CHAPTER VI

TRADITIONAL MATRIMONIAL BARS

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INTRODUCTORY

The dichotomy of innocence and guilt, as we have seen earlier in chapter III, requires the petitioner spouse to prove the commission of the matrimonial fault of the respondent spouse and at the same time requires to establish his innocence. It is based on the maxim, "He who comes to equity, must come with clean hands." And, therefore, the petitioner is required to be 'innocent' to obtain the decree of divorce on the fault of the other spouse. If he is not innocent he cannot seek divorce even though he has succeeded in proving the matrimonial fault of the other. This dichotomy gave birth to the matrimonial bars. Since the burden of proof is fixed on the petitioner, this characteristic of the fault theory came to be known and named as "bars to matrimonial relief." The decree of divorce sought by the petitioner could be refused if he were in one way or the other, directly or indirectly connected with or responsible for the commission of the fault by the respondent. The bars generally are either absolute or discretionary or both. Those bars are generally such as the petitioners' taking advantage of his wrong or his disability, or the petitioner should have not been accessory to or connived at or condoned the fault of the respondent. Apart from these, the undue delay or collusion are also the bars so as to enable the court to refuse the decree of divorce sought by the petitioner. In the presence of all these bars, the petitioner is not supposed to be innocent and therefore not entitled to be favoured with the decree of divorce.
In England from where India borrowed the matrimonial fault structure of divorce along with the matrimonial bars thereto, connivance, condonation and collusion were the absolute bars under Section 30\(^1\) and the petitioner's own adultery, cruelty, desertion or conduct conducive to respondent's adultery, and delay were the discretionary bars under Section 31.\(^2\) These sections came to be amalgamated in one section i.e. 178 of the *Judicature (Consolidation)* Act, 1925, and then it was replaced by the substituted for Section 4 of the *Matrimonial Causes Act*, 1937. The substituted section was repealed by and inserted in Section 34(1) of the *Matrimonial Causes Act*, 1950. The *Matrimonial Causes Act*, 1963 brought about some radical changes in the law of condonation and collusion though in order to facilitate the reconciliation possibilities between the estranged spouses.\(^3\) It came to be therefore provided that adultery which had been condoned should not be capable of being revived.\(^4\) Section 2 of the *Matrimonial Causes Act*, 1963 says:

\[(1)\text{ For the purpose of the Matrimonial Causes Act 1950, and of the Matrimonial Proceedings (Majistrate's Courts) Act, 1960, adultery or cruelty shall not be deemed to have been condoned by reasons only of continuation or resumption of cohabitation between the parties for one period not exceeding three months, or of anything done during such cohabitation if it is proved that cohabitation was continued or resumed as the case may be, with a view to effecting reconciliation.}\]^5

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1 Of the first matrimonial legislation i.e. The *Matrimonial Causes Act*, 1857.
3 As revealed in the preamble of the Act 1963.
4 Section 3, See now Section 42(3) of the *MCA*, 1965, and Section 27(8) of the *MCA*, 1973.
5 See now Section 42(2) of the *MCA*, 1965. Section 2(1)(2) of the *MCA*, 1973 replacing Section 3(3), (4) of the *Divorce Reform Act*, 1969.
(2) In calculating for the purposes of Section 1(1)(b) of the Matrimonial Causes Act, 1950 the period for which the respondent has deserted the petitioner without cause, in considering whether such desertion has been continuous no account shall be taken of any one period (not exceeding three months) during which the parties resumed cohabitation with a view to reconciliation.  

In the year collusion was made a discretionary bar.  

In India these bars have been enacted to all the personal laws but not uniformly. Nor all bars apply to all matrimonial causes. Moreover the English distinction between the absolute and the discretionary bars has not been maintained in the Indian personal laws. Although the bars are almost the same in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954, The Parsi Marriage and Divorce Act, 1936 and the Indian Divorce Act, 1869 contain the same bars.

Under the Hindu Marriage Act, 1955 the matrimonial bars to divorce apart from other matrimonial reliefs are, (a) burden an a standard proof; (b) taking advantage of one’s own wrong or disability; (c) accessory, (d) connivance, (e) condonation, (f) collusion, (g) improper delay and (h) any other legal ground. They are discussed below in

6 See now Section 1(2) of the MCA, 1965 and repealed by Section 42(2) of the Matrimonial Proceedings and Property Act, 1970, Schedule 3. But again in Section 2(5) of the MCA, 1973 replacing Divorce Reform Act, 1969, Section 3(5).
7 Section 4 of the MCA, 1965, and replaced by Section 5 and 12 (1) of the MCA, 1965.
8 Sections 21(1) and 34 respectively.
9 Section 35 and 12 respectively but in the latter the bars apply only to divorce proceedings.
10 See Section 23(1) of the Act.
11 See Ibid.
the light of the fault structure of divorce.

**Burden and Standard of Proof**

Under Section 23(1)\(^{12}\) it is the statutory duty of the court to be satisfied, in any proceedings whether defended or not, before granting the reliefs that no bar exists as stated from Clause (a) to (e) of sub-Section (1) of Section 23.\(^{13}\) The relevant words are,

\[
(1) \text{In any proceedings under this Act, whether defended or not, if the court is satisfied that - .}
\]

At the outset it may be noted that though 'satisfaction of the court' is mentioned as a mandatory condition for granting the relief, no special rules or tests have been provided to find such satisfaction on the part of the court. Nor any other code of evidence except "satisfaction of the court" has been provided for the guidance of and adoption by the court under the Hindu Marriage Act.\(^{14}\) The courts are therefore free to adopt any criterion to find whether certain fact stands duly proved or not in view of the material and evidence adduced before them in each and every case.\(^{15}\)

In \textit{Jipin Chander v. Prabhavati}\(^{16}\) the Supreme Court laid down that it was a well established principle that in divorce

\[\begin{align*}
12 & \text{The HMA, 1955.} \\
13 & \text{Ibid.} \\
14 & \text{Including other matrimonial laws in India.} \\
15 & \text{Raj Kumari Agrawala, Matrimonial Remedies Under Hindu Law, pp. 280-281 (1974).} \\
16 & \text{(1956) SCR 838, 852 - though a case under the Bombay Hindu Divorce Act 1947, Section 3(1)(d) which employs similar duty on the courts.}
\end{align*}\]
proceedings the petitioner must prove the alleged matrimonial offence beyond all reasonable doubt. The view was in consonance with the following observations of Lord Mac Dermott in the case of Preston Jones v. Preston Jones.17

The jurisdiction in divorce involves the status of the parties and public interest requires that the marriage bond shall not be set aside lightly or without strict enquiry. The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be satisfied, in respect of a ground for dissolution, with something less than proof and beyond reasonable doubt. (Emphasis added).

In White v. White,18 the Supreme Court concurred with and adopted the above view pronounced in the English case of Preston Jones v. Preston Jones19 and laid down that the court must be satisfied beyond reasonable doubt about the commission of the matrimonial offence alleged in the petition for divorce.20 This had led to the development of an analogy and opinion that the same standard of proof was required in matrimonial proceedings as applied in criminal proceedings. The prosecution in criminal law is required to prove the offence of the accused beyond all reasonable doubts.21 In Sachindra v. Nilima22 Mukherji J has also

17 (1951) 1 All ER 124, 138 decided by the House of Lords Lord Simmonas expressly used this language; See also Blyth v. Blyth (1966) 1 All ER 524 HL.
18 1958 SCR 1410 though a case under the Indian Divorce Act, 1869.
19 Supra note 17.
20 Same view was taken by the Supreme Court in Bipin Chandra v. Prabhavati, Supra note 16. See also Manglabai v. Deo Rao, AIR 1962 MP 193.
22 AIR 1970 Cal. 38 at 43. See also Nishit Kumar v. Anjali, AIR 1968 Cal. 105, 108.
... an action for divorce, a civil proceeding without, becomes, in a trice, a criminal proceeding, all because of the application of the yardstick of proof beyond all reasonable doubts which has been in fact the standard of proof in criminal cases from the very beginning.

He gave the reason for this as,

To send an accused man to the gallows or the jail without his guilt being proved beyond reasonable doubt would be as much a grave public mischief as to dissolve the tie of marriage, say, on the ground of adultery, without the matrimonial offence being proved beyond reasonable doubt.

It is submitted that when he decided the instant case, the decisions of the two famous cases were already in hand in which the House of Lords held that it was inappropriate to apply the set of rules meant to define the criminal culpability to the law of divorce. In Blyth v. Blyth also some judges in the House of Lords were of the view that the word "satisfied" did not mean 'satisfied beyond all reasonable doubts' and a matrimonial offence could be proved by a 'preponderance of probability' and the degree of probability rested on the gravity of the principle on the notion that 'the proportion as the offence is grave

23 Ibid.
24 Ibid.
25 Williams v. Williams (1963) 2 All ER 994; Gollins v. Gollins, (1963) 2 All ER 966.
26 (1966) 1 All ER 524 (HL).
so ought the proof to be clear*. This had been approved as a correct test in *Bastable v. Bastable*. On the other hand the Calcutta High Court in *Nishit Kumar v. Anjali*, observed that the satisfaction of the court was to be on the matter rested before it and judgement should not be given on the mere balance of probability and circumstances. On the other hand, the Madras High Court had held that while the two jurisdictions - matrimonial and criminal were distinct jurisdictions, the expressions "satisfied" in the statute meant, satisfaction 'beyond reasonable doubt and... The matter came to be finally resolved in 1975 when the Supreme Court in *Dastane v. Dastane* scaled down the *beyond reasonable doubt* to *preponderance of probabilities* test on the ground that the proceedings under the Act are essentially of a civil nature. Therefore the word "satisfied" in Section 23(1)(a) is to mean "satisfied on a preponderance of probabilities" and not "satisfied beyond a reasonable doubt."

Thus the matrimonial offence principle of divorce is coming to be weakened on the proof aspect also. The offence theory is substantially losing its ground in this way. The courts must however satisfy themselves that the bars provided

27  (1968) 3 All ER 701.
30  AIR 1975 SC 1534 - a case under the *HMA, 1957*.
31  See also *Kamal v. Ram Chandra* (1978) Mah. LJ 598.
in the section are duly observed and insist upon corroborative evidence in proof of a matrimonial offence, even in exparte cases. A decree in disregard of any or all of the bars so provided in this section will also be nullity.

Taking Advantage of One's Own Wrong or Disability

Such a provision contained in Section 23 (1)(a) of the Hindu Marriage Act, 1955 is sui generis for it has not got similar statutory express recognition in other Indian personal laws. This bar may however be covered under the clause that "there is no legal ground why relief should not be granted" the provision contained in Section 34 (1)(f) of the Special Marriage Act, 1954. The Indian Divorce Act 1869 does however provide that a petitioner may be refused a decree of divorce if he or she has been, during the marriage, guilty of adultery or cruelty towards the respondent or of deserting her or him and wilfully separating from her or him and such conduct has conduced to the adultery of the respondent.

The provision debars a petitioner from seeking relief, who is in anyway responsible, directly or indirectly for the commission of matrimonial offence by the respondent notwithstanding the fact that the petitioner has duly proved the alleged matrimonial offence of the respondent. For instance, in a petition for divorce on the ground of cruelty of the respondent if the petitioner is guilty of provocation or cruelty, or desertion or has unreasonably separated

33 Anupama v. Bhagabati, AIR 1972 Or. 163.
34 Ibid., Hirakali v. Awasthi, AIR 1971 All 201; See also Manilal v. Gangaben, AIR 1973 Guj. 98.
35 Section 14.
himself or herself from the respondent and it reveals that he or she is taking advantage of his or her own wrong / disability, the petitioner shall be disentitled from being favoured with the decree sought for. 36 Similarly if the divorce is sought on the ground of adultery of the respondent, it will be refused if the petitioner's own adultery, desertion or any other wrong has severely contributed to the misconduct of adultery of the respondent. 37 The bar will however not apply if the petitioner seeking relief e.g. divorce, has availed himself of a statutory benefit or an advantage existing for him or her under any provision of the Act. 38 In the case of Mohan Lal v. Mohanbai 39 the wife had been living separately from her husband for the reason that her husband had married the second wife before the commencement of the Act, 1955. She would as it was held, not be disentitled to the decree of divorce being granted under Section 13 (2) of the Act, 1955. The court shall refuse the decree on this ground also that the respondent's venereal disease or leprosy has been contracted from the petitioner himself or herself. Again, the petitioner will be refused the decree of divorce sought, on the insanity of the respondent, the insanity of the latter has been caused or the result direct or indirect of the petitioner's own cruelty or neglect. 40 The petitioner's wrong should have the connection with the respondent's fault. 41 But the respondent will not be allowed to take a defence or a bar that the petitioner's refusal to live with him was the

37 Ibid.
38 For example under Section 13(1A)(ii). Also see Mulla, Supra note 3.
40 Paras Diwan, Supra note 21.
41 Ibid.
cause of her / his second marriage or the petitioner had married him or her with full knowledge that the respondent was already a married man, or the petitioner's denial of having sexual intercourse was the cause of his or her i.e. respondent's adultery. In Bai Mani v. Jayantilal the husband filed a petition for divorce under Section 13(1A)(i) of the Hindu Marriage Act, 1955 on the ground of non-resumption of cohabitation for one or more years after the decree of judicial separation sought by the wife on husband's adultery. The husband still continued to live in adultery. This fact was regarded by the court as 'wrong' on the part of the husband under Section 23(1)(a) and therefore the court refused the decree of divorce sought by him. The judgement was however assailable on the plea that the wrong was not the connection or cause of the husband's seeking divorce under Section 13(1A)(1) of the Act, 1955. There was a heap of controversies over the exact interpretation of this broad phrase i.e. "the petitioner is not taking advantage of his wrong or disability" in regard to Section 13(1A)(i) and (ii) of the Hindu Marriage Act, 1955 but the Supreme Court in Dharmendra v. Usha has set at rest such controversy on the word 'wrong' employed in Section 23(1)(a) as noted above by restricting its scope and said,

In order to be a 'wrong' within the meaning of (this clause), the conduct

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42 See Ibid.
45 AIR 1979 Guj 209.
46 These have been fully dealt with in Chapter VIII.
47 AIR 1977 SC 2218.
48 Ibid.
... alleged must be misconduct, serious enough to justify denial of the relief to which the husband or wife is otherwise entitled.
(Emphasis added)

It is submitted that such an interpretation taken by the Supreme Court was in relation to the breakdown ground specified in Section 13(1A) and therefore tends to buttress the breakdown principle and dilutes the offence principle. 49 Mulla says, 50

In arriving at its conclusion the court will certainly have regard to the intendment and scheme of the Act which is to discharge divorce but not withhold relief when the marriage has completely failed or broken down.

The matrimonial relief may not however be sought for some ulterior motive. 51

Accessory

This bar is provided under the Hindu Marriage Act, 1955 only in case when the petition for divorce 52 is filed on the ground of respondent's adultery. 53 A similar bar is available in a similar condition under the Special Marriage Act, 1954 54 and the Indian Divorce Act, 1869 55 It is a general bar under the Parsi Marriage and Divorce Act, 1936. 56

49 Also see Mulla, Supra note 36, p. 855.
50 Ibid.
52 or judicial separation.
53 Section 23(1)(b).
54 Section 34(1)(b).
55 Section 12.
56 Section 35(c).
Although there is no reported Indian case on this bar, it is a terminology of criminal law. It implies a petitioner's active participation in the commission of the crime by the respondent. For instance, if the husband hires or solicits some people to commit adultery with his wife or keep a vigilance on his wife while she has sex with some third party. Thus the husband is being an accessory to her commission of adultery. This may, therefore, mean a deliberate and active participation in getting the offence committed and if it is established, the petitioner will be refused in decree of divorce sought on respondent's adultery. This bar based on criminal law should be no longer good in view of Dastane v. Dastane which declares the proceedings of relief sought on even matrimonial offence(s) to be civil proceedings whereupon the rule of the balance of probabilities will apply and not the proof beyond all reasonable doubts.

Connivance

Connivance is a bar to the petition for also divorce on the respondent's adultery alone under the Hindu Marriage Act, 1955, the Special Marriage Act, 1954, and the Indian Divorce Act, 1869, while it is a general bar to any matrimonial reliefs under the Parsi Marriage and Divorce Act, 1936.

57 Supra note 30.
58 Section 23(1)(b).
59 Section 34(1)(b).
60 Section 12.
61 Section 35(c).
Though connivance and accessory are of the same quality, the necessary difference lies in the fact that in the former there is an active participation by the petitioner in the commission of the guilt of the respondent while in the latter there is no such participation. Connivance is rather an "anticipatory unwilling consent or culpable passive acquiescence in a course of conduct reasonably to lead to the commission of adultery." It is the corrupt intention and not the active corruption which is essential to form the connivance. It has its root source in the maxim *volenti non fit injuria* and thus seeks its basis in the maxim of the Ecclesiastical Courts that the "petitioner cannot take advantage of his wrong." For instance, if a husband says to a wife to make money by having sex with others, thereupon the respondent agrees and commits adultery, then the husband petitioner is guilty of connivance and his petition if filed for divorce, will be refused. The position will be the same if the *vice versa* happens. Connivance, therefore always precedes the material act/event which is the inception of the adulterous act but not essentially in its perpetuation, continuance or repetition. The connivance at the continuance of adultery may however show that he had connived at the adulterous act from the first. A husband

64 Ibid.
65 See Ibid.
66 *Churchman v. Churchman* (1945) 2 All ER 190, 194; *Mudge v. Mudge* (1950) 1 All ER 607. See also *Richmond v. Richmond* (1952) 1 All ER 838.
has suspicion about his wife's chastity. In order to procure evidence he keeps a watch on her or employs an agent, or so conducts himself that affords opportunity to the wife to enable her to commit adultery or continue it, the husband cannot be said to have connived at the act of adultery being committed by his wife until and unless it is shown that he has done any thing that encourages her committing an offence. But if he intentionally encourages the situation or makes enough room that he knows his wife, may like commit adultery he then will be termed to be guilty of connivance and the husband will not be allowed to say that his motive was to procure the conclusive evidence. It is, therefore, submitted that it is a matter of great difficulty to determine connivance at or accessory to the commission of adultery. Somewhere the conduct of the conniver is much more than the offence of the respondent and culpable intention might be implied. Mere indifference, negligence, folly, imprudence or dullness of apprehension is not sufficient to constitute connivance. The connivance of the adultery of his wife with the first person does however mean or exclude all relief for all time for the subsequent adultery with another person for the determination

67 As in the case of P. v. P. AIR 1983 Bom 8 - a case under the HMA, 1955 wherein the husband employed private detective in order to collect proof of the actual act of adultery of his wife. See also B.D. Charles v. Nora AIR 1979 Raj 156 - A case under the Indian Divorce Act.

68 Douglas v. Douglas (1950) 2 All ER 748; Mudge v. Mudge (1950) 1 All ER 607; Rumbelow v. Rumbelow (1965) 2 All ER 763 wherein the husband was "willfully blind" to his wife's adultery.

69 K.J. v. K. AIR 1952 Nag 395 FB.

70 Manning v. Manning (1950) 1 All ER 602.

71 See also Churchman v. Churchman Supra note 66, pp. 190, 195 where Lord Merriman has sound such a warning.

72 Rumbelow v. Rumbelow, (1965) 2 All ER 763; Godfrey v. Godfrey (1964) 3 All ER 154.

73 Mulla, Supra note 36, 855.
of which the courts should scrutinise all the circumstances.\textsuperscript{74}

There is hardly any reported case under the Hindu Marriage Act, 1955 on connivance.

\textbf{Condonation}

Condonation under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 applies to matrimonial offences of adultery and cruelty,\textsuperscript{75} under the Indian Divorce Act, 1869 condonation applies only to adultery.\textsuperscript{76} The Parsi Marriage and Divorce Act, 1936 has made it a general bar to be applicable to all the matrimonial reliefs.\textsuperscript{77}

Adultery and cruelty are but condonable matrimonial offences and the decree of divorce shall be refused if the condonation on the part of the petitioner is duly proved. Condonation generally means 'forgiveness and reinstatement with knowledge of all material facts.'\textsuperscript{78} The forgiveness whether express or implied is for a breach of a matrimonial offence subject to the implicit condition that the offence will not be repeated. Though condonation is also termed as 'blotting out of the offence' in order to restore the offending spouse to the position which he or she had before the commission of the offence, the phrase 'blotting out of the offence' is not literally used in this context for the reason that offence when once committed can not in fact be blotted out and condonation as generally

\textsuperscript{74} \textit{Gorst v. Gorst} (1951) 2 All E\textsuperscript{2} 956, 957.
\textsuperscript{75} See Section 23(1)(b) and Section 34(1)(b) respectively.
\textsuperscript{76} See Section 12, 13, and 14.
\textsuperscript{77} Section 35(a).
\textsuperscript{78} Mulla,\textit{Supra} note 36, p. 857.
recognised always and also implies that the offending spouse shall be of good behaviour in future, and is therefore complete, absolute and irrevocable if there is no breach of this implied condition or no fraud in regard to forgiveness. The condonation essentially lies in a factum of reinstatement and animus remittendi which rests on the principle that where the status quo ante between the parties has been restored, the offence stands obliterated and cannot be used anywhere for any purpose unless subsequently repeated and the condoned spouse becomes retus et integer. This is the fundamental of condonation. The condonation involves forgiveness confirmed or made effective, and, therefore, forgiveness is conditional depending on the condoned spouse thereafter fulfilling in all respects the matrimonial obligations. And if any matrimonial offence is committed by him or her notwithstanding the fact that the offence condoned was the same as or different from that condoned. The condonation in such condition ceases to be effective. And it will revive for all purposes. Forgiveness, according to Mulla is an inappropriate and misleading term for the purpose of interpretation of condonation and real one is "a conditional waiver of the right of the injured spouse to take matrimonial proceedings." The real import of condonation also essentially includes the reinstatement element which is an intention to forgive and remit the offence.

79 See Ibid.
80 Chandrabhagabai v. Rajaram, AIR 1956 Bom 91, 93.
81 The condonation and its implications were authoritative-ly discussed by Lord Simon L.C.in Henderson v.Henderson (1944) 1 All ER 44.
82 Supra note 36, p. 958.
83 Cramp v. Cramp and Freeman (1920) P. 158 and Perry v. Perry (1952) 1 All ER 1076, 1080.
In *Dastane v. Dastane*\(^{84}\) the Supreme Court defined and favoured *inter alia* its important aspects thus stated above,\(^{85}\)

Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore two things: forgiveness or restoration.

Evidence showing that the spouses led a normal life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty though "intercourse is not a necessary ingredient of condonation."

Forgiveness:

Forgiveness should be understood in a technical and legal sense, for it is not in any psychological or theological sense. The theological sense implies that resentment at the wrong is no longer felt while the legal sense implies that the legal remedy is waived.\(^{86}\) Forgiveness is, therefore, meant to be the waiver of the right by the offended spouses to bring a divorce action and shows that he had overlooked the wrong and is prepared to accord restoration to the offending spouse to his / her earlier position then when the offence / wrong was committed. Moreover, it is a mutual act and there will not constitute condonation if the offending spouse did not want to be forgiven.\(^{87}\) It is mutual but not unilateral. For instance, if the wife, who has committed adultery, confesses, repents

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\(^{84}\) Supra note 30.

\(^{85}\) Ibid.

\(^{86}\) Rayden on Divorce, 10th Ed., p. 2014.

\(^{87}\) Ford v. Ford (1970) 3 All ER 188.
promises not to commit it in future before her husband, whereupon the husband simply says, "all right, I have forgiven you, but we will sleep in separate rooms." This will not form condonation, it is submitted. The continued cohabitation even after the full knowledge of all material facts may also be an evidence of condonation. In Dastane v. Dastane the Supreme Court had although held cruelty on the part of the wife but also found condonation duly proved on the part of the husband on the facts that the husband continued to suffer persistent illtreatment and cruelty from his wife while continuing cohabitation with her. Shortly after filing petition for judicial separation, a child was also born. The continuance of sexual relations was, the Supreme Court held, a proof of both forgiveness and reconciliation which raised a presumption of condonation. But the mere belief or suspicion of the offence will not be enough to constitute full knowledge of all material facts. If a party does not want to hear full confession and on hearing half of it shows his preparedness to the guilty spouse back, it may constitute condonation.

Reinstatement:

Forgiveness must be essentially coupled with the element of reinstatement to constitute a valid condonation. Mere forgiveness is not enough. Reinstatement is restoration of status quo ante following forgiveness. The moment the offended spouse had done it he would be precluded from taking divorce action. In Fearn v. Fearn the wife confessed

88 Supra note 30.
89 Ibid.
90 Burch v. Burch (1958) 1 All ER 848, 853.
91-92 (1948) 1 All ER 459.
her adultery leading to her pregnancy to her husband who was in Army in Italy and wrote a letter to her that he had forgiven her and assured that he would accept the child born of such adulterous union as his own child. The wife continued receiving separation allowance from the Government and also parental allowance. The husband had notice of all this. Later on, the husband's favourable attitude changed and he got the separation allowance stopped. On his return to England, he did not resume cohabitation but brought divorce proceedings. The wife resisted it on the bar of condonation. The court held that the husband did not reinstate her following his forgiveness to her. Here forgiveness is not enough to form a valid condonation. In most of the cases the reinstatement may be inferred from the continuation or resumption of cohabitation,\(^93\) provided it is with full knowledge of all the material facts.\(^94\) In *Saptami v. Jagdish*\(^95\) the wife brought an action for judicial separation on the husband's cruelty. After the marriage the spouses had lived and slept together till August, 1963, when the husband's cruelty against her started. After this the wife, though living in the same house, used to leave it off and on when he caused harassment to her. But she used to come back also every time for the sake of her children of the marriage. It was proved that they had not taken to sexual intercourse after August, 1963, though the wife continued to live in the same house. Many a time, they even did not talk to each other and slept in different bedrooms. The court, however, held that there was no condonation notwithstanding the fact that she continued to reside in the same house which did not amount to


\(^94\) *Bhaqwan v. Amar Kaur*, AIR 1962 Punj 144.

\(^95\) (1969) 73 CWN 502.
cohabiting with him. But cohabitation without even sexual intercourse may constitute condonation. In *Hearn v. Hearn* 96 the spouse continued cohabiting for ten years after the respondent's adultery and the sexual intercourse did never take place between them. It was, however, regarded to amount to condonation. But the returning of the wife to her husband's house and working as a paid house-keeper will not be condonation on her part for her husband's adultery. 97 Therefore resumption of cohabitation is but a rebuttable presumption 98 and resumption of sexual intercourse with notice knowledge of the guilt of the spouse also raises a similar presumption for condonation by the innocent spouse. In *Swan v. Swan*, 98a the husband committed cruelty to his wife, and thereafter was admitted to Sanatorium. He was suddenly discharged therefrom. Since he was ill, the wife took him in and lived with him for a month. Thereafter he was again admitted to a mental hospital. No sexual intercourse between the parties had taken place during his stay with the wife. On these facts, the court held no condonation on the part of his wife for the reason that what she had done was common courtesy. 99 It is also not necessary that resumption of sexual intercourse should co-exist with the resumption of cohabitation. Mukherji said, 1

... there are married persons who have mastered their passions instead of being mastered by them and maintain complete abstinence in their conjugal life. They regard each other as partners and co-workers in life dispensing with sexual

96 (1969) 3 All ER 417.
97 *Cook v. Cook* (1949) 1 All ER 384.
98a (1953) 2 All ER 854.
99 Ibid.
act altogether. If such persons fall out, and again resume cohabitation, that is enough. No evidence of sexual intercourse is necessary unless it is shown that resumption of cohabitation was partial.

All this shows as an attempt to reconcile. This is why the English Matrimonial Causes Act, 1965 specifically laid down that adultery or cruelty would not be deemed to have been condoned if the continuance or resumption of cohabitation for one period(s) not exceeding three months was with a view to effecting reconciliation. The same has been incorporated even in the current Matrimonial Causes Act, 1973 which lays down that in reckoning the period of separate living for five years or two years' desertion anyone period (not exceeding six months) or any two or more periods (not exceeding three months) during which the parties resumed living with each other shall not be counted. There is no such statutory provision in the Indian Personal laws. The Marriage Laws (Amendment) Bill, 1981 which seeks to introduce three-year-living-apart ground for divorce does however contain a clause which lays down that no account shall be taken of any period (not exceeding three months) during which the parties resumed living together.

The condonation should not have been procured by fraud else it entails no legal consequence. For instance, if the husband had condoned the act of adultery of his wife on her misrepresenting the fact that she was seduced under the effect of drugs or had not been conceived by the corespondent.

2 Section 2(5).
3 Section 13C(4).
4 Roberts v. Roberts (1917) 117 LT 167.
Revival of Matrimonial Offence:

Although condonation once given cannot be revoked, there is an exception to it i.e. the condoned spouse will behave properly in future and will not repeat the condoned or any other matrimonial offence - or misconduct.\(^5\) So the rule, laid down in Henderson v. Henderson\(^6\) that just as there cannot be resumption of cohabitation subject to a condition subsequent, there cannot be conditional condonation, which is however, subject to an implied condition that the condoned spouse will not commit the condoned or any other matrimonial offence in future. If this implied condition, whenever subsequent to condonation, is violated by the spouse condoned the original offence will be said to have been revived.\(^7\) The term 'matrimonial offence' is not to be taken in its technical sense.\(^8\) So although the misconduct subsequent to condonation may fall short of matrimonial offence like adultery or cruelty but should however lead to the breakdown of marriage or making married life impossible.\(^9\)

The doctrine of revival of the condoned matrimonial offence does not however mean that the implied condition will remain operative all the time to come. Condonation is

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5 Mulla, Supra note 36, p. 861; Paras Diwan, Supra note 21, p. 247.

6 (1974) 1 All ER 44.


8 In Beard v. Beard (1945) 2 All ER 306 Scott L.J. observes that the condoned offence would revive by any misconduct whether it does or does not reach the duration, gravity or completeness which is necessary to permit a decree it is sufficiently so serious enough that the court regards it a substantial breach of duty.

9 Richardson v. Richardson (1949) 2 All ER 330 (CA) and Thompson v. Thompson (1912) 39 Cal 395; See also Beale v. Beale (1950) 2 All ER 539, 540.
on the same footing as the probation which cannot for an
indefinite time. In Cundy v Cundy, the court said
that the revival of the condemned offence would depend on
the circumstances in which the offence was committed and
the time of commission of the original offence that had
elapsed, the meanwhile behaviour of the spouse, the gravity
of the conduct alleged to have revived the offence and its
circumstances including manners and custom of the society
to which the parties belong. Parsi Divan has sounded a note
that the time will come when the offence is completely
abolition so that no future misconduct of any sort will
revive it.

Collusion

Initially in the Hindu Marriage Act, 1955, the
collusion was a general bar applicable to all matrimonial
reliefs but after the Hindu Marriage (Amendment) Act, 1976
it has now been restricted only to other matrimonial
proceedings than the nullity of marriage to be obtained
under Section 11. But such an amendment has not been
affected in the Special Marriage Act, 1954 wherein the
collusion is still a general bar applied to all matrimonial
reliefs. Collusion is a general bar to all matrimonial
reliefs under the Parsi Marriage and Divorce Act, 1936,
while a bar to only relief of the dissolution of marriage

10 Richardson v Richardson (1949) 2 All ER 330, 331;
McCaule v McCaule (1950) 2 All ER 539, 540.
11 (1956) 1 All ER 245.
12 See Ganga note 21, p. 249.
13 Section 23(1)(c).
14 Ibid. Section 11 deals with the grounds on which a
Hindu marriage is void ab initio and the decree to
be obtained thereon.
15 Section 34(1)(d).
16 Section 35 (c).
under the Indian Divorce Act, 1869. Therefore no petition presented in collusion with the respondent can be granted by the court in the above circumstances.

According to Mulla, "Collusion may consist in an understanding express or implied that the court shall be deceived by misrepresentation, exaggeration or suppression of facts. There must be present an element of corruption or perversion of justice." And it is the statutory duty of the court to get itself satisfied that there is no collusion between the parties, apart from the duty of the petitioner to prove that the petitioner is not in collusion with the respondent. It is not collusion if the parties in anticipation of a divorce make arrangements / agreements / settlement for the joint property or household / maintenance and custody of the children and to costs as a matter of necessity but not to prevent the justice. If a party illegally gratifies the other, then it will be collusion. For instance, where a husband agrees to pay excessive maintenance as a bribe to persuade his wife to file a divorce action or abstain from defending, then it is a case of collusion. If the proceedings have been initiated or being conducted, especially if abstention from defence be a condition by an agreement between the parties or their agents, it is collusion. The standard of proof is the same

17 Sections 13 and 14.
18 Supra note 36, p. 863.
19 Lowndes v. Lowndes (1950) 1 All ER 999, 1003, 1004.
20 Mulla, Supra note 36, p. 863.
21 Ibid.
22 Churchward v. Churchward and Holiday (1895) P. 7; Ste Croix v. Ste Croix (1917) 44 Cal. 1091.
as for condonation. In *Blyth v. Blyth*\(^{23}\) the House of Lords held that it was not necessary that condonation should be established beyond reasonable doubt and that as regards other bars to divorce like connivance or condonation, the petitioner need only show that on the balance of probability he has not connived or condoned.\(^{24}\) It is the duty of every professional adviser to bring such facts leading to collusion to the notice of the court.\(^{25}\)

**Hotel Bill** cases of England present the best example of collusion. In such cases usually a husband took some lady with him to a hotel or boarding house and represented themselves to be as husband and wife in the hotel's register, took a room in the hotel and stayed there with her for the night. The next day he used to leave the room by paying off the bill in his name and his so-called wife. Subsequently, the wife filed the petition for divorce on the ground of her husband's adultery in support of which she produced the copy of the hotel register and bills and sometimes she produced the collaborative oral evidence of the hotel staff. Most of these cases were decided *ex parte*. These collusion cases when discovered later on became a scandal.\(^{26}\)

In *Joginder v. Pushpa*\(^{27}\) the issue before the court was whether the consent decree of the restitution of conjugal rights could be one on which a divorce could be sought under Section 13(1)(ii) of the **Hindu Marriage Act**. The court said that such a decree be passed if the consent decree was not

\(^{23}\) Supra note 26.

\(^{24}\) See also Mulla, Supra note 36, p. 863.

\(^{25}\) *Teale v. Burt* (1951) 2 All ER 433, 434.


\(^{27}\) AIR 1969 P & H 397 (FB).
collusive one intended to fabricate in advance a ground for divorce. But the court answered otherwise in *Pirakali v. Avasthi*. The court may decline to grant the decree of divorce sought under section 13(1A)(i) if a decree for judicial separation was passed merely by consent. In *Clarance v. Clarance*, the parties had submitted all facts before the court and shown inclination or willingness for having the marriage dissolved. The court held that the parties were not in collusion just for the reason that they were willing for the dissolution decree, the parties had disclosed all facts and had not hidden any evidence. It has, however, been laid down in two cases, *viz.*, *A.B. Mannuel v. L.M. Mannual*, and *Antoniswami v. Anna Manickan*, both were under the **Indian Divorce Act**, that since the matrimonial proceedings lead to change of the parties involving individual and social interest, the court should never act in an entirely formal sense in finding out that the parties had not colluded. But mere delay would not amount to collusion. It is submitted that Section 23 of the **Hindu Marriage Act**, 1955, and similar other statutes, is silent as to the fate of the decree obtained by collusion between the parties. In *Edger Wesley v. Emily Violet*.
the court lays down that absence or express plea of non-collusion does not vitiate the decree of divorce. In Nirmala v. Harsimha 36 the court lays down, –

A decree obtained by parties by collusion would not be set aside on an application by either party for that what would be to allow a party to take advantage of his or her own wrong.

Collusion will not generally be a bar to divorce by mutual consent in view of its inherent requirement of consent of both the parties under Section 133 of the Hindu Marriage Act, 1955.

It is submitted that collusion should cease to be an absolute bar and should become discretionary bar. Its continuance as an absolute bar hardens the grant of relief of divorce.

**Unnecessary or Improper Delay**

Unnecessary or improper delay is a general bar applicable to all matrimonial reliefs under the Hindu Marriage Act, 1955, 37 the Special Marriage Act, 1954 38 and the Parsi Marriage and Divorce Act, 39 1936. But it is a specific discretionary bar under the Indian Divorce Act, 1869 applicable only to divorce proceedings. 40

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36 ILR (1973) Kant 584.
37 Section 23(1)(d).
38 Section 34 (1)(e).
39 Section 35(d).
40 Section 14.
Mere delay is not a bar unless it be unnecessary, improper or unreasonable or lache. It seems that it is a compromise between the two conflicting principles, viz. No one should rush to the court for matrimonial relief because time is a great healer here as it is elsewhere; and how long a person can sleep over his remedy because it affects the other spouse also. Therefore, if the delay can be properly, plausibly or reasonably explained, it will not be a bar to any matrimonial proceedings. The culpable delay is fatal to a divorce sought by the petitioner. Unreasonable delay may give an inference of condonation or acquiescence in the guilt, indifference to injury or collusion between the parties. The burden of proof lies on the petitioner.

The words 'improper or unnecessary' to qualify delay are not defined by the Act and have been entirely left to the courts alone to determine them. In S. v. R., the court considering 6 years' delay as reasonable observed that no decide what amounts to improper or unreasonable the court should look to the social conditions and family tradition in which the parties live. Social inhibition against divorce particularly among the Hindus must also be looked into. In Nirmoo v. Nikka, there was 11 years' delay for seeking divorce by wife. She explained that she did not speak all along and nor had any intention to come to the court but for her husband's harassment which had

41 Rama v. Krishnasami (1973) 1 MLJ 203.
42 Vinod v. Aruna, AIR 1977 Del 24 - If delay is culpable or wrong in nature it will defeat the action.
43 Paras Diwan, Supra note 33, p. 251.
44 AIR 1968 Del 79.
45 See also Chinaperummal v. Mariyapee, AIR 1976 Mad 179; Nirmoo v. Nikka, AIR 1968 Del 260; Vinod v. Aruna, AIR 1977 Del 24. wherein this theme has been adopted.
46 AIR 1968, Del 260.
started since the time she inherited the property from her father. The court considered it to be a reasonable explanation for delay. Whether delay is improper or unnecessary depends on a variety of factors and it is impossible to expect a similar rule applicable to all cases. Unwillingness for involving the petitioner's family members in family tangles, regards their sentiments and feelings and avoidance of scandal are also the factors which are considered for reasonable explanation for delay. So if there is some explanation which is satisfactory, the delay will be said not to be improper or unnecessary. In Lalithamma v. Kannan there was five years' delay in instituting petition. This case presents a predicament of the Hindu wife who had at one side a bigamous and aggressive husband while on the other hand she had equally an aggressive orthodox father. The court considered all this the proper explanation of delay. In Jyotish v. Neera the wife had a sister yet to be married and any proceedings for divorce could stand as a scandal in her community and would have come in the way of her sister's chance of marriage. The court gave weightage to such particular Hindu social situation and considered it a proper and reasonable explanation of delay in instituting the petition.

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48 S. v. R. AIR 1968 Del 79.
51 AIR 1966 Mys 178.
52 Suora note 49
Although the cases decided under the Indian Divorce Act and the English law where improper delay is / was a discretionary bar not analogous cases they may be of help, though little, to the cases coming under the Hindu Marriage Act, 1955 or other similar statutes. In Tabias v. Tabias\(^5^3\) the wife's explanation of 26 years' delay was regarded as reasonable - and acceptable in view of the fact that she did not come earlier for divorce in the interest of her two minor daughters and a son who are now all settled. In B.P. Charles v. Nora\(^5^4\) Another case under the Indian Divorce Act, 1869, six years' delay was regarded not improper on the explanation of the husband that he came to know of the wife's adultery too late and he had sought for divorce within one year of his knowledge.\(^5^5\) Where the wife was engrossed in exploring all possible outside-court-modes for reconciliation due to which belatedly filed petition for matrimonial proceedings could be regarded as not improper delay on her part.\(^5^6\) An unexplained delay in matrimonial relief on desertion or cruelty or adultery would be improper delay.\(^5^7\) And the similar would be the result of the case for divorce sought under Section 13(1A).\(^5^8\)

\(^{53}\) AIR 1968 Cal 133 - a case under Indian Divorce Act, 1869.

\(^{54}\) AIR 1979 Raj 156.

\(^{55}\) In Teja Singh v. Surjit Kaur, AIR 1962 Punj 195 (Seven years' delay); Shantidevi v. Ramesh Chandra AIR 1969 Pat 27 (Ten years' delay) the courts however, found not sufficient explanation of delay.


\(^{57}\) For instance see Mohinder Pal v. Kulwant Kaur AIR 1976 Del 141 (21 years' delay).

But if the wife was living in adultery and the husband gave chance to the wife to get out of her misconduct but she did not. He was then compelled to seek divorce. Delay of three and a half years would not be improper because it is sufficiently explained.\(^{59}\) Petition for divorce by the husband was filed after 7 years of the decree of the restitution of conjugal rights. Criminal proceedings by the wife's father came to be concluded only a year before the petition for divorce filed. Held, the explanation proper for such delay. \(^{60}\) Even petition for divorce filed by the wife much late under Section 13 (2)(i) of the Hindu Marriage Act, that is the husband's pre-Act polygamous marriage ground was dismissed on unnecessary or improper delay. \(^{61}\)

It is submitted that in view of the cases discussed above it is clear that what is improper or unnecessary delay is entirely dependent on the facts and circumstances of each and every case and no clear-cut-rule can be laid down to guage it. Although the courts have adopted liberal view in interpreting the 'delay' to be improper and unnecessary, it was better if the law itself had made 'delay' by a discretionary bar instead of being an absolute bar.

Any Other Legal Grounds:
Residuary Clause

Such a clause that there should be no other legal ground for refusing the reliefs is available as a general bar under

\(^{59}\) Sulekha v. Kamala Kant, AIR 1980 Cal, 370.
\(^{60}\) Balaev Kaur v. Avtar Singh 1981 Hindu LR 554, 556.
\(^{61}\) Lakshmi Ammal v. Alagiriswami, AIR 1975 Mad 211, 212, 213.
the Hindu Marriage Act, 1955, the Special Marriage Act, 1954, and the Parsi Marriage and Divorce Act, 1936. Such a bar does not exist in the Indian Divorce Act, 1869.

This clause has not come up so far for interpretation in any divorce suit. Mulla takes the view, "A ground for relief cannot be said to exist or to have been established if the requirements of the ground and the conditions relating to the same are not fulfilled and presumably the clause was not inserted ex abundanti cautela." Derret takes another view according to which this clause authorises the court to apply the learning accumulated in India and abroad which controls and modifies the bare rights to seek matrimonial reliefs specified in sections 9 to 13 of the Hindu Marriage Act. The third view holds, "this clause has been enacted to cover some hard cases where the relief has to be refused, on account of some principle of public policy."

The vagueness of the ground, it is submitted, is thus well reflected and does not seem to be meaningful particularly when the specific matrimonial bars have been provided under Section 23(1) (a) to (e) of the Act 1955 to refuse a divorce to be granted by a decree thereof. This clause may, if used, make divorce hard to be obtained.

The bar under Section 23(1)(bb), the Hindu Marriage Act, 1955 that, in case of divorce by mutual consent, the consent

62 Section 23(1)(e).
63 Section 34 (1)(r).
64 Section 35 (e).
64a Supra note 58, pp. 866-867.
64b Introduction to Modern Hindu Law, 1st Ed., p. 181.
64c Supra note 33, p. 253.
64d The HMA.
should not have been obtained by force, fraud or undue influence has been dealt with ahead in the next chapter dealing with the consent theory of divorce.

The study reveals that all the matrimonial bars, emerged as a necessary corollary to the fault theory of divorce, are the hit ones for the 'Fault Structure of Divorce'. Therefore, so long as the Fault Structure remains the bars will also remain. They will go as and when Fault Structure will go. Hence the continuance of the matrimonial bars though make the relief of divorce hard *if* in the fitness of things.