁰

¹⁹⁰. Prof. G.C.V. Subba Rao- Family Law in India, 8th edn. 2005, p.195, S. Gogia & Company, Hyderabad.

Sub-section (1):

According to Sub-section (1), the three essentials are:

- i) that both the parties have been living separately for a period of one year or more;
- ii) that both the parties have not been able to live together;
- iii) that both the parties have mutually agreed that their marriage should be dissolved.

The first condition is that, both the parties should live separately for a period of minimum one year. If they have lived separately for a period of one year or more at some time in their life, but not immediately before the petition, is not entitled to obtain divorce. They should live separately before filing the petition. Further, it is not necessary that the parties should live under separate roofs. They can live in the same house, but without any relation as husband and wife.

In *Kiritbhai Girdhar bhai Patel v. Prafulaben Kiritbhai Patel*,¹⁹¹ the Gujarat High Court held that, the expression “have been living separately” under Sub-Section (1) of Section 13-B of the Act does not necessarily mean that the spouses has to live in different places. What the expression would seem to require is that they must be living apart, viz., not living with each other as ‘husband’ and ‘wife’. Merely going abroad jointly and staying under one roof is not living as husband and wife. It can not be ground to refuse divorce when marriage has not been consummated for more than one year.

The second condition is that, ‘they have not been able to live together’, which means that there is a state of complete breakdown of marriage. Hence the word “able” does not mean “inclined”. The disability in living together may be due to any external reason or due to some internal or subjective reason. It may be that they do not like each other or either of them likes or both of them like some

¹⁹¹. AIR 1993 Guj 111.

other person or persons. May be their philosophy of life, or socio-political views or habits and way of life etc., do not agree each other or may be that because of their employment at different places or their different pre-occupations, they do not want to remain in wedlock. The court can not inquire in the reasons why the parties have not been able to live together and why they want divorce.

The last condition is that the parties have mutually agreed that their marriage should be dissolved. That is, consent of both parties is required. Such consent must free and voluntary. Section 23 (1) (bb) of the Hindu Marriage Act, 1955 provides that their mutual consent to this effect must not be obtained by force, fraud or undue influence. If any of the elements mentioned is found to be present in the petition, the application is liable to be rejected by the court on finding the truth of the case.¹⁹²

The parties have mutually agreed that their marriage should be dissolved. The same may proceed from on party to the other or from a third party to both the parties.¹⁹³

After filing of a petition under Sub-section (1) of Section 13-B, the court shall not proceed with it for six months. This is for the purpose of giving time to the parties to re-think over this drastic step. At the end of six months, the court will not proceed with the petition suo moto. If the parties move the court thereafter, then only the court will proceed. The motion must be made by both parties. These are mandatory provisions.

The parties have to make a motion not later than eighteen months from the date of the filing of the petition. This again is a mandatory provision. The petition will not be heard beyond above said period. It is however, open to the parties to withdraw the petition in the mean time. In *Smt. Sureshta Devi v. Om Prakash*,¹⁹⁴ the Supreme Court held that a party to the petition for divorce by

¹⁹². R.K. Agarwala- Hindu Law, 21st edn. 2003, p.96, Central Law Agency, Allahabad.

¹⁹³. R.C. Nagpal- Modern Hindu Law, 2nd edn. 2008, p.254, Eastern Book Co., Lucknow.

¹⁹⁴. AIR 1992 SC 1904.

mutual consent can unilaterally withdraw his consent at any time till passing of the decree under this section. It is not irrevocable. If subsequent motion seeking divorce decree under sub-section (2) is not of both the parties because of the withdrawal of consent by one of the parties, the court gets no jurisdiction to pass the decree. Mutual consent must continue till divorce decree is passed.

In this case, the wife stated that her consent was obtained under pressure and threat of the husband and she was not even allowed to see or consult her relatives before filing of the petition for divorce. The court observed that there is a period of waiting from six to eighteen months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period, one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under Sub-section (2). There is nothing in the Section which prevents such course. Even after filing of a petition, a party may change his or her mind not to proceed with the petition.

If the court is held to have the power to make a decree solely based on the initial petition, it negates the whole idea of mutuality and consent for divorce. Mutual consent should continue till the divorce decree is passed.

If the facts stated are proved, the court is obliged to pass a decree for divorce. The use of the word 'shall' here shows that it is not left to the discretion of the court not to grant divorce. The court cannot pass decree of judicial separation also instead of divorce on such a petition either under Section 13-A of the Act or in its general discretion under order 7, Rule 7, CPC. r/w Section 21 of the Act because there is no sense in granting judicial separation to those who are already living separately from each other.

The parties are entitled to petition again under this Section if they have withdrawn the petition or if they did not move the court within the prescribed

period of eighteen months. Withdrawal of the petition or failure in moving the court to proceed in the matter shows that they had attempted reconciliation.¹⁹⁵

In *Indramal v. Radhey Raman*,¹⁹⁶ the Allahabad High Court held that the parties are not required to prove any grounds of dissolution of marriage, but the courts have to simply find out that the mutual consent is not the result of any conspiracy between them. Once it is proved that they want it voluntarily without any ground of divorce being present, the court would be obliged to pass a decree by mutual consent.

In *Shaveta Garg v. Rajat Goyal*,¹⁹⁷ it was held that waiting period of six months can be waived on concession of both the parties.

In *Smt. Suman v. Ashok Chhajjer*,¹⁹⁸ in a petition for divorce under Section-13-B, both parties appearing in person and stating that it was not possible for them to live together. To secure ends of justice for peace of life of both parties, divorce by mutual consent granted.

In *Chikkamuniyappa & Anr. v. Ramanarasamma alias Sumithramma*,¹⁹⁹ D.V. Shylendra Kumar and N. Anand, JJ. held that, dissolution of marriage does not happen by mere passage of time. But it is only after both parties consciously affirm their desire to separate and dissolve marriage in terms of petition. Death of one of the spouses during pendency of petition for divorce by mutual consent makes such petition infructuous. Fact that period of eighteen months has elapsed since presentation of such petition by parties and neither party has withdrawn or rescaled from it is immaterial. Settlement that might have been arrived at amongst parties during their lifetime in separate proceedings cannot have a bearing for an order being brought into existence.

¹⁹⁵. R.C. Nagpal- Modern Hindu Law, 2nd edn. 2008, p.254, Eastern Book Co., Lucknow.

¹⁹⁶. AIR 1981 All 152.

¹⁹⁷. AIR 2009 (NOC) 1640 (P & H).

¹⁹⁸. AIR 2010 (NOC) 549 (Raj).

¹⁹⁹. AIR 2011 (NOC) 42 (Kar).

The changes made in the law of divorce are too much and undesirable. These changes have almost altered the nature of Hindu marriage. The original provisions of the Hindu Marriage Act regarding divorce have been liberalized by the Marriage Laws (Amendment) Act, 1976. Too much liberalization can be seen from the passing of Marriage Laws (Amendment) Act, 1976. It reduced the time limits for few grounds and it added new grounds of divorce. With these changes, it almost altered the sacramental nature of Hindu marriage.

In *Hitesh Bhatnagar v. Deepa Bhatnagar*,²⁰⁰ the Supreme Court held that marriage cannot be dissolved on the ground of non-withdrawal of consent by wife before expiry of stipulated period of eighteen months' has no bearing. Eighteen months period was specified only to ensure quick disposal of cases of divorce by mutual consent, and not to specify time period for withdrawal of consent.

The first amendment to this provision was effected by the Hindu Marriage (Amendment) Act 1964 which substituted Section 13 (1-A) (i) and (ii) for Section 13 (1) (viii) and (ix). The second amendment is made by the Marriage Laws (Amendment) Act 1976. It has reduced the period after the passing of the decree on the expiry of which, the petition for divorce can be made from two years to one year. The amendment of 1964 has entitled even the judgment-debtor to the relief of divorce on the basis of that decree. It means that one who was found guilty of some matrimonial wrong or disability for the purpose of either of the decrees can benefit oneself from that decree. Both the amendments have liberalized the law.²⁰¹

The Marriage Laws (Amendment) Act, 1976 through its unnecessary interference, almost altered the sacramental nature of Hindu marriage.

²⁰⁰. AIR 2011 SC 1637.

²⁰¹. R.C. Nagpal- Modern Hindu Law, 2nd edn. 2008, p.234, Eastern Book Co., Lucknow.

